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Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports for the period specified at the top of each table, with the corresponding Volumes and Pages of Indian Cases.

43 I. L. R., ALLAHABAD SERIES, FOR JANUARY-FEBRUARY, 1921.

Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.
1	Baldeo Singh v. Udal Singh ...	58 732	56	Shib Dayal v. Meharban ...	58 230
18	Daulatia v. Har Gobind ...	57 206	69	Ram Sarup v. Dalpat Rai ...	58 105
20	Beni Madho Pragwal v. Hira Lal	59 873	77	Ram Sarup v Baij Nath ...	58 324
25	Nand Kunwar v. Sujan Singh ...	57 1006	81	Tulshi Ram v Sat Narain ...	57 445
29	Chhabraji Kunwar v. Ganga Singh ...	60 643	85	Jawahar Bano v. Shujaat Husain Beg ...	58 114
35	Lokya v Sulli ...	57 315	88	Bhopal Singh v. Ujagar Singh	58 122
38	Wizarat Husain v. Mohan Lal ...	53 7	92	Emperor v Chatur Singh ...	58 825
42	Bhagwati Prasad v. Shafaat Muhammad Chaudhri ...	58 414	95	Het Singh v. Bihari Lal ...	59 92
45	Muhammad Jahan Begam v. Gobind Ram ...	59 4	101	Basdeo Mal, Gobind Prasad v Kanhaiya Lal, Lachmi Narain ..	59 667
50	Basdeo Gir v. Pritam Gir ...	58 162	104	Chhattar Singh v. Tej Singh ...	59 671
55	Pritam Gir v. Mahant Basdeo Gir	57 484	108	Harakh Ram Jani v. Lakshmi Ram Jani ...	60 626

19 ALLAHABAD LAW JOURNAL, FROM JANUARY TO 4TH MARCH, 1921.

1	Jaisukh v. Emperor ...	59 559	49	Reoti Ram v. Sita Ram ...	60 814
3	Bhagwan Singh v. Allahabad Bank, Ltd. ...	*Not reportable.*	50	Mohammad Askari v. Nisar Husain ...	60 901
6	Ganga Saran v. Emperor ...	59 850	53	Ganpat Rai v. Husaini Begam ..	60 905
11	Ballu Mal v. Ram Kishun ...	*To be printed.*	56	Lokpal Singh v. Emperor ...	59 655
14	Shahzadi Begam v. Muhammad Ibrahim ...	59 787	58	Rama Nand Bharti v. Sheo Dass ...	60 933
16	Karan Singh v. Ishtiaq Husain...	61 276	61	Rajjab Shah v. Tahir Shah ...	60 878
19	Straus & Co v. Raghubar Dayal, Durga Prasad ...	59 784	63	Hukm Singh v. Tunda ...	60 912
22	Abdus Samad v Yusuf ...	59 917	65	Kali Nath Roy v. Emperor ...	59 641
24	Ram Prasad v. Asa Ram ...	61 334	69	Sheo Shankar v. Mohan Sarup ...	60 996
26	Rameshvar Singh v. Moheshvar Singh ...	59 636	71	Ganpatji v. Emperor ...	*Not reportable.*
32	Lachmi Narain v. Dirg Bijai Singh ...	*To be printed.*	72	Sant Prasad v. Bhawani Prasad ...	60 831
33	Kanhya Lal v. Jagannath Prasad	60 857	73	Jhanku Lal v. Rewati ...	61 892
39	Kallu v. Emperor ...	60 1002	76	Harkhu v. Emperor ...	*To be printed.*
41	Mahadeo Prasad v. Dirgbijai Singh ...	60 881	77	Kunj Behari Lal v. Lanua ...	59 751
47	Ratan Lal v. Hamidullah Khan...	60 899	79	Ajodhia Prasad v. Ram Narain...	62 447
			81	Ishri Prasad v. Muhammad Sami	60 829
			83	Gyan Singh v. Ata Husain ...	60 817
			87	Jwala Singh v. Fatta ...	60 825
			89	Sham Das v. Bahadur Singh ...	60 831
			92	Shankar Lal v. Babu Ram ...	60 842

19 ALLAHABAD LAW JOURNAL, FROM JANUARY TO 4TH MARCH, 1921—concld.

95	Bhaiya Bindha Chal v. Nawal Raj Kuari ...	*Not reportable.*		146	Jai Prasad v. Dalsingar ...	60	991
97	Malraju Lakshmi Venkayyamma Row v. Venkatadri Appa Row...	59	767	147	Baijnath Prasad v. Raja Narendra Bahadurpal ...	61	74
101	Maharaj Bahadur Singh v. A. H. Forbes ...	59	782	149	Mathar Singh v. Ranbaz Singh ..	61	65
104	Faiyaz Ali v. Rekhab Das ...	61	24	152	Bohra Gajadhar Singh v. Basant Lal ...	61	69
107	L. A. Puech v. Aziz Fatima Bibi	61	30	155	Hardeo Prasad v. Ganga Sahai...	61	48
108	Talib Husain Khan v. Dhukhu Khan ...	60	992	156	Dalip Singh v. Man Kuar ...	61	156
110	Chandu Lal v. Kokamal ...	61	36	159	Rup Narain v. Sheo Prakash ...	61	129
116	Sughra Begam v. Mohammad Mir Khan ...	61	6	161	Radhakrishna Ayyar v. Swaminatha Ayyar ...	60	85
120	Ratan Singh v. Pran Sukh ...	61	44	164	Sayyapureddi Chinnayya Dhora v. Emperor ...	59	926
123	Tilak Rai v. Emperor ...	60	978	168	Raja of Ramnad v. Velusami Tevar ...	59	880
125	Lalta Prasad v. Emperor ...	61	59	171	Nakimo Dewani v. Pemba Dichen	59	911
126	Lal Bahadur v. Rameshwar Dayal	60	990	174	Madho Prasad v. Draupadi Bibi ..	61	417
129	Sri Ram Jankiji v. Jagdamba Prasad ...	61	3	180	Ghafoor Bakhsh v. Jwala Prasad ..	61	394
132	Nainsukh Das Nagar Mal v. Gajanand Shyam Lal ...	61	269	183	Shambhu Nath v. Badri Das ...	61	410
138	Ram Ratan v. Emperor ...	60	1007	185	Hikmatullah Khan v. Abdul Azim Khan ...	61	412
139	Masihun-Nissa Bibi v. Kaniz Sughra Bibi ...	60	975	187	Sital Prasad v. Clements Robson & Co. ...	61	401
141	Bhawani Din v. Jadunath Misir...	61	89	191	Chiranji Singh v. Dharam Singh ..	*Not reportable.*	
143	Asa Singh v. Naubat ...	61	34	192	Ram Charan v. Mewa Ram ...	61	518
145	Mathura Prasad v. Bhup Narain...	61	135	194	Said-un-nissa Bibi v. Fida Husain	61	385
				196	Emperor v. Janki Prasad ...	55	673

45 I. L. R., BOMBAY SERIES, FOR JANUARY-FEBRUARY, 1921.

1	Babaldas Khemchand, *In re* ...	57	997	164	Kuverji Kavasji v. Municipality of Lonavala ...	58	403
8	Sir Mahomed Yusuf v. Secretary of State ...	57	971	170	Gordhandas Vithaldas v. Mohanlal Maneklal ...	59	106
24	Karim Elahi Sheth v. Sher Ahmed ...	59	28	174	Bhaichand Kirparam v. Ranchhoddas Manchharam ...	58	231
45	Mahadev v. Sadashiv ...	59	118	188	Emperor v. Ram Gopal ...	58	149
55	Daluchand v. Appi ...	59	347	193	Emperor v. Haji Aboo ...	58	157
61	Pandu v. Ramchandra ...	*Not reportable.*		196	Madhavarao Moreshwar v. Secretary of State ...	59	452
67	Bhaga v. Dorabji ...	59	440	203	Emperor v. Bhagwan Krishna ...	*Not reportable.*	
75	Essafally v. Abdeali ...	59	396	206	Sheikh Hassan v. Mahomed Ali...	59	210
80	Ananta v. Ganu ...	57	143	216	Gurunath Keshav v. Sadashiv Balkrishna ...	59	217
87	Pranjivandas v. Mia Chand ...	59	418	220	Emperor v. Vrijvallubhdas ...	58	152
91	Pandurang v Jagya ...	59	399	223	Rajacharya v. Chemanna ...	59	192
96	Emperor v. Chiman ...	58	147	225	Motilal Mansukhram v. Maneklal Dayabhai ...	59	245
99	Shriniwas v. M. C. Waz ...	59	421	227	Jamnadas Shivram v. Chunilal Hambirmal ...	59	520
105	Sitaram v Khandu ...	59	480	234	Girjashankar Daji v. Murlidhar Narayan ...	59	271
110	Emperor v. Yellappa ...	58	60	241	Janardan Triumbak v. Martand Triumbak ...	59	523
117	Genu v. Narayan ...	59	258				
129	Ramchandra Ramvallabh v. Vasanji Sons & Co. ...	57	978				
138	Ranjitsinhji v. Bank of Bombay ...	57	964				
146	Bai Awabai v. Khodadad Ardesher ...	58	91				
151	Kulsumbi v. Abdul Kadir ...	59	433				
157	Chitguppi & Co. v. Vinayak Kashinath ...	58	184				

23 BOMBAY LAW REPORTER, FOR JANUARY FEBRUARY, 1921.

1	Emperor v. Purshottam Ishvar Amin ...	60	593	48	Ambalal Sarabhai v. Ahmedabad Municipality ...	60	578
35	Bombay Municipality v. Damodar Bros. ...	60	571	55	Laxman v. Bhagvansingh ...	60	581
				60	Ichalal v. Nago ...	60	589

23 BOMBAY LAW REPORTER, FOR JANUARY FEBRUARY, 1921—concld.

62	Bhimaji v. Bhimabai ...	61	764	148	Mangaldas v. Assistant Collector, Ahmedabad ...	*To be printed.*	
69	Martand v. Dhondo ...	61	34				
75	Andaniswami v. Todadswami ...	60	907				
81	Jagjivan v. Kalidas ...	60	901	158	Advocate General v Haji Ismail	61	143
84	Chhotalal v. Vishnu ...	60	903	161	Vasudeo Harihar, *In re* ...	61	145
89	Dattatraya v. Secretary of State	60	744	189	Jagannath Vasudeo, *In re* ...	61	271
92	Dattatraya v Radhabai ...	60	885	193	Ahmedabad Municipality v. Mani Lal ...	*To be printed.*	
100	Bhimabai v. Swamirao ...	60	892				
107	Vishvanath v. Narsu ...	60	916				
110	Sonubai v Shivajirao ...	60	919	213	Girmallappa v. Kenchava ...	61	264
119	Gitabai v. Krishna ...	60	913	227	Parshotam v. Venichand ...	61	492
125	Sakharam v Ganu ...	60	924	238	Vasta v Secretary of State ...	61	440
133	Chapsi v. Keshavji ...	60	960	244	Sholapur Municipality v. Abdul Wahab ...	61	428
139	Bombay and Persia Steam Navigation Company, *In re* ...	60	964	250	Vyankat v. Onkar ...	61	276
				254	Balwant v. Umabai ...	61	287

10 LOWER BURMA RULINGS, FROM JULY TO SEPTEMBER, 1920.

241	Karamath Khan v. Latchmi Achi	61	675	292	B. I. S. N. Co. Ltd. v. Alibhai Mohammad ...	62	378
253	Maung Kyaw Kin v. Aminul Haq ...	62	53				
258	U Nandiya v. U Kaw Wida ...	61	778	307	Alibhai Mahomed v. B I. S. N. Co. Ltd. ...	62	71
264	Achaya v. Maung Po Saing ...	61	634				
267	Ma Hlaing v. P. R. A. R Firm ...	61	701	309	Kaladan Sooratee Bazar Company Ltd Mulmein, *In re* ...	56	914
269	Po Myaing v. Emperor ...	*To be printed.*		321	Maung Po Sin v. Vellayappa Chetty ...	62	315
274	Emperor v. Po Mya ...	61	1035	326	Kyanksema v. Aparna Charan ...	62	342
276	Dawood v. Rahman ...	62	175	329	Mensee Devjee & Co. v. Maung Than Gyaung ...	62	57
280	Lall Dwarka Das v. Dass Gupta	62	291				
288	Ma Myin v. Ma Toke ...	*To be printed*					

4º I. L. R., CALCUTTA SERIES, FOR JANUARY-FEBRUARY, 1921.

1	Tilakdhari Lal v. Khedan Lal ...	57	465	93	Bhut Nath Chatterjee v. Rama Nath Naskar ...	57	1004
22	Yadalli Beg v. Tukaram ...	57	535				
30	Balwant Rao v. Baji Rao ...	57	545	100	Sureshwar Misser v. Maheshrani Misrain ...	57	825
45	Sasanka Sekhar Banerjee v. Sudhangsu Mohan Ganguli ...	59	572	110	Charan Das v. Amir Khan ...	57	606
				119	Bhusan Mani Dasi v. Profulla Kristo Deb ...	60	801
53	Mohabor Rahman v. Hazi Abdur Rahim ...	62	115	124	Santana Ray v Advocate-General of Bengal ...	62	193
57	Kulendra Kishore Roy v. Rai Kishori Shaha ...	62	112	138	Hriday Nath Roy v. Ram Chandra Barna Sarma ...	58	806
61	Jagan Nath Khan v. Bajrang Das Agarwala ...	62	97	153	Abdul Ohad v. Amdali Gazi ...	57	969
65	Nagendra Nath Sen v. Sadhu Ram Mandal ...	57	992	157	Abeda Khatun v. Majubali Chowdhury ...	59	760
69	Virjiban Dass Moolji v. Biseswar Lal Hargovind ...	60	406	161	Killing Valley Tea Company, Ld. v Secretary of State ...	61	107
78	Ram Sahay Ram v Emperor ...	57	278	176	Ducasse v. Cohen ...	60	105
87	Sripat Singh v. Prodyat Kumar Tagore ...	57	810				

33 CALCUTTA LAW JOURNAL, FOR JANUARY-FEBRUARY, 1921.

1	W. Krishnamachariar v. A Sankara Sah ...	57	713	19	Indian Motor Taxi Cal Co. Ltd. v. Corporation of Calcutta ...	61	641
7	Barendra Nath Mitter v. Matin & Co. ...	62	167	24	Superintendent & Rememberancer of Legal Affairs v. Kajal Hoaldar	62	187
				26	Levy v. Ezra ...	62	199

33 CALCUTTA LAW JOURNAL, FOR JANUARY-FEBRUARY, 1921—concld.

34	Surendra Krishnamandai v. Ranee Dassee ...	59	814
57	Giribala Dasi v. Kali Das Bhanja	57	626
69	Ranada Ranjam Bhattacharjee v. Bharat Chandra Saha ...	62	180
70	Mafiz-ud-Din v Emperor ...	61	793
72	Indian General Navigation & Ry. Co. v. Eastern Assam Co. Ltd.	61	14
97	Birendra Kumar Biswas v. Hemlata Biswas ...	60	362
109	Rameshwar Singh Bahadur v. Homeshwar Singh ..	59	636
115	Bhut Nath Jana v Shashi Bhusan Jana ...	59	177
118	Prayag Singh v. Mrs. Morgan ...	62	190
122	Emperor v. Nazir Ali Beg ...	62	334
124	Kali Nath Roy v. Emperor ...	59	641
128	Promotho Nath Roy v. W. A. Lee	62	26
131	Marium Begam v. Banku Behary Bose ...	62	205
132	Abdul Hakim v. Ebrahim Solaiman ...	62	210
141	Radharani Dasi v. Dayal Chand	62	222
145	Chatturbhuj Chandan Mall v. Basdeo Das Daga ...	60	909
151	Ezakiel Abraham Gubbay v. Ramjas Roy ...	*To be printed.*	
171	Venkayyamma Rao Bahadur v. Venkatadri Appa Row Bahadur	59	767
176	Maharaj Bahadur Singh v. Forbes	59	782
179	Emperor v Bharat Bipari ...	62	414
180	Tenaram Mandal v. Emperor ...	61	1003
184	Bhairab Chandra Mandal v. Jiban Krishna Mandal ...	60	819
186	Midnapur Zimindari Co. v. Jagendra Kumar Bhaumik ...	62	491
193	Sulia Mohan Banerjee v. Raj Krishna Ghose ...	60	826
198	Mahendra Nath Mandal v. Sh. Sams-ud-Din ...	62	241
201	Partap Chandra Gope v. Sarat Chandra Gangopadhyay ...	62	348

2 I. L. R., LAHORE SERIES, FOR JANUARY-FEBRUARY, 1921.

1	Umed Ali v. Municipal Committee, Jhang-Maghiana ...	56	143
5	Amir Begam v. Hussain Bibi ...	58	323
13	Parmeshri Das v Fakiria ...	60	772
19	Ganesh Das-Ishar Das v. Durga Dat-Jagan Nath ...	60	776
22	Punjab Singh v Arjan ...	59	776
25	Honda Ram v. Hotu Ram ...	59	715
27	Hazara Singh v. Crown ...	59	918
34	Kali Nath Roy v Emperor ...	59	641
40	Gokal Chand v Hukam Chand-Nath Mal ...	60	379
53	Karori Mal v Ramji Lal ...	59	812
57	Dina Nath v. Muhammad Abdulla	61	53
61	Dhera Mal v Haidar Shah ...	61	77
63	Amar Nath v. Mam Raj ...	61	57
66	Bholu v. Ram Lal ...	60	720

22 PUNJAB LAW REPORTER, FOR JANUARY, 1921.

No.			
1	Rup Ram v. Fazal Din ...	57	223
2	Emperor v. Rahman ...	57	285
3	Data Ram v. Deoki Nandan ...	58	6
4	Gordhan Das v. Rukman ...	58	31
5	Ghulam Haidar v. Amir Haidar ...	58	19
6	Sital v. Emperor ...	57	943
7	Fahlad v Emperor ...	57	450
8	Akbar Hussain v. Ragnandan Das ...	57	348
9	Ram Jas v. Katha Singh ...	58	51
10	Ethel Mabel Emily Harris v. Caplain C. P. Harris ...	59	89
11	Kartar Singh v. Lal Singh ...	59	238
12	Hari Singh v. Lachhmi Devi ...	59	280
13	Hukman v. Crown ...	61	717
14	Ram Ditta v. Dyal Mal ...	59	160
15	Mihan Singh v. Crown ...	59	142
16	Bodha v Crown ...	59	384
17	Crown v. Suhela ...	59	412
18	Mohan Lal v. Maya Mal ...	59	231
19	Amir Chand v. Hem Raj ...	59	243
20	Murad Bibi v. Rahim Bakhsh ...	59	346
21	Parmanand v Sheo Charandas ...	59	253
22	Firm Kotu Ma-Charandas v. Firm Bihari Lal-Jagga Mal ...	59	424

15 PUNJAB WEEKLY REPORTER, FOR JULY 1920.

No.	*Civil.*		
59	Khodeja v. Ghulam Nabi ...	55	845
60	Moman v Dhanni ...	55	869
61	Gujar Shah v. Barkat Ali Shah ..	56	744
62	Ahmadi-ul-Nissa v. Nasib-ul-Nissa	*To be printed.*	
63	Indar Singh v. Fateh Singh ...	59	721
64	Indar Singh v. Fateh Singh ...	59	734

16 PUNJAB WEEKLY REPORTER, FOR JANUARY, 1921.

No.	*Civil.*		
1	Muhammad Rustam Ali Khan v. Mushtaq Husain ...	**57**	329
2	W. Krishnamachariar v. A. Sankara Sah ..	**57**	713
3	Charan Das v. Amir Khan ...	**57**	606
4	Hardit Singh v. Gurmukh Singh...	**59**	7
5	Bakhtawar v. Shop of Kesar Singh Gurdit Singh ...	**59**	31
6	Giasu v. Har Dial ...	**59**	82
7	Firm known as Messrs. Ram Lal Ishar Das v. Salig Ram ...	**59**	2
8	Sujan Devi v. Jagiri Mal ...	**59**	124
9	Kartar Singh v. Lal Singh ...	**59**	235
10	Hari Singh v. Lachhmi Devi ...	**59**	220
	Criminal.		
1	Hukman v. Crown ...	**61**	717
2	Ram Ditta v Dayal Mal ...	**59**	160
3	Mihan Singh v. Crown ...	**59**	142
4	Bodha v. Crown ...	**59**	384
5	Crown v. Suhela ...	**59**	412

44 I. L. R., MADRAS SERIES, FOR JANUARY-FEBRUARY, 1921.

Page.			
1	Gurusami Pandiyan v. Pandia Chinna Thambiar ...	**61**	242
35	Jayarama Ayyar v. Vridhagiri Aiyar	**59**	167
43	Ramanathan Chetty v. Arunachelam Chettiar ...	**60**	316
47	Subbasari v. Emperor ...	**61**	228
51	Appalanarasayya Bhukta v. Emperor ...	**59**	913
53	Somanna v. Chellapathi Rao ...	**60**	52
55	Rama Sahu v. Gowro Ratho ...	**59**	350
65	Secretary to the Board of Revenue, Income-Tax, Madras v. Arunachalam Chettiar ...	**59**	482
100	Visvanadhan Chetty v. Arunachellam Chetti ...	**60**	302
113	Ponnusami Pillai, *In re* ...	**60**	64
114	Subramania Mudaliar v. Ranganathan Chettiar ...	**18**	506
121	Chinna Pichu Iyengar v. Padmanabha Iyengar ...	**59**	690
131	Atchamma v. Papiah ...	**60**	583
140	Thayyil Mammad v. Purayil Mammad ...	**60**	118
145	Krishna Naik & Sons v. Cayzer Irwine & Co, Ltd ...	**62**	372
156	Taluk Board, Bandar v. Zemindar of Challapalli ...	**61**	497
167	Dhadha Sahib v. Muhammad Sultan Sahib ...	**59**	311
170	Empire of India Life Assurance Company, Ltd. v. Nanu Ayyar...	**60**	69
179	Venkatasubba Rao v. Satyanarayanamurti ...	**60**	27
187	Alagappa Chetty v. Alagappa Chetty ...	**60**	130
189	Jagannadha Rao v. Ramayamma	**62**	437
196	Perumal Ammal v. Perumal Naicker ...	**61**	461

40 MADRAS LAW JOURNAL, FOR JANUARY-FEBRUARY, 1921.

1	Rameshvar Singh v. Homeshvar Singh ...	**59**	636
7	Singariah Chetty v. Chinnabbi...	**60**	780
13	Ranganathan Chetty v. Parthasarathy Chetty ...	**61**	457
18	Raja of Pittapur v. Ballapragada Pallamraju ...	**60**	353
25	Perumal Ammal v. Perumal Naicker ...	**61**	461
31	Venkata Subba Row v. Satyanarayanamurti ...	**60**	27
38	Davood Mohideen Rowther v. Jayarama Aiyar ...	**62**	284
46	Moosalakanthi Venkatarama Naganatha Rao v. Kotamarti Ramayamma ...	**62**	437
52	Rajah Rajeswara Dorai v. Ponnuswami Tevar ...	**61**	907
55	Brahmayya v. Appaya Sastri ...	**62**	203
57	Krishna Naick & Sons v. Cayyar Irvine & Co. ...	**62**	372
65	Chamiyappa Tharagan v. Rama Iyer ...	**62**	121
83	Ivatury Atchamma v. Ivatury Bapiah ...	**60**	583
91	Taluk Board, Bandar v. Raja Yarlagadda Mallikarjuna Prasada Naidu ...	**61**	497
101	Kali Nath Roy v. Emperor ...	**59**	641
105	Karnam Kandaswamy Pillay v. Chinnabha ...	**62**	603
111	Secretary of State v. Narayana Chettiar ...	**62**	251
114	Govinda Padayachi v. Lokanatha Aiyar ...	**62**	291
124	Govindarajulu Naidoo v. Ranga Rao	**62**	255
126	Lakshmanan Chetty v. Muthaya Chetty ...	*To be printed.*	
141	Maharaj Bahadur Singh v. Forbes ...	**59**	782
144	Malraju Lakshmi Venkayyamma Row v. Venkatadri Appa Row...	**59**	767
149	Batchu China Venkatarayudu v. Duvvuri Ramamurti ...	**61**	986
153	Kakumanu Venkatasuryanarayna v. Akuthota Ramayya ...	*To be printed.*	

40 MADRAS LAW JOURNAL, FOR JANUARY-FEBRUARY, 1921—concld.

161	Swaminatha Mudaliar v. Ramaswami Mudaliar ...	62	354	
166	Shaw Wallace & Co. v. Subbier & Sons ...	62	205	
173	Rustomji Dorebji v. Nurse ...	62	260	
194	Sayyapureddi Chinnayya Dhora v. Emperor ...	59	926	
197	Raja of Ramnad v. Velusami Tevar ...	59	880	
201	Nakimo Dewani v. Pemba Dichen	59	911	
204	Venkatarama Aiyar v. Ramaswami Aiyar ...	62	305	
208	Saminatha Pillay v. Rajagopal Mudaliar ...	62	360	
209	Subba Aiyar v. Ramaswami Aiyangar ...	62	346	
211	Palani Goundan, *In re* ...	62	582	
213	Midnapore Zemindari Co. Ltd. v. Muthappudayan ...	62	337	
218	Askaram Sowcar v. Venkataswami Naidu ...	62	393	
219	Kochu Mahomed Asan Tharagan v. Sankaralinga Mudaliar ...	62	495	
229	Radhakrishna Aiyar v. Swaminatha Aiyar ...	60	85	
232	Khetramoni Dasi v Jiban Krishna	60	1	
236	Panaganti Ramarayanimgar v. Maharajah of Venkatagiri ...	61	612	

29 MADRAS LAW TIMES, FOR JANUARY-FEBRUARY, 1921.

1	Giribala Dasi v. Kali Das Bhanja...	57	626	
10	Rama Sahu v. Gowro Ratho ...	59	350	
16	Secretary, Board of Revenue v. Arunachalam Chettiar ...	59	482	
40	Alagiasundaram Pillai v. Midnapore Zemindary Co., Ltd. ...	54	816	
43	Polepeddi Venkatasivayya v. Polepeddi Adenna ...	60	98	
45	Mammad v. Mammad ...	60	118	
48	Somanna v. Chalapathi Rao ...	60	52	
49	Empire of India Life Assurance Co. v. Nanu Aiyar ...	60	69	
56	Fernandez v. Sylvester Souza ...	61	829	
57	Vellayyan Chetty v. Muthayya Chetty ...	61	901	
59	Palaniappa Chettiar v. Chokalingam Chettiar ...	60	127	
63	Asethu v. Kesavayya ...	60	215	
67	Ranganathan Chetty v. Parthasarathy Chetty ...	61	457	
71	Girdhar Das v. Krishna Dutt Dube ...	56	293	
78	Davood Mohideen Rowther v. Jayarama Aiyar ...	62	284	
85	Krishna Naik & Sons v. Cayyar Irvine & Co. Ltd. ...	62	372	
92	Venkatarama Iyer v. Ramaswamy Iyer ...	62	305	
95	Rangasami Reddi v. Konda Reddi ...	61	967	
99	Govindarajulu Naidu v. Ranga Rao ...	62	255	
101	Rajah Rajeshwara Dorai v. Ponnusami Tevar ...	61	907	
103	Naganatha Rao v. Ramayyamma	62	437	
108	Brahmayya v. Appayya Sastri ...	62	203	
110	Alagappa Chetty v. Krishnasamy Iyer ...	61	753	
112	Chidambara Chetty, *In the matter of* ...	61	931	
114	Venkatasuryanarayana v. Ramayya ...	*To be printed.*		
121	Rustomji Dorabji v. Nurse ...	62	260	
139	Masilamony Mundaly, *In the matter of* ...	62	376	
141	Palani Gounden, *In re* ...	62	582	
142	Kali Nath Roy v. Emperor ...	59	641	
145	Vannisami Thevar v. Chellasami Thevar ...	62	276	
151	Saminatha Pillai v. Rajagopala Mudaliar ...	62	360	
152	Swaminatha Mudaliar v. Ramaswami Mudaliar ...	62	354	
153	Govinda Padayachi v. Lokanatha Aiyar ...	62	291	
164	Venkayamma Row v. Venkatadri Appa Row ...	59	767	
167	Kandaswamy Pillay v. Chinnabha	62	603	
172	Kuttiyali v. Ummamma Amma ...	62	62	
175	Venkatalingama Nayanim v. Venkatarama Rao ...	61	562	
176	Arunachala Chettiar v. Rajah of Kalahasti ...	62	505	
178	Vazir Beg, *In re* ...	*Not reportable.*		
181	Secretary of State v. Srinivasa Chariar ...	60	230	
185	Midnapore Zemindary Co. v. Muthappudayan ...	62	337	

13 LAW WEEKLY, FOR JANUARY-FEBRUARY, 1921.

1	Toolsidas Tejpal v. Venkatachalapathy Aiyar ...	59	27
4	Bharat Indu v. Hamid Ali Khan...	58	386
11	Rangunatha Rao v. Secretary of State ...	60	187
15	Yagnasami Ayyar v. Chidambaranatha Mudaliar ...	61	931
16	Brahmayya v. Appayya Sastri ..	62	203
19	Lal Jagdish Bahadur Singh v. Mahabir Prasad Singh ...	58	845
25	Maruvada Venkataratnama v. Maruvada Krishnama ...	57	735
32	Peddi Kayilakath Kunni v. Thayyil Kunhqi Amma ...	57	674
34	Nagu Reddiar v. Veerappa Mudaliar ...	61	815
37	Viswanatha Sastri v. Sitalakshmi Ammal ...	61	979
49	Charan Das v. Amir Khan ...	57	606
54	Fernandez v. Sylvester Souza ...	61	829
56	Rajah Rajeswara Dorai v. Ponnusami Tevar ...	61	907
59	Vellayyan Chetty v. Muthayya Chetty ...	61	901
61	Vemanna Venkatachela Naidu v. Ethirajammal ...	60	192
67	Lakshmana Goundan v. Subramania Aiyar ...	61	962
69	Perumal Ammal v, Perumal Naicker ...	61	461
76	Muddappa v. Rudramma ...	61	958
77	Ranganatham Chetty v. Parthasarthy Chetty ...	61	457
82	Raj Raghubar Singh v. Jai Indra Bahadur Singh ...	55	550
91	Jagannadha Rao v. Ramayyamma	62	437
97	Govindarajulu Naidu v. Ranga Rao ...	62	255
101	Kattayatha Kutti v. Achuthan...	60	209
104	Vannisami Thevar v. Chellasami Thevar ...	62	276
112	Amritrao v. Mukundrao ...	53	866
123	Venkia v Donga Pallayi ...	57	724
140	Venkatachalapathi Chettiar v. Lakshmanan Chettiar ...	*Not reportable.*	
141	Muthia Chettiar v. Lakshminarasa Aiyar ...	61	756
143	Narasa Reddi v. Kondap Naidu...	61	759
145	Hanumanthu v. Receiver to the Estate of Subbayyer ...	61	767
148	Saminatha Pillai v. Rajagopala Mudaliar ...	62	360
150	Alagappa Chetty v. Krishnaswami Iyer ...	61	763
153	Govindaraja Mudaliar v. Sabapathi Mudaliar ...	61	783
156	Kamla Lachmi v. Basdeo Prasad...	58	900
161	Tilakdhari Lal v. Khedan Lal ...	57	465
172	Kirukan v. Alagappa Chetty ...	62	87
183	Chandu v Ramunni ...	59	943
187	Kaliyanasundaram Pillai v. Krishnaswami Iyer ...	62	250
193	Askaram Sowcar v. Venkataswami Naidu ...	62	393
195	Palani Goundan, *In re* ...	62	582
196	Secretary of State v. Narayana Chettiar ...	62	251
199	Venkatarama Aiyar v. Ramaswami Aiyar ...	62	305
203	Venkatappacharyulu v. Papireddi	62	309
208	Kuttiali v Ummamma Amma ...	62	62
212	Sundaresa Gurukkal v. Subramania Mudali ...	61	741
217	Maharaj Bahadur Singh v. Forbes ...	59	782
218	Raman v. Muthu ...	62	534
223	Sayyapureddi v. Emperor ...	59	926
225	Municipal Council of Tanjore v. Krishna Pillai ...	*To be printed.*	
227	Subba Aiyar v. Official Receiver, Madura ...	62	346
230	Fowler v. Secretary of State for India ...	61	852
253	Kali Nath Roy v. Emperor ...	59	641
256	Venkayyamma Row v. Appa Row	59	767
260	Venkata Reddi v. Kuppu Reddi ..	61	762
262	Raghaviah v. Ramanayya ...	61	772
266	Athimoolam Pillai v. Palaniandi Ambalam ...	60	670
268	Velayudham Pillai v. Thina Velayudham Pillai ...	62	27
273	Krishna Naik & Sons v. Irvine & Co., Ltd. ...	62	372

(1921) MADRAS WEEKLY NOTES, FOR JANUARY-FEBRUARY.

1	Kandasami Pillai v. Subbaraya Pillai ...	62	603
5	Perumal Ammal v. Perumal Naicker ...	61	461
9	Brahmayya v. Appayya ...	62	203
11	Ambalavana Pandara Sannidhi v. Meenakshi Sundareswari Devastanam ...	56	730
14	Visvanadhan Chetti v. Arunachalam Chetti ...	60	302
21	Rameshvar Singh v. Homeshvar Singh ...	59	636
24	Raja Ananda Rao v. Ramdas Daduram ...	*To be printed.*	
26	Bahadur Singh v. Forbes ...	59	782
26	Sayyapureddi v. Emperor ...	59	926
28	Suranna v. Appadu ...	60	615
29	Chengappa v. Akula Venkatasami ...	60	135
31	Pichu Naidu v. Jefferson ...	60	591
33	Singariah Chetty v. Muni Reddi...	60	780
37	Muthuramalinga v. Ponnusamy Devar ...	61	907

(1921) MADRAS WEEKLY NOTES FOR JANUARY FEBRUARY—concld.

38	Krishna Naik & Sons v Cayyar Irvine & Co, Ltd. ...	62	372	
43	Dawood Mohidin Rowther v. Jayaram Iyer ...	62	284	
49	Kali Nath Roy v. Emperor ...	59	641	
51	Rajah of Ramnad v Velusami Tevar ...	59	880	
53	Chamiyappa Tharakan v. Rama Iyer ...	62	121	
66	Premadikoer v. Jagu Singh ...	61	681	
70	Nana Tawker v Bhavani Boyee	60	239	
77	Venkayamma Row v. Venkatadri Appa Row ...	59	767	
80	Seth Maniklal Mansukbhai v. Raja Bijoy Singh Dudhoria ...	62	156	
85	Secretary of State v. Narayana Chettiar ...	62	251	
87	Maharaj Bahadur Singh v. Balchand Chowdhury ...	62	320	
87	Govinda Padayachi v. Lokanatha Aiyar ...	62	291	
94	Suri Runganatham Chetty v. Gadala Parthasarathy Chetty	61	457	
98	Govindarajulu Naidu v. Ranga Row ...	62	255	
100	Venkatasurya Narayana v. Ramayya ...	*To be printed.*		
106	Alagappa Chetty v. Krishnasawmy Iyer ...	61	753	
108	Swaminatha Pillai v. Rajagopala Mudaliar ...	62	360	
109	Satrasala Hanamunthu v. Talisetti Subbayyar ...	61	767	
111	Secretary of State v. Srinivasa Chariar ...	60	230	
115	Nakimo Devani v. Pemba Dichen	59	911	
117	Batchu Chinna Venkatarayudu v. Duvuri Ramamurthi ...	61	986	
119	Radhakrishna Ayyar v. Swaminatha Ayyar ...	60	85	
121	Rustomji Dorabji v. Nurse ...	62	260	
135	Subba Iyer v Official Receiver, Madura ...	62	346	
137	Venkatarama Iyer v. Ramaswamy Iyer ...	62	305	
139	Municipal Council of Tanjore v Krishna Pillai ...	*To be printed.*		
141	Kaliyanasundaram Pillai v. Krishnasamy Iyer ...	62	280	
144	Palani Goundan v. Emperor ...	62	582	
145	Swaminadha Mudaliar v. Ramaswami Mudaliar ...	62	354	
148	Shaw Wallace & Co. v. Subbier and Sons ...	62	205	
153	Adit Narayan Singh v. Mahabir Prasad Tiwari ...	60	251	
157	Maharaj Pahadur Singh v. Balchand Chowdhury ...	61	702	
159	Sabitri Thakurain v. Savi ...	60	274	
165	Bai Shirinbai v Ratanbai ...	60	222	
168	Masilamony Mudali, *In re* ...	62	376	

17 NAGPUR LAW REPORTS, FOR JANUARY FEBRUARY, 1921.

1	Mill Stores Trading Company of India Limited v. Seth Mathuradas ...	57	686	
8	Rukhmabai v. Balwant Hari ...	59	172	
15	Ganpatrao Mohite v. Kesrichand...	54	705	
18	Sitaram v. Rajaram ...	48	270	
20	Thakur Hemraj Sha v. Pannalal	61	563	
22	Jairam v. Motilal	58	961	
25	Ramchandra v. Raghoji ...	53	62	
29	Itwaridas v. Bodhan ...	*Not reportable.*		
33	Baliram v Narayan ...	54	276	

24 OUDH CASES, FROM JANUARY TO MARCH, 1921.

1	Jasodha v. Murlidhar ...	61	144	
4	Emperor v. Chandika Singh ...	*Not reportable.*		
5	Jageshar v. Bhushan ...	*Not reportable.*		
11	Narpat v. Janaka ...	61	303	
16	Lachhmin v. Ram Singh ...	61	230	
18	Hira Lal v. Emperor ...	61	237	
21	Emperor v. Bandi Din	61	240	
22	Amir Ali v. Iqbal Ali ...	61	312	
29	Swami Nath v. Jang Bahadur Singh	58	132	
33	Barati v. Secretary of State ...	61	721	
77	Secretery of State v. Mohammad Qasim ...	61	871	

8 OUDH LAW JOURNAL, FOR JANUARY-FEBRUARY, 1921.

1	Shankar Bakhsh Singh v. Udit Narain Singh ...	61	31	
4	Jagmohan Singh v. Ram Dayal Singh	61	135	
10	Kallu v Emperor ...	61	163	
18	Basdeo Lal v Mahabir ...	59	670	
23	Raghubar Singh v. Sanwal Singh	61	175	
27	Ahmad Khan v Hurmuzi Khanam	61	177	
60	Pancham Lal v. Nihal Singh ...	61	192	
64	Lal Bahadur Singh v. Tirbhawan Bahadur Singh ...	61	158	
67	Imtiazi Begam v. Hurmuzi Khanam ...	61	196	
76	Bahadur Khan v Abbu Saheb...	61	203	
81	Gajadhar Bakhsh v. Gauri Shankar ...	61	205	
87	Ram Saran v. Mangal Singh ...	60	219	
94	Jai Indra Bahadur Singh v. Dilraj Kuar ...	61	278	

(1921) PATNA CASES, FOR JANUARY FEBRUARY.

1	Rameshwar Singh Bahadur v. Harihar Jha ...	57	259
3	Jangal Chaudhury v. Laljit Pasban ...	60	124
6	Rajkeshwar Singh v. Basdeo Narayan Singh ...	57	270
8	Ram Charan Singh v. E. W. Berry ...	58	43
11	Lalu Pandit v. Emperor ...	53	153
12	Deodhari Mahto v. Emperor ...	59	921
16	Kadir Akram v. Emperor ...	62	189
17	Sumitra Kuer v Ram Khair Chowdhury ...	57	581
19	Dedhraj v Mahabir Prasad ...	57	303
21	Bikram Ahir v. Lala Rajpati Lal...	62	720
25	Kapilman Misser v. Kokilman ..	*To be printed.*	
29	Madan Mohan Singh v. Braj Bihari Lal ...	57	717
31	Gowkaran Lal v Sarjoo Saw ...	56	775
34	Bagho Prasad Singh v. Jadunandan Prasad Singh ...	59	896
38	Tokait Deg Narain Singh v. Bhuk Lal Raut ...	57	196
40	E. F Rawlins v. Anant Lal Sahu ...	59	905
42	Babui Girija Kuer v. Secretary of State ...	50	315
47	Sri Thakurji v. Narsingh Narain Singh ...	*To be printed.*	
49	Ramlal Kaviraj v. Satya Niranjan Chakerverty ...	57	786
68	Babu Lal Saha v. Kado Mahto ...	60	849
69	Dinanath Sahai v. Mayawati Kuer ...	60	346
74	Bhupendra Nath Bose v. Ami Prasad Singh ...	60	297
75	Mirza Mahammad Zahur Beg v. Maharaja Gopal Saran Narayan Singh ...	57	640
76	Mata Ho v. Emperor ...	57	171

6 PATNA LAW JOURNAL, FOR JANUARY-FEBRUARY, 1921.

1	Jangal Chaudhry v. Laljit Pasban	60	124
6	Ram Kripal Singh v. Hanuman Singh ...	59	929
11	Sheikh Mangree Mian v. Behari Lal ...	61	132
16	Pahlad Singh v. Sajiwan Rai ...	61	126
27	Raghu Prasad Singh v. Jadunandan Prasad Singh ...	59	896
34	Rameshwar Singh Bahadur v. Suraj Narain Jha ...	61	120
37	Hitendra Singh v. Rameshwar Singh Bahadur ...	61	67
41	Badri Narain Singh v. Subhkaran Misser ...	61	90
43	Ahmad Nawab v Abbas Husain ..	61	76
48	Sri Thakurji v. Narsingh Narain Singh ...	*To be printed.*	
51	Parbhu Charan Bharthi v Secretary of State ...	61	46
54	Dinanath Sahai v. Mayawati Kuer ...	60	346
62	Raja Jyoti Prasad Singh Deo of Kashipur, *In the matter of* ...	60	357
72	Bankhandi Rai v Keshori Mandal	61	102
82	Rajendra Prasad v Prabodh Chandra Mitra ...	59	936
85	Lal Shaha v. Kado Mahto .	60	849
97	Deokinandan Prasad v. Narsing Raut ...	60	567
101	Khetra Mohan Mohapatra v. Ganesh Lal Pandit ..	61	565
106	Samanta Gagarnath Mahapatra v Lokenath Sukul ...	61	635
109	Rameswar Prasad Singh v. Ramjanak Singh ...	60	390
112	Uchant Ahir v. Pasawan Ahir ...	61	639
114	Sripat Singh v. Budhu Singh ...	61	657
116	Lachmi Narain Marwari v. Balmakund Marwari ...	60	479
121	Ram Bahadur Singh v. Damodar Prasad Singh ...	60	514
125	Mritunjoy Praharaj v. Balmakund Kanungoe ...	61	663
127	Rameshwar Singh Bahadur v. Basudeva Singh ...	60	521

2 PATNA LAW TIMES, FOR JANUARY-FEBRUARY, 1921.

1	Sri Radha Krishna Ji v Sukh Nandan Singh ...	58	193
4	Debi Dayal Pandey v Ram Sakal ...	58	744
6	Rajbalam Rai v Nawlakh Singh ..	61	55
7	Rameshwar Singh Bahadur v. Subalal Jha ...	59	25
10	Gobind Behari v Emperor ...	61	49
11	Harihar Prasad Singh v Babu Edal Singh ...	57	333
15	Khedun Mahto v. Hussaini Kalal	61	51
17	Bankhandi Rai v. Kishori Mandal	61	102
22	Kesho Prasad Singh v. Harbans Lal ...	53	85
28	Ragho Prasad Singh v. Jadunandan Prasad Singh ...	59	896
31	Maksuddan Mistri v. Emperor ...	59	207
33	Baldeo v. Kanhaiyalal ...	58	21
35	Kashi Prasad Singh v. Akleshwari Prasad Narain Singh ...	58	22
36	Daulat Singh v. Kesho Prasad Singh ...	57	75

2 PATNA LAW TIMES, FOR JANUARY-FEBRUARY, 1921—concld.

38	Arunbati Kumari v. Ramniranjan Marwari ...	58	299
40	Shib Saran Shah v. Rameshwar De ...	60	640
42	Deokilal v. Ramanandlal ...	59	179
45	Ram Chandrika Prasad Singh v. Ram Niwaji Lal ...	61	666
47	Padmanabh Patnaik v. Emperor	57	283
49	Tekait Krishna Prasad Singh v Wazir Narain Singh ...	58	177
55	Inder Lall v. Ram Surat Kuar ...	58	773
59	Gajadhar Prasad v. Dulhin Gulab Kuar ...	57	744
63	Manghan Dass v. Rahim Bux ...	*To be printed.*	
64	Madan Mohah Prasad v. Sital Prasad ...	*To be printed.*	
66	Pahlad Singh v. Sajiwan Rai ...	61	126
70	Nena Ojha v. Sarbhoo Dutt Ojha	59	883
73	Hazari Lal v. Emperor ...	61	836
78	Tekait Krishna Prasad v. Surendra Mohan Kundu ...	58	223
80	Gobardhan Prasad v. Bishunath Prasad ...	58	393
81	Bibi Wakilan v. Deo Nandan Prasad ...	59	298
91	Nemdhari Singh v. Emperor ...	61	833
95	Tilakdhari Singh v Gour Narain	59	290
97	Adit Narain Singh v. Mahabir Prasad Tiwari ...	60	251
101	Tilakdhari Lall v. Khedan Lal...	57	465
109	Khedani Rajwarin v Lagan Singh	61	64
110	Ashutosh Rai v. Babu Lal Jhungar	59	513
111	Inder Chand v. Bidyadhar Panday	60	282
112	Rajendra Kishore v. Rajkumar Kamakhya Narain Singh ...	60	285

22 CRIMINAL LAW JOURNAL FOR JANUARY-FEBRUARY 1921.

1	Nandi v. Emperor ...	59	33
2	Ram Das v. Emperor ...	59	34
4	Khushi Ram v Emperor ...	59	36
5	Pramatha Nath v. P. C. Lahiri ...	59	37
8	Sita Ram v. Emperor ...	59	40
9	Abdul Ali v. Emperor ...	59	41
13	Hussaina Beari v. Emperor ...	59	45
17	Fernandez v. Emperor ...	59	129
21	Mukbul Ali v. Emperor ...	59	131
22	Muhammad Wasi v. Emperor ...	59	134
23	Rajaram Bhavan i s h a n k a r v. Emperor ...	59	135
25	Aloke Mohan Saha v. Narayanganj Municipality ...	59	137
29	Emperor v. Shamsunderbai ...	59	141
30	Mihan Singh v. Emperor ...	59	142
31	Satis Chandra v. Ram Dayal ...	59	143
48	Ram Ditta v. Dyal Mal ...	59	160
49	Bindeshri Dube v. Emperor ...	59	193
49	Govind Pandurang, *In re* ...	59	193
50	Mazhar Husain v. Emperor ...	59	194
51	Changouda Pirgouda v. Emperor ...	59	195
54	Sakhawat Haidar v. Emperor ...	59	198
55	Emperor v. Alibhai Abdul Vora ...	59	199
56	Abdul Ghafoor v. Emperor ...	59	200
58	Alex Pimento v. Emperor ...	59	202
60	Asimuddin Sardar v. Emperor ...	59	204
63	Maksuddan Histry v. Emperor ...	59	207
65	Gokal Chand v. Emperor ...	59	321
66	Mohan Das Pujhari v. Emperor ...	59	322
67	Radha Kissen v. Fateh Chand ...	59	323
68	Emperor v. Cunna ...	59	324
79	Behari Lal v. Emperor ...	59	335
81	Sheo Balak v. Emperor ...	59	369
82	Rupa Singh v. Emperor ...	59	370
84	Mohan Singh v. Emperor ...	59	372
86	Lachmi Singh v. Emperor ...	59	374
88	Abdul Rab v. Azmat Ali ...	59	376
90	Velu Malavarayan v. Kuppusawmi Pillai ...	59	378
95	Emperor v. Jhabdey ...	59	383
96	Bodha v. Emperor ...	59	384
97	Har Piari v. Nathe Lal ...	59	401
99	Indian Iron & Steel Co, Ltd v. Bauso Gopal ...	59	403
107	Molai v. Emperor ...	59	411
103	Emperor v. Suhela ...	59	412
109	Ziaullah Khan v. Emperor ...	59	413
110	Adepu Reddi v. Ramayya ...	59	414
111	Mahar Singh v. Emperor ...	59	415
112	Taqi Shah v. Emperor ...	59	416
113	P. S. Pillay v. Moulmein Municipal Committee ...	59	545
115	Rahu v. Emperor ...	59	547
118	Anant Ram v. Emperor ...	59	550
119	Madhu Majhi v. Emperor ...	59	551
119	Mangal Singh v. Emperor ...	59	551
120	Faiz Mahomed v. Emperor ...	59	552
122	Bai Das v. Ali Bux Khan ...	59	554
122	Chaubey Kunj Behari Lal v. Lauua ...	59	554
123	Ma Twe v. Lwe Hain ...	59	555
124	Surta Singh v. Emperor ...	59	556
125	Baijnath Mahton v. Emperor ...	59	557
127	Jaisukh v. Emperor ...	59	559
127	Bo Gyi v. Ma Nyein ...	59	559
128	Daulat v. Emperor ...	59	560
129	Kali Nath Roy v. Emperor ...	59	641
131	Ali Mohammad v. Fakiruddi Munshi ...	59	643
141	Bishna v. Emperor ...	59	653
142	Khushi Ram v. Emperor ...	59	654
143	Lal Lokpal Singh v. Emperor ...	59	655
144	Kanwar v. Emperor ...	59	656

Alphabetical List of Cases reported in Volume LIX of Indian Cases with references to the Volumes and Pages of other Law Journals and Reports.

An asterisk (*) *denotes cases not reported yet elsewhere.*

Names of cases reported.	Where reported.	Page.
Abdul Ali v. Emperor ...	1 P L T 446; 22 Cr L J 9 ...	41
Abdul Ghafoor v. Emperor ...	18 A L J 1137; 22 Cr L J 56; 2 U P L R (A.) 433; 43 A 225 ..	200
Abdul Hafiz v. Abdul Alim Saheb ...	(1920) M W N 324; 24 C W N 494; 28 M L T 135; 12 L W 497; 32 C L J 447 **P. C.** ...	1
Abdul Rab v. Azmat Ali ...	18 A L J 1145; 22 Cr L J 88 ...	376
Abdul Wahid v. Halima Khatun ...	18 A L J 210; 42 A 262. ...	188
Abdulla v. Akhil Chandra Biswas ...	*Calcutta High Court ...	84
Abdus Samad v. Yusuf ...	19 A L J 22; 2 U P L R (A.) 389; 22 Cr L J 165	917
Abeda Khatun v. Majubali Chowdhury ...	24 C W N 1020; 33 C L J 304 ...	760
Adepu Reddi v. Ramayya ...	12 L W 227; 22 Cr L J 110 ...	414
Adkia v. Shankar Rao ...	*Nagpur Judicial Commissioner's Court ...	757
Aishan v. Sher Muhammad ...	22 Cr L J 149 ...	853
Alex Pimento v. Emperor ...	22 Bom L R 1224; 22 Cr L J 58 ...	202
Ali Mohammad v. Fakiruddi Munshi ...	24 C W N 1039; 32 C L J 255; 22 Cr L J 131 ...	643
Aloke Mohan Saha v. Narayanganj Municipality ...	22 Cr L J 25 ...	137
Amir Chand v. Hem Raj ...	19 P L R 1921; 12 P W R 1921 ...	243
Anant Ram v. Emperor ...	22 Cr L J 118; 8 P W R 1921 Cr ...	550
Annaya Madvalaya v. Sidaya Murgayya ...	22 Bom L R 1092. ...	125
Arumuga Chettiar v. Ramanadan ...	12 L W 352 ...	898
Arunachellam Chetty v. Somasundaram Chetty ...	12 L W 328 ...	86
Ashiruddin Mohammad v. Taher Mohammad ...	*Calcutta High Court ...	306
Ashutosh Rai v. Babu Lal Jhungar ...	5 P L J 650; 2 P L T 110 ...	513
Asimuddin Sardar v. Emperor ...	32 C L J 89; 22 Cr L J 60 ...	204
Atma Singh v. Hem Raj Shah ...	*Lahore High Court ...	939
Atul Chandra Kundu v. Sarat Chandra Laha ...	24 C W N 967 ...	215
Aziz-un-nissa Bibi v. Chiene ...	18 A L J 745; 2 U P L R (A.) 251; 42 A 593 ...	296
Babusing Ramchandra Rajeshirke v. Pandu Tatya Kate ...	22 Bom L R 1413; 45 B 508 ...	718
Bahadur v. Gelomal ...	14 S L R 128 ...	607
Bai Das v. Ali Bux Khan ...	23 C W N 1053; 22 Cr L J 122 ...	554
Bai Monghibai v. Bai Rambhalaxmi ...	22 Bom L R 1286 ...	344
Bai Parvati v. Mansukh Jetha ...	22 Bom L R 1097; 44 B 972 ...	361
Baidyanath Mahto v. Shyam Mahto ...	*Patna High Court ...	899
Baijnath Kalooram and Alibhoy Mahomed, *In the matter of* an arbitration between ...	24 C W N 567 ...	439
Baijnath Mahton v. Emperor ...	1 P L T 708; 22 Cr L J 1251 ...	557
Bakhtawar v. Kesar Singh-Gurdit Singh ...	5 P W R 1921 ...	31
Balai Chand Pal v. Panchu Gopal Seal ...	*Calcutta High Court ...	319
Baldeo Singh v. Chhail Behari Lal ...	18 A L J 944 ...	688
Balkrishna Bhimaji v. Ramkrishna Gangadhar ...	22 Bom L R 1442; 45 B 353 ...	771
Bansi v. Kanhaya ...	18 A L J 983; 43 A 159 ...	659
Bapu Tatya v. Bala Raojee Desai ...	22 Bom L R 1383; 45 B 446 ...	759
Basanta Kumar Chowdhuri v. Secretary of State ...	*Calcutta High Court ...	273
Basanta Kumari Chaudhurani v. Krishna Nalini Dassya ...	*Calcutta High Court ...	312
Basdeo Lal v. Mahabir ...	23 O C 344; 8 O L J 18; 3 U P L R (J. C.) 1 ...	570
Basdeo Mal v. Kanhaiya Lal ...	18 A L J 952; 43 A 101 ...	667
Basvanappa Shivrudrappa v. Krishnadas Govardhandas ...	22 Bom L R 1387; 45 B 443 ...	743
Basvant Mushappa v. Mallappa Kallappa ...	22 Bom L R 1400; 45 B 459 ...	800
Behari Lal v. Emperor ...	22 Cr L J 79 ...	335

Beli Ram v. Hari Chand	...	*Lahore High Court	... 744
Beni Madho v. Hira Lal	...	18 A L J 679: 2 U P L R (A.) 227	... 873
Benode Behary Audhikary v. Shashi Bhusan Bhur	...	24 C W N 958	... 882
Bhaga Motiji v. Dorabji Sorabji	...	22 Bom L R 1111; 45 B 67	... 440
Bhagabati Debya v. Nilkantha Chatterjee	...	24 C W N 927	... 191
Bhagwan Baksh Singh v. Damodarji Joshi	...	18 A L J 100; 42 A 230	... 20
Bhagwan Singh v. Bhawani Das-Bhagwan Das	...	18 A L J 1119; 2 U P L R (A.) 411; 43 A 223	... 794
Bhagwat Koer v. Dhanukhdhari Prashad Singh	...	12 L W 105 **P. C.**	... 415
Bhimaji v. Rajabhai Hussain Sahib	...	12 L W 114; 39 M L J 239; 43 M 808; 28 M L T 295	... 842
Bhola Singh v. Babu	...	1 L 464	... 503
Bhutnath v. Tara Chand	...	33 C L J 115; 25 C W N 595	... 177
Bibi Wakilan v. Deo Nandan Prosad	...	5 P L J 681; 2 P L T 81	... 298
Bibi Wasila v. Sharafat Hussain	...	*Patna High Court	... 176
Bidhumukhi Dasi v. Bhaba Sundari Dasi	...	24 C W N 961	.. 868
Binayak Das v. Saminuddi	...	24 C W N 1022	... 209
Bindeshri Dube v. Emperor	...	18 A L J 1135; 2 U P L R (A.) 374; 22 Cr L J 49	193
Bipin Chandra Sarkar v. Basanta Kumar Chakravarti	...	23 C W N 773	... 454
Bis Ram v. Kewal Ram	...	*Lahore High Court	... 781
Bishna v. Emperor	...	22 Cr L J 14'; 9 P W R 1921 Cr	... 653
Bisweswar Ram v. Paltu Ram Kahar	...	*Patna High Court	... 887
Bo Gyi v. Ma Nyein	...	13 Bur L T 104; 22 Cr L J 127	... 559
Bodha v. Emperor	...	22 Cr L J 96; 16 P L R 1921; 4 P W R 1921 Cr	384
Borgonha v. Borgonha	...	22 Bom L R 261; 44 B 924	... 931
Braja Sundar Deb v. Sivaranjan Dei	...	1 P L T 647	... 282
Brojendra Chandra Sarma v. Prosunna Kumar Dhar		32 C L J 48; 24 C W N 1016	... 589
Burma Oil Co. Ltd. v. Baijnath Singh	...	3 U B R (1920) 212	... 960
Butchiraju v. Seetaramayya	...	12 L W 86	... 258
Chandanmal Hambirmal v. Bhaskar Waman	...	22 Bom L R 1079	... 114
Chandoo v. Parbhoo	...	*Nagpur Judicial Commissioner's Court	... 707
Chandra Kanta Chakrabarty v. Adinath Shom	...	32 C L J 81	... 565
Chandrabhaga v. Harsukhdas	...	*Nagpur Judicial Commissioner's Court	... 128
Changouda Pirgouda v. Emperor	...	22 Bom L R 1241; 22 Cr L J 51; 45 B 619	... 195
Charandas Chaturbhuj v. Chhaganlal	...	22 Bom L R 1169; 45 B 428	... 533
Chaubey Kunj Behari Lal v. Lauua	...	19 A L J 77; 22 Cr L J 122	... 554
Chhatter Singh v. Tej Singh	...	18 A L J 956; 2 U P L R (A.) 384; 43 A. 101	... 671
Chinna Pichu Iyengar v. Padmanabha Iyengar	...	12 L W 197; (1920) M W N 609; 39 M L J 417; 28 M L T 303; 44 M. 121	... 690
Chinnammal v. Ratnasabapathy Chettiar	...	12 L W 191; (1920) M W N 532	... 241
Chintamani Hargovan v. Ratanji Bhimbhai	...	22 Bom L R 1131	... 426
Chokhu Raoji v. Tatya Nama	...	22 Bom L R 1297	... 569
Cohen v. Cohen	...	10 L B R 198; 13 Bur L T 78	... 806
Cowasji v. Nath Singh Oil Company Ltd.	...	13 Bur L T 51	... 524
Curlender v. Abdul Hamid	...	18 A L J 1131; 2 U P L R (A.) 437; 41 A 216	... 941
Dalip Singh v. Balwant Singh	...	1 L 500	... 513
Daluchand Balaram v. Appi Khema Sasto	...	22 Bom L R 1033; 45 B 55	... 347
Dasarathi Chatterjee v. Asit Mohan Ghosh	...	24 C W N 879	... 126
Dattatraya v. Rajaya	...	*Nagpur Judicial Commissioner's Court	... 711
Daulat v. Emperor	...	22 Cr L J 128	... 560
Dayal Khushal v. Secretary of State	...	22 Bom L R 1089.	... 122
Deba Nand v. Anandmani	...	18 A L J 1127; 2 U P L R (A.) 431; 43 A 213	... 909
Debendra Prasad Sukul v. Surendra Prasad Sukul	...	*Patna High Court	... 975
Deivanayaga Padayachi v. Muthu Reddi	...	12 L W 291; (1920) M W N 547; 39 M L J 525; 28 M L T 255; 44 M 829	... 1003
Deodhari Mahto v. Emperor	...	(1921) Pat 12; 22 Cr L J 169; 2 P L T 211	... 921
Deoki Lal v. Ramanand Lal	...	(1920) Pat 333; 5 P L J 701; 2 U P L R (Pat.) 235; 2 P L T 42	... 179
Dhada Sahib v. Muhammad Sultan Sahib	...	39 M L J 706; (1920) M W N 710; 12 L W 603; 44 M 167	... 311
Dhar and Co. v. Sib Narayan Singh	...	*Calcutta High Court.	... 185
Din Dayal v. Gursaran Lal	...	18 A L J 287; 42 A 336	... 67
Dinesh Chandra Banerjee v. Romesh Chandra Das	...	*Calcutta High Court	... 316
Doaba Bank Ld. v. Kundan Lal	...	18 P W R 1921	... 588
Duggempudi Nagamma v. Tirumala Reddi	...	12 L W 147	... 363
Dulabdass v. Ma Win	...	3 U B R (1920) 217	... 965

Dandappa Basappa v. Bhimawa Baswantiappa	...	22 Bom L R 1306; 45 B 557	... 561
Emperor v. Alibhai Abdul Vora	...	22 Bom L R 1221; 22 Cr L J 55; 45 B 346	... 199
——— v. Cunna	...	22 Bom L R 1247; 22 Cr L J 68	... 324
——— v. Jhabdey	...	22 Cr L J 95	... 383
——— v. Rab Nawaz	...	1 L 612; 22 Cr L J 150	... 854
——— v. Samand	...	22 Cr L J 172	... 924
——— v. Shamsunderbai	...	22 Bom L R 1234; 22 Cr L J 29; 45 B 529	... 141
——— v. Suhela	...	1 L 614; 22 Cr L J 108; 17 P L R 1921; 5 P W R 1921 Cr	... 412
Erachshaw Dosabhai v. Bai Dinbai	...	22 Bom L R 1293; 45 B 318	... 189
Esufalli Alibhai v. Abdealli Gulam Hussein	...	22 Bom L R 1117; 45 B 75	... 396
Faiz Mahomed v. Emperor	...	14 S L R 168; 22 Cr L J 120	... 552
Fernandez v. Emperor	...	22 Bom L R 1040; 22 Cr L J 17; 45 B 672	... 129
Firm Budhu Ram-Honda Ram v. Ramzan	...	*Lahore High Court	... 676
Firm Kotu Mal-Charan Das v. Firm Bihari Lal-Jagga Mal	...	22 P L R 1921; 16 P W R 1921	... 424
Firm Makhan Lal-Tej Pal v. Firm Jai Narain-Birj Raj	...	17 P W R 1921	... 450
Gabu Naroba v. Zipru Ramsing	...	22 Bom L R 1289; 45 B 313	... 357
Gajindra Singh v. Akal Koer	...	*Patna High Court	... 292
Ganga Rama v. Sakharam Babaji	...	22 Bom L R 1396	... 796
Ganga Saran v. Emperor	...	19 A L J 6; 22 Cr L J 146	... 850
Gangabai v. Jankibai	...	22 Bom L R 1309; 45 B 337	... 583
Ganpat Rao Mohitey v. Kesrichand	...	17 N L R 15	... 705
Gauri v Hinga	...	23 O C 349	... 575
Genu Tukaram v. Narayan Raghu	...	22 Bom L R 1147; 45 B 117	... 258
Ghamandi v. Buta	...	3 U P L R (L.) 1	... 592
Ghasita Mal v Emperor	...	22 Cr L J 45	... 849
Giasu v. Har Dial	...	6 P W R 1921	... 82
Girdaridoss Radhakishen Doss v. Ponnu Pillai	...	12 L W 19; 39 M L J 233; 28 M L T 464	... 252
Girjashankar Daji v. Murlidhar Narayan	...	22 Bom L R 1202; 45 B 234	... 271
Goba Nathu Barola v. Sakharam Teju Patil	...	22 Bom L R 1101; 44 B 977	... 366
Gokal Chand v. Emperor	...	22 Cr L J 65	... 321
Gopal Dinkar v. Ganesh Narayan	...	22 Bom L R 1416; 45 B 512	... 785
Gopal Rao v. Ambabai	...	16 N L R 182	... 455
Gopaldas Ganpatdas v. Tribhovan Jethiram	...	22 Bom L R 1420; 45 B 365	... 790
Gordhandas Vithaldas v. Mohanlal Maneklal Doshi	...	22 Bom L R 1158; 45 B 170	... 506
Govind Pandurang, *In re*	...	22 Bom L R 1239; 22 Cr L J 49; 45 B 668	... 193
Govinda Krishna Sathe v. Hanmaya Lingaya Fulmali	...	22 Bom L R 1450; 45 B 567	... 777
Govinda Malavarayan v. Velu Mazhavarayan	...	(1920) M W N 701; 12 L W 530	... 307
Gulab Chand Ram v. Pancham Ram	...	*Patna High Court	... 338
Gulam Nabi v. Kanhaisingh	...	16 N L R 180	... 511
Gurunath Keshav Kalkundri v. Sadashiv Balkrishna Deshpande	...	22 Bom L R 1190; 45 B 216	... 217
Hait Singh v. Behari Lal	...	18 A L J 947; 43 A 95	... 92
Hanskuarbai v. Imam Ali	...	*Nagpur Judicial Commissioner's Court	... 717
Har Piari v. Nathe Lal	...	18 A L J 1140; 2 U P L R (A) 428; 22 Cr L J 97	401
Hardit Singh v Gurmukh Singh	...	22 Bom L R 550; 4 P W R 1921 **P. C.**	... 7
Hari Singh v. Lachhmi Devi	...	12 P L R 1921; 10 P W R 1921	... 220
Harish Chandra Guha v. Nripendra Coomar Chakravarti	...	24 C W N 1024	... 719
Harris v. Harris	...	10 P L R 1921; 19 P W R 1921	... 89
Hazara Bibi v. Suleiman Haji Mohammad	...	13 Bur L T 86	... 562
Hazara Singh v. Emperor	...	2 L 27; 22 Cr L J 166	... 9.8
Hira v. Sardara	...	*Lahore High Court	... 712
Hira Singh v. Sheikh Mosaheb	...	2 P L T 207; (1921) Pat 147	... 865
Hiralal Ambalal v. Gopalji Kallianji	...	22 Bom L R 338	... 263
Honda Ram v. Hotu Ram	...	2 L 25	... 715
Hussaina Beari v. Emperor	...	43 M 443; 22 Cr L J 13	... 45
Idarapalli Dhanushkotirayudu v. Venkayala Venkataratnam	...	38 M L J 320; 11 L W 453	... 65
Indar Singh v. Fateh Singh	...	1 L 511	... 721
Indar Singh v. Fateh Singh	...	1 L 540	... 734
Indian Iron and Steel Co. Ltd, v. Banso Gopal	...	32 C L J 54; 22 Cr L J 99	... 403
Indraj v. Ranji Lal	...	*Lahore High Court	... 808

Inu Mandal v. Bimalendu Roy	...	*Calcutta High Court	... 337
Ismail v. Wasudeo	...	16 N L R 129	... 285
Izzat Husain Khan v Ram Chander	...	18 A L J 120; 2 U P L R (A) 89	... 366
Jagannath v. Behari	...	*Nagpur Judicial Commissioner's Court	... 419
Jagat Singh v. Baldeo Prasad	...	18 A L J 974; 2 U P L R (A.) 373; 43 A 137	... 679
Jago v. Mahadeo	...	*Nagpur Judicial Commissioner's Court	... 709
Jagrup Singh v. Ram Kishen Das	...	23 O C 353; 7 O L J 705	... 596
Jaisukh v. Emperor	...	19 A L J 1; 22 Cr L J 127; 43 A 25	... 559
Jamnadas Shivram v. Chunilal Hambirmal	...	22 Bom L R 1207; 45 B 227	... 520
Janardan Trimbak Gadre v. Martand Trimbak Gadre		22 Bom L R 1212; 45 B 241	... 523
Jatindra Mohon v. Abdul Aziz	...	32 C L J 83	... 595
Jatindra Nath Dutta v. Suresh Chandra Ray	...	24 C W N 922	... 181
Jayarama Aiyar v. Vridhigiri Aiyar	...	39 M L J 188; 12 L W 182; (1920) M W N 490; 44 M 35	... 167
Jesmudin v. Isadally	...	10 L B R 240; 22 Cr L J 140	... 853
Jiwan Singh v. Garbha Singh	...	*Lahore High Court	... 522
Jonnalagadda Appalanarasayya Bhukta, *In re*	...	12 L W 388; 39 M L J 484; (1920) M W N 785; 22 Cr L J 161; 44 M 51	... 913
Joynath Sarkar v. Hari Mohan Das	...	*Calcutta High Court	... 469
Jugmohan Pradhani v. Indra Chandra	...	*Calcutta High Court	... 95
Jwala Prasad v. Kopeya Munda	...	*Patna High Court	... 880
Kali Kant Chakerbutty v. Rajani Kanta Chakravarty	...	*Calcutta High Court	.. 308
Kali Nath Roy v. Emperor	...	19 A L J 65; 33 C L J 124; 40 M L J 101; 18 L W 253; (1921) M W N 49; 29 M L T 142; 22 Cr L J 129; 2 L 34; 25 C W N 701; 23 Bom L R 709 **P. C.**	... 641
Kandaiya Pillai v. Chokkammal	...	12 L W 7; 28 M L T 106	... 214
Kandasami Chetty v. Ramalinga Chetty	...	12 L W 285	... 906
Kanhaya v. Nur Muhammad	...	*Lahore High Court	... 965
Kanwar v. Emperor	...	22 Cr L J 144; 3 U P L R (L) 3; 7 P W R 1921 Cr	... 656
Karim Elahi Sheti v. Sher Ahmed Haji Mir Ahmed		22 Bom L R 863; 45 B 24	... 28
Karooth Parakote Ammukutty v. Manavikraman	...	12 L W 331; 43 M 793	... 568
Karori Mal v. Ramji Lal	...	2 L 53	... 812
Kartar Singh v. Lal Singh	...	11 P L R 1921; 9 P W R 1921	... 238
Keesara Venkatapayya v. Nayani Venkataranga Rao		38 M L J 149; 43 M 288	... 978
Kehr Singh v. Emperor	...	22 Cr L J 161	... 913
Khalilal Rahaman v. Marian Bibi	...	10 L B R 194; 13 Bur L T 89	... 804
Khetra Nath Mondal v. Lakhan Sardar	...	*Calcutta High Court	... 442
Khushi Ram v. Emperor	...	1 L 451; 22 Cr L J 4	... 36
Khushi Ram v. Emperor	...	22 Cr L J 142; 6 P W R 1921 Cr	... 654
Kiran Chandra v. Bono Behari Datta	...	*Calcutta High Court	... 752
Kishan Dayal v. Deputy Commissioner, Partabgarh		23 O C 342	... 566
Kishen Chand v. Sohan Lal	...	2 L 95	... 710
Kondan Damu v. Indarchand Bacharaj	...	22 Bom L R 1209; 45 B 323	... 676
Kooverbai Sorabji v. Assistant Collector, Surat	...	22 Bom L R 11 6	... 429
Krishna Lal Jha v. Mandeswar Jha	...	2 P L T 215; 3 U P L R (Pat.) 17	... 872
Krishnabai Govind v Keshav Gajanan	...	22 Bom L R 1162	... 511
Krishnaji Govind v. Sitaram Hanmant	...	22 Bom L R 1439; 45 B 300	... 769
Krishnama Chariar v. Tiruvengada Chariar	...	12 L W 149	... 275
Krishnamacharry v Komalammal	...	(1920) M W N 559, 39 M L J 490; 28 M L T 275; 43 M 903	... 532
Krishnarao v. Sitaram	...	22 Cr L J 151	... 855
Kulsambi v. Abdul Kadir	...	22 Bom L R 1142; 45 B 151	... 433
Kunhiparambath Parkum Kunhi Koranath Chandu v. Antholi Thoovakunnon Ramunni	...	39 M L J 273; (1920) M W N (O); 28 M L T 262 13 L W 183	... 943
Kuppusawmi Iyengar v. Kamalammall	...	12 L W 243; 39 M L J 375; 43 M 842	... 662
Lachhmi Narayan v. Ganga Bakhsh Singh	...	7 O L J 268; 2 U P L R (J. C.) 103	... 364
Lachman Das v. Sundar Das	...	1 L 558	... 678
Lachman Prasad v Shitaba Kunwar	...	18 A L J 1008; 2 U P L R (A.. 386; 43 A 177	... 619
Lachmi Narain v. Muhammad Yusuf	...	18 A L J 688; 42 A 540	... 503
Lachmi Narayan v. Deoki	...	*Allahabad High Court	... 797
Lachmi Singh v. Emperor	...	1 P L T 681; 22 Cr L J 86	... 874
Ladha Ram-Wadhawa Ram v. Muhammad	...	*Lahore High Court	... 708

Lajpat Rai v. Lachhman Das ...	*Lahore High Court ...	795
Lakhambai v. Devibai ...	14 S L R 132 ...	673
Lakhmiram Kevalram Bhatt v. Punamchand Pitamber ...	22 Bom L R 1173; 45 B 550 ...	441
Lakshminarasimha v. Ramalingam Pillai ...	12 L W 202; (1920) M W N 519; 39 M L J 319; 28 M L T 205 ...	245
Lakshmindrathirtha Swamiar v. Raghavendra Rao	12 L W 139; 39 M L J 174; (1920) M W N 568; 43 M 795; 28 M L T 269 ...	287
Lal Lokpal Singh v. Emperor ...	19 A L J 56; 22 Cr L J 143 ...	655
Lalchand Sakharam v. Khandu Kedu ...	22 Bom L R 1431 ...	762
Ma Me I v. Maung Lauk Hnya ...	3 U B R (1920) 228 ...	999
Ma Twe v. Lwe Hain ...	13 Bur L T 105; 22 Cr L J 130 ...	555
Madan Mohan Lal v Emperor ...	22 Cr L J 153 ...	857
Madhavrao v. Secretary of State for India ...	22 Bom L R 1176; 45 B 196 ..	452
Madhu Majhi v. Emperor ...	2 P L T 129; 22 Cr L J 119 ...	551
Madras Estates Land Act, 1908, s. 205, *In re* ...	12 L W 145 Rev ...	345
Mahadev Narayan v. Sadashiv Keshav ...	22 Bom L R 1032; 45 B 45 ...	118
Mahar Singh v. Emperor ...	18 A L J 1149; 22 Cr L J 111 ...	415
Maharaj Bahadur Singh v. Forbes ...	19 A L J 10 ; 33 C L J 176; 25 C W N 366; 40 M L J 141; 13 L W 217; (1921) M W N 26; 2 P L T 115; 6 P L J 129, 23 Bom L R 727 **P. C.**	782
Mahesh Prasad v. Bharath ...	23 O C 252 ...	677
Mahmud v. Ude Bhan ...	*Lahore High Court ...	891
Mahmud Jahan Begam v. Govind Ram ...	18 A L J 783: 43 A 45 ...	4
Mahomed Siraj-ud-din v. Fayaz-ud-din ...	*Nagpur Judicial Commissioner's Court ...	473
Mahomed Sirajuddin v. Gulam Jailani ...	12 L W 25 ...	233
Maksuddan Histry v. Emperor ...	22 Cr L J 63; 2 P L T 31; (1920) Pat 108 ...	207
Malraju Lakshmi Venkayyamma Row v. Venkatadri Appa Row ...	19 A L J 97; 33 C L J 171; 40 M L J 144; 13 L W 256; (1921) M W N 77; 29 M L T 164; 25 C W N 654; 23 Bom L R 713 **P. C.** ...	767
Maluka v. Sundar Singh ...	20 P W R 1921 ...	594
Manak v. Narayan ...	22 Bom L R 1114 *foot-note* ...	437
Manoklal v. Bai Amba ...	22 Bom L R 1394; 45 B 350 ...	751
Mangal Singh v. Emperor ...	6 P W R 1919 Cr 22 Cr L J 119 ...	551
Manicka Gramanai v. Parasuram Mudeley ...	12 L W 35 ; (1920) M W N 787 ...	894
Manikchand Maganchand v. Rangappa Kondappa...	22 Bom L R 1435; 45 B 523 ...	765
Manilal Girdhar Patel v. Nathalal Mahasukhram Vyas ...	22 Bom L R 1446; 45 B 561 ...	774
Manilal Motilal v. Gokaldas Rowji ...	22 Bom L R 1048; 45 B 245 ...	53
Manmatha Nath Bose v. Jagat Ram Roy ...	*Calcutta High Court ...	517
Manujendra Dutt v. Beswanath Roy ...	*Calcutta High Court ...	277
Mathosri Rama Boi v. Sivaji Rajah Sahib ...	12 L W 171; 1920, M W N 601 ...	265
Mathura Sahu v. Chandradip Singh ...	*Patna High Court ...	87
Matiwor Rasuk v Dhanu Molla ...	*Calcutta High Court ...	963
Maung Nga v. Ma Pyu ...	3 U B R (1920) 251 ...	1005
Maung Po Thein v. Ma Waing ...	10 L B R 236; 13 Bur L T 91 ...	844
Mazhar Husain v. Emperor ...	22 Cr L J 50 ...	194
Meenakshi Achi v Somasundaram Pillai ...	12 L W 232; (1920 M W N 507; 39 M L J 403; 44 M 205 ...	464
Midnapur Zemindary Co. Ltd. v. Jaga Nath Sarangi	*Patna High Court ...	314
Mihan Singh v. Emperor ...	22 Cr L J 50; 15 P L R 1921; 3 P W R 1921 Cr	142
Mohan Das Pujhari v. Emperor ...	(1919) Pat 273; 22 Cr L J 66 **S. B.** ...	322
Mohan Lal v. Maya Mal ...	18 P L R 1921; 11 P W R 1921 ...	231
Mohan Singh v. Emperor ...	18 A L J 633; 2 U P L R (A.) 360; 42 A 522; 22 Cr L J 84 ...	372
Mohendra Lal Biswas v. Jagat Chandra Dey ...	*Calcutta High Court ...	63
Molai v. Emperor ...	2 U P L R (A) 335; 22 Cr L J 107 ...	411
Motilal Mansukhram v. Maneklal Dayabhai ...	22 Bom L R 1195; 45 B 225 ...	245
Motiram v. Bhikan Rao ...	*Nagpur Judicial Commissioner's Court ...	601
Moto Dasi v. Behari Lal ...	*Calcutta High Court ...	772
Muhammad Sher Ali Khan v. Ghasi Ram ...	22 Cr L J 159; 3 U P L R (A.) 35 ...	863
Muhammad Wasi v. Emperor ...	22 Cr L J 22 ...	134
Muhammed Khalil v. Alathadi Malwa Kunhi Rama Nair ...	12 L W 180; (1920) M W N 477 ...	262
Mukbul Ali v. Emperor ...	22 Cr L J 21 ...	133

Mulchand Kalwar v. Gobind Singh	...	*Patna High Court	... 939
Murad Bibi v. Rahim Bakhsh	...	20 P L R 1921; 13 P W R 1921	... 346
Murlidhar Roy v. Pengal Steamship Co. Ltd.	...	47 C 654	... 542
Muthu Reddi v. Chinnasawmy Reddi	...	12 L W 403; (1920) M W N 673; 39 M L J 486; 28 M L T 308	... 685
Muthusami Swamiar v. Somoo Kandiar	...	12 L W 262; (1920) M W N 537; 39 M L J 438; 43 M 809	... 507
Muthuveerappa Chetty v. Adikappa Chetty	...	43 M 845; 12 L W 240; (1920) M W N 505; 39 M L J 312	... 472
Nagendra Lal Das v. Municipal Commissioners of Chittagong	...	47 C 426	... 340
Nakimo Dewani v Pemba Dichen	...	19 A L J 171; 40 M L J 201; (1921) M W N 115; 29 M L T 202; 33 C L J 211; 23 Bom L R 698 **P. C.**	... 911
Nand Lal Singh v. Ramphal Singh	...	*Patna High Court	... 875
Nanda Kumar v. Dinabandhu Nandi	...	*Calcutta High Court	... 748
Nandi v Emperor	...	1 L 430; 22 Cr L J 1	... 33
Narain Das v. Mahnga Ram	...	*Lahore High Court	... 706
Narayan v. Waman	...	*Nagpur Judicial Commissioner's Court	... 121
Narsappa Ningappa v. Bharmappa Rayappa	...	22 Bom L R 1196; 45 B 296	... 251
Natharsa Rowthar v. Muhammad Rowthar	...	*Madras High Court	... 385
Nathuram Shivanarayan v. Dhularam Hariram	...	22 Bom L R 1199; 45 B 292	.. 267
Nawab v. Punjaba	...	*Lahore High Court	... 946
Nena Ojha v. Sarbhoo Dutt Ojha	...	2 P L T 70	... 881
Nilratan Mitra v. Abdul Gofur Gazi	...	32 C L J 75	... 3
Nizam Din v. Shadi	...	*Lahore High Court	... 580
Nookoor Chandra Mullick v. Rajani Kanta Ghose	...	*Calcutta High Court	... 51
Noor Mahomed v. Belasiram	...	47 C 515	... 488
Nurdin Najbudin v. Umrav Bu	...	22 Bom L R 1429; 45 B 519	... 780
Official Assignee of Madras v. Ramaswami Chetty	...	12 L W 89; (1920) M W N 424; 39 M L J 135; 43 M 747	... 475
Oudh Commercial Bank Ld. v. Gur Din	...	23 O C 364	... 604
Pahalwan Singh v. Jiwan Das	...	18 A L J 41; 42 A 109	... 162
Palayakayal Swami Sangumugeswarar v. Veyinramuthu Pillai	...	12 L W 324	... 183
Pandipati Subbarami Reddi v. Pandipati Ramamma		12 L W 249; (1920) M W N 529; 43 M 824	... 681
Pandu Krishna Jadhav v. Dhondi Krishna Patil	...	22 Bom L R 1403	... 783
Pandurang Balkrishna v. Jagya Bhau	...	22 Bom L R 1120; 45 B 91	... 899
Parmanand v. Sheo Charandas	...	2 L 69; 21 P L R 1921; 15 P W R 1921	... 253
Parmeshri Das v. Fakeria	...	1 L 457; 56 P W R 1920 **F. B.**	... 71
Paul, G. H. v. T Thomson	...	13 Bur L T 80	... 535
Pillay P. S. v. Moulmein Municipal Committee	...	13 Bur L T 107; 22 Cr L J 113	... 545
Pir Muhammad-Sadr-ud-Din v. Khair-ud-din	...	*Lahore High Court	... 703
Prabhulingappa Khangouda v. Gurunath Balaji	...	22 Bom L R 389; 45 B 453	... 747
Pramatha Nath v. P. C. Lahiri	...	47 C 818; 22 Cr L J 5	... 37
Pranjivandas Narsidas v. Mia Chand Bahadur	...	22 Bom L R 1123; 45 B 87	... 418
Provash Chandra Chatterjee v. Jahar-ud din Mondal		32 C L J 77	... 49
Punjab Singh v. Arjan	...	2 L 22	... 776
Puran Chand v. Punjab National Bank, Ltd.	...	3 U P L R (L.) 6	... 578
Rabiuddin v. Ram Kanai Sen	...	*Calcutta High Court	... 186
Radha Kissen v Fatch Chand	...	23 C W N 543; 22 Cr L J 67	... 323
Radhashyam Dasya v. Ranga Sundari Dasya	...	24 C W N 541	... 664
Rafiq-un-nissa v. Keshwar Narain Singh	...	*Patna High Court	... 840
Ragho Prasad Singh v. Jadunandan Prasad Singh	...	6 P L J 27; 2 P L T 28; (1921) Pat 34	... 896
Raghunandan Koeri v. Emperor	...	1 P L T 684; 22 Cr L J 154	... 858
Rahu v. Emperor	...	18 A L J 1114; 22 Cr L J 115; 43 A 186	... 547
Raiji v. Shriram	...	*Nagpur Judicial Commissioner's Court	... 368
Raja of Ramnad v. Velusami Tevar	...	19 A L J 108; 40 M L J 197; 18 L W 290; (1921) M W N 51; 33 C L J 218; 25 C W N 581; 23 Bom L R 701 **P. C.**	... 880
Rajacharya Sheshacharya v. Chemanna Gurushantappa	...	22 Bom L R 1198; 45 B 223	... 192
Rajagopala Nayagar v. Spencer and Co. Ltd.	...	12 L W 87; 28 M L T 98	... 218
Rajaram Bhavanishankar v. Emperor	...	22 Bom L R 1229; 22 Cr L J 23	... 185
Rajendra Prasad v. Probodh Chandra	...	2 P L T 116; 6 P L J 82; (1921) Pat 156	... 926
Rajmal Girdharlal v. Maruti Shivram	...	22 Bom L R 1377; 45 B 329	... 755

Raju Mahton v. Hossaini Mian	...	*Patna High Court	... 171
Ram Bahadur Singh v. Nirbhai Singh	...	23 O C 339	... 564
Ram Chand v. Jana	...	*Lahore High Court	... 770
Ram Chunder-Gouri Shanker v. Ganputram-Biswanath	...	47 C 583	... 539
Ram Das v. Emperor	...	18 A L J 857	... 34
Ram Ditta v Dyal Mal	...	22 Cr L J 48; 14 P L R 1921; 2 P W R 1921 Cr	160
Ram Jas v. Katha Singh	...	9 P L R 1921; 14 P W R 1921	... 51
Ram Kripal Singh v. Hanuman Singh	...	6 P L J 6; 2 P L T 122	... 929
Ram Lal v. Bhola Nath	...	18 A L J 749; 2 U P L R (A) 254; 42 A 619	... 359
Ram Lal v. Ganeshi Lal	...	Lahore High Court	... 685
Ram Lal Ishar Das v Salig Ram	...	7 P W R 1921	... 2
Ram Sahu v. Gowro Ratho	...	(1920) M W N 711; 12 L W 649; 39 M L J 639; 29 M L T 10; 44 M 55 **F. B.**	... 350
Ram Sarup v. Jagat Ram	...	2 L 102	... 977
Rama Ranchhod v. Abdul Rahim	...	22 Bom L R 1214; 45 B 303	... 278
Ramakrishna Rao v. Subbanna Rao	...	12 L W 155; 39 M L J 183; (1920) M W N 474; 43 M 830	... 268
Ramalinga Rowthan v. Ibrahim Sahib	...	12 L W 34	... 161
Ramanand v. Jai Ram	...	18 A L J 1001; 2 U P L R (A.) 379; 43 A 170	... 632
Ramaswami Chettiar v. Mallappa Reddiar	...	(1920) M W N 572; 39 M L J 350; 28 M L T 170; 43 M 760; 12 L W 475 **F. B.**	... 947
Ramchandra Balwant v. Balaji Ganesh	...	22 Bom L R 1452; 45 B 570	... 805
Ramchandra Govind v. Jayanta Ravji	...	22 Bom L R 1409; 45 B 603	... 715
Rameshvar Singh v. Homeshvar Singh	...	1 P L T 731; 19 A L J 26; 40 M L J 1; (1921) M W N 21; 33 C L J 109; 25 C W N 337; 6 P L J 182; 13 L W 546; 23 Bom L R 721 **P. C.**	636
Rameshwar Singh v Subu Lal Jha	...	5 P L J 402; 2 P L T 7	.. 25
Ramiah Asari v. Chidambara Mudaliar	...	(1920) M W N 426; 12 L W 15'; 39 M L J 341	... 229
Ramjanum Singh v. Khub Lal Singh	...	2 P L T 219; (1921) Pat 151	... 908
Ramkrishna Timmanna v. Laxminarayan	...	22 Bom L R 1181	... 458
Rangoon Municipal Committee v. Burma Railways Co. Ltd.	...	10 L B R 203; 13 Bur L T 62 & 136	... 823
Ratan Chand Jwala Das v. Asa Singh Bogha Singh		3 U P L R (L.) 3	... 669
Ravjibhai Kashibhai v. Dahyabhai Zaverbhai	...	22 Bom L R 1454	... 811
Rawlins v. Anant Lal Sahu	...	2 P L T 176; (1921) Pat 40	... 905
Rupa Singh v. Emperor	...	1 P L T 679; 22 Cr L J 82	... 370
Rustamji A Dubash v. Haji Hussein Lari	...	22 Bom L R 1165	... 515
S. T. K. Chetty v. Balasundram	...	10 L B R 199; 13 Bur L T 100	... 809
Sachindra Narain Sah v. Hironmoyee Dasi	...	24 C W N 588	... 435
Sakhawat Haidar v. Emperor	...	18 A L J 1151; 22 Cr L J 54	... 198
Samsul Nehar Bibi v. Mohiud-Din Ahmad	...	25 C W N 810	... 355
Sanchi Lal v. Onkar Mal	...	18 A L J 981; 2 U P L R (A.) 375	... 675
Sari v. Sailabala Dasi	...	*Calcutta High Court	... 788
Sarju v. Budha	...	*Lahore High Court	... 885
Sasanka Sekhar Banerjee v. Sudhangsu Mohan Ganguli	...	24 C W N 891; 48 C 45	... 572
Satis Chandra v. Ram Dayal	...	32 C L J 94; 24 C W N 982; 22 Cr L J 31 **S. B.**	143
Sawan Mal v. Kanhaya Lal-Gopal Das	...	*Lahore High Court	... 680
Sayyapureddi Chinnayya Dhora v. Emperor	...	19 A L J 164; 40 M L J 194; 13 L W 223; (1921) M W N 26; 33 C L J 222; 22 Cr L J 174; 25 C W N 514; 3 U P L R (P. C.) 10; 44 M 297; 23 Bom L R 705 **P. C.**	... 926
Secretary of State for India v. Zamindarani of Vegayammapeta Estate	...	12 L W 334	... 98
Secretary to the Board of Revenue, Income-tax, Madras v. Arunachalam Chettiar	...	39 M L J 649; (1920) M W N 789; 29 M L T 16; 13 L W 336; 44 M 65 **F. B.**	.. 482
Shah Nawaz v. Ahmad	...	1 L 549	... 478
Shahzadi Begam v. Muhammad Ibrahim	...	19 A L J 14	... 787
Shakir Ali v. Abdul Hakim	...	*Court of Election Commissioners, United Provinces	... 846
Shamas Din Mehr Bakhsh v. Muhammad Khalil	...	*Lahore High Court	... 971
Shambhoo v. Tika Ram	..	*Nagpur Judicial Commissioner's Court	... 240
Shantidas v. Hiralal	...	*Nagpur Judicial Commissioner's Court	... 657
Shekh Hasan Gulam Mohidin v. Mahomed Ali	...	22 Bom L R 1183; 45 B 206	... 210

Sheo Balak v. Emperor	...	22 Cr L J 81	... 369
Sheo Mohan Pande v. Kali Prasad Shukul	...	*Allahabad High Court	... 937
Sheodan Kurmi v. Balkaran Kurmi	...	18 A L J 1033; 2 U P L R (A.) 392; 43 A 193 **F. B.**	116
Shidramappa v. Mahomed Yusaf	...	22 Bom L R 1107	... 391
Shriniwas Kuppuswami Mudliar v. M C Waz	...	22 Bom L R 1126; 45 B 99	... 421
Shunmugha Udayar v. Kandasami Asary	...	12 L W 170	... 973
Sibnath Saha v. Mohesh Chandra	...	*Calcutta High Court	... 89
Sidh Gopal v. Harilal	...	*Nagpur Judicial Commissioner's Court	... 428
Sita Ram v. Emperor	...	1 L 443; 22 Cr L J 8	... 40
Sitaram v. Donger Singh	...	*Nagpur Judicial Commissioner's Court	... 477
Sitaram Ravaji v. Khandu Mairala	...	22 Bom L R 1155; 45 B 105	... 480
Somasundaram Chetty v. Unnamalai Ammal	...	12 L W 163; (1920) M W N 458; 39 M L J 179; 43 M 800; 28 M L T 317	.. 398
Sooratha Singa v. Kanaka Singa	...	12 L W 245; (1920) M W N 528; 43 M 867	... 585
Sourendra Mohan Sinha v. Murari Lal Sinha	...	24 C W N 888	... 581
South Indian Railway Co. Ld. v. Municipal Council, Trichinopoly	...	12 L W 411; (1920) M W N 618; 43 M 905	... 697
Strauss and Co. Ld. v. Raghubar Dayal	...	2 U P L R (A.) 387; 19 A L J 19	... 784
Sua v. Dukalu	...	*Nagpur Judicial Commissioner's Court	... 499
Sughra v. Ram Lal Misra	...	23 O C 352	... 593
Sujan Devi v. Jagiri Mal	...	1 L 608; 8 P W R 1921.	... 124
Sukhamal Bansidhar v. Babulal Kedia & Co.	...	18 A L J 652; 2 U P L R (A.) 243; 42 A 525	... 75
Sukhnath Rai v. Nehal Chand	...	18 A L J 644; 2 U P L R (A.) 240; 42 A 661	... 801
Sundara Goundan v. Arumuga Goundan	...	12 L W 159	... 890
Surapu v. Diwan Chand	...	*Lahore High Court	... 764
Surat City Municipality v. Maneklal Ichharam	...	22 Bom L R 1104	... 389
Suratsingh v. Rani	...	*Nagpur Judicial Commissioner's Court	... 461
Surendra Krishna Mondal v. Ranee Dassi	...	24 C W N 860; 33 C L J 34; 47 C 1043	... 814
Surendra Kristo Ray v. Gooroo Prasad Ghose	...	24 C W N 536	... 432
Surendra Nath Ghosh v. Keshab Lal Ghosh	...	25 C W N 36	... 778
Surjan Mal-Kishen Chand v. Gian Chand-Chiranji Lal		*Lahore High Court	... 877
Surta Singh v. Emperor	...	1 L 508; 22 Cr L J 124	... 556
Tanha Singh v. Bandhu Singh	...	(1919) Pat 323	... 8
Taqi Shah v. Emperor	...	22 Cr L J 112	... 416
Thayarammal v. Lakshimi Ammal	...	12 L W 161; (1920) M W N 457; 39 M L J 181; 43 M 822	... 417
Tikamchand Santokchand v. Santokchand Singhi	...	24 C W N 735	... 218
Tilkdhari Singh v. Gour Narain	...	5 P L J 715; 2 P L T 95; (1921) Pat 122	... 290
Toolsidas Tejpal v. Venkatachalapathy Iyer	...	(1920) M W N 557; 25 C W N 26; 28 M L T 410; 13 L W 1 **P. C.**	... 27
Udebhan v. Rangrao	...	*Nagpur Judicial Commissioner's Court	... 451
Umda Begum v. Zaib-ul-nisa	...	*Lahore High Court	... 694
Vadrevu Ranganayakamma Garu v. Ryali Somasundara Rao	...	43 M 876	... 609
Vaithialingha Chetty v. Kullappa Naicken	...	12 L W 354	... 889
Velu Malavarayan v. Kuppusawmi Pillai	...	12 L W 315; 22 Cr L J 90	... 378
Venkatachalam Chetty v. Rama Mudali	...	12 L W 322	... 91
Venkatachellam Chetty v. Ramanathan Chetty	...	12 L W 228; (1920) M W N 602; 39 M L J 269	591
Vishnu Dhonddev Palkar v. Rampratap Daulatram Marwadi	...	22 Bom L R 1407; 45 B 360	... 713
Vithal Rao v. Balwant Hari	...	17 N L R 8	... 172
Vithaldas Prabhu v. Subraya Manjappa	...	22 Bom L R 1204; 45 B 343	... 541
Wadhawa Singh v. Sundar Singh	...	21 P W R 1921	... 667
Wadhawa Singh v. Sundar Singh	...	*Lahore High Court	... 689
Wasinda Ram v. Sita Ram	...	1 L 389; 51 P W R 1920	... 393
Wazir Nonian v. Ram Prasad Lal	...	*Patna High Court	... 893
Weld and Co. v. Sher Ahmed Ekbal Ahmed	...	*Bombay High Court	... 10
Weld and Co. v. Sher Ahmed Ekbal Ahmed	...	21 Bom L R 808 at p 810	... 12
Weld and Co. v. Sher Ahmed Ekbal Ahmed	...	*Bombay High Court	... 16
Weld and Co. v. Sher Ahmed Ekbal Ahmed	...	21 Bom L R 808 at p 816	... 18
Yoosof Oosman Bros and Co. v. Win Ne Ya	...	10 L B R 191	... 798
Ziaullah Khan v. Emperor	...	22 Cr L J 109	... 413

Table showing seriatim the pages of Volume LIX of Indian Cases and the corresponding pages of other Law Journals and Reports.

An asterisk (*) denotes cases not reported yet elsewhere.

Page.	Names of cases reported.	Where reported.
1	Abdul Hafiz v. Abdul Alim Saheb ...	(1920) M W N 324; 24 C W N 494; 28 M L T 135; 12 L W 497; 32 C L J 447 **P. C.**
2	Ram Lal-Ishar Das v Salig Ram ...	7 P W R 1921.
3	Nilratan Mitra v. Abdul Gofur Gazi ...	32 C L J 75.
4	Mahmud Jahan Begam v. Govind Ram ...	18 A L J 783; 43 A 45.
7	Hardit Singh v. Gurmukh Singh ...	22 Bom L R 550; 4 P W R 1921 **P. C.**
8	Tanha Singh v. Bandhu Singh ...	(1919) Pat 323.
10	Weld and Co. v. Sher Ahmed Ekbal Ahmed ...	*Bombay High Court,
12	Weld and Co. v. Sher Ahmed Ekbal Ahmad ...	21 Bom L R 808 at p 810.
16	Weld and Co v. Sher Ahmed Ekbal Ahmed ...	*Bombay High Court.
18	Weld and Co v. Sher Ahmed Ekbal Ahmed ...	21 Bom L R 808 at p 816.
20	Bhagwan Baksh Singh v. Damodarji Joshi ...	18 A L J 100; 42 A 230.
25	Rameshwar Singh v Subu Lal Jha ...	5 P L J 402; 2 P L T 7.
27	Toolsidas Tejpal v. Venkatachalapathy Iyer ...	(1920) M W N 557; 25 C W N 26; 28 M L T 410; 13 L W 1 **P. C.**
28	Karim Elahi Sheti v. Sher Ahmed Haji Mir Ahmed	22 Bom L R 863; 45 B 24.
31	Bakhtawar v. Kesar Singh-Gurdit Singh ...	5 P W R 1921.
33	Nandi v. Emperor ...	1 L 410; 22 Cr L J 1.
34	Ram Das v. Emperor ...	18 A L J 857.
36	Khushi Ram v. Emperor ...	1 L 451; 22 Cr L J 4.
37	Pramatha Nath v. P. C. Lahiri ...	47 C 818; 22 Cr L J 5.
40	Sita Ram v. Emperor ...	1 L 443; 22 Cr L J 8.
41	Abdul Ali v. Emperor ...	1 P L T 446; 22 Cr L J 9.
45	Hussaina Beari v. Emperor ...	43 M 443; 22 Cr L J 13.
49	Provash Chandra Chatterjee v. Jahar-ud-din Mondal	32 C L J 77.
51	Ram Jas v. Katha Singh ...	9 P L R 1921; 14 P W R 1921.
51	Nookoor Chandra Mullick v. Rajani Kanta Ghose ...	*Calcutta High Court.
53	Manilal Motilal v. Gokaldas Rowji ...	22 Bom L R 1048; 45 B 245.
63	Mohendra Lal Biswas v. Jagat Chandra Dey ...	*Calcutta High Court.
65	Idarapalli Dhanushkotirayudu v. Venkayala Venkataratnam ...	38 M L J 320; 11 L W 453.
67	Din Dayal v. Gursaran Lal ...	18 A L J 287; 42 A 336.
71	Parmeshri Das v. Fakeria ...	1 L 457; 56 P W R 1920 **F. B.**
75	Sukhamal Bansidhar v. Babulal Kedia & Co. ...	18 A L J 652; 2 U P L R (A.) 243; 42 A 525.
82	Giasu v. Har Dial ...	6 P W R 1921.
84	Abdulla v. Akhil Chandra Biswas ...	*Calcutta High Court.
86	Arunachellam Chetty v. Somasundaram Chetty ...	12 L W 328.
87	Mathura Sahu v. Chandradip Singh ...	*Patna High Court.
89	Harris v. Harris ...	10 P L R 1921; 19 P W R 1921.
89	Sibnath Saha v. Mohesh Chandra ...	*Calcutta High Court.
91	Venkatachalam Chetty v. Rama Mudali ...	12 L W 322.
92	Hait Singh v. Behari Lal ...	18 A L J 947; 43 A 95.
95	Jugmohan Pradhani v. Indra Chandra ...	*Calcutta High Court.
98	Secretary of State for India v. Zamindarani of Vegayammapeta Estate ...	12 L W 334.
114	Chandanmal Hambirmal v. Bhaskar Waman ...	22 Bom L R 1079.
116	Sheodan Kurmi v. Balkaran Kurmi ...	18 A L J 1033; 2 U P L R (A.) 392; 43 A 193 **F. B.**
118	Mahadev Narayan v. Sadashiv Keshav ...	22 Bom L R 1032; 45 B 45.
121	Narayan v. Waman ...	*Nagpur Judicial Commissioner's Court.
122	Dayal Khushal v. Secretary of State ...	22 Bom L R 1089.
124	Sujan Devi v. Jagiri Mal ...	1 L 608; 8 P W R 1921.
125	Annaya Madvalaya v. Sidaya Murgayya ...	22 Bom L R 1092.

126	Dasarathi Chatterjee v. Asit Mohan Ghosh	...	24 C W N 879.
128	Chandrabhaga v. Harsukhdas	...	*Nagpur Judicial Commissioner's Court.
129	Fernandez v. Emperor	...	23 Bom L R 1040; 22 Cr L J 17; 45 B 672.
133	Mukbul Ali v. Emperor	...	22 Cr L J 21.
134	Muhammad Wasi v. Emperor	...	22 Cr L J 22.
135	Rajaram Bhavanishankar v. Emperor	...	22 Bom L R 1229; 22 Cr L J 23.
137	Aloke Mohan Saha v. Narayanganj Municipality	...	22 Cr L J 25.
141	Emperor v. Shamsunderbai	...	22 Bom L R 1234; 22 Cr L J 29; 45 B 529.
142	Mihan Singh v. Emperor	...	22 Cr L J 30; 15 P L R 1921; 3 P W R 1921 Cr.
143	Satis Chandra v. Ram Dayal	...	32 C L J 94; 24 C W N 982; 22 Cr L J 31 **S. B.**
160	Ram Ditta v. Dyal Mal	...	22 Cr L J 48; 14 P L R 1921; 2 P W R 1921 Cr.
161	Ramalinga Rowthan v. Ibrahim Sahib	...	12 L W 34.
162	Pahalwan Singh v. Jiwan Das	...	18 A L J 41; 42 A 109.
167	Jayarama Aiyar v. Vridhigiri Aiyar	...	39 M L J 188; 12 L W 182; (1920) M W N 490; 44 M 35.
171	Raju Mahton v. Hossaini Mian	...	*Patna High Court.
172	Vithal Rao v. Balwant Hari	...	17 N L R 8.
176	Bibi Wasila v. Sharafat Hussain	...	*Patna High Court.
177	Bhutnath v. Tara Chand	...	33 C L J 115; 25 C W N 595.
179	Deoki Lal v. Ramanand Lal	...	(1920) Pat 333; 5 P L J 701; 2 U P L R (Pat.) 285; 2 P L T 42.
181	Jatindra Nath Dutta v. Suresh Chandra Ray	...	24 C W N 922.
183	Palayakayal Swami Sangumugeswarar v. Veyinramuthu Pillai	...	12 L W 324.
186	Rabiuddin v. Ram Kanai Sen	...	*Calcutta High Court.
188	Abdul Wahid v. Halima Khatun	...	18 A L J 210; 42 A 262.
188	Dhar and Co. v. Sib Narayan Singh	...	*Calcutta High Court.
189	Erachshaw Dosabhai v. Bai Dinbai	...	22 Bom L R 1293; 45 B 318.
191	Bhagabati Debya v. Nilkantha Chatterjee	...	24 C W N 927.
192	Rajacharya Sheshacharya v. Chemanna Gurushantappa	...	22 Bom L R 1193; 45 B 223.
193	Bindeshri Dube v. Emperor	...	18 A L J 1135; 2 U P L R (A.) 374; 22 Cr L J 49.
193	Govind Pandurang, *In re*	...	22 Bom L R 1239; 22 Cr L J 49; 45 B 668.
194	Mazhar Husain v. Emperor	...	22 Cr L J 50.
195	Changouda Pirgouda v. Emperor	...	22 Bom L R 1241; 22 Cr L J 51; 45 B 619.
198	Sakhawat Haidar v. Emperor	...	18 A L J 1151; 22 Cr L J 54.
199	Emperor v. Alibhai Abdul Vora	...	22 Bom L R 1221; 22 Cr L J 55; 45 B 346.
200	Abdul Ghafoor v. Emperor	...	18 A L J 1137; 22 Cr L J 56; 2 U P L R (A.) 433; 43 A 225.
202	Alex Pimento v. Emperor	...	22 Bom L R 1224; 22 Cr L J 58.
204	Asimuddin Sardar v. Emperor	...	32 C L J 89; 22 Cr L J 60.
207	Maksuddan Histry v. Emperor	...	22 Cr L J 63; 2 P L T 31; (1920) Pat 108.
209	Binayak Das v. Saminuddi	...	24 C W N 1022.
210	Shekh Hasan Gulam Mohidin v. Mahomed Ali	...	22 Bom L R 1183; 45 B 206.
214	Kandaiya Pillai v. Chokkammal	...	12 L W 7; 28 M L T 106.
215	Atul Chandra Kundu v. Sarat Chandra Laha	...	24 C W N 967.
217	Gurunath Keshav Kalkundri v. Sadashiv Balkrishna Deshpande	...	22 Bom L R 1190; 45 B 216.
218	Tikamchand Santokchand v. Santokchand Singhi	...	24 C W N 735.
218	Rajagopala Nayagar v. Spencer and Co. Ltd.	...	12 L W 87; 28 M L T 298.
220	Hari Singh v. Lachhmi Devi	...	12 P L R 1921; 10 P W R 1921.
229	Ramiah Asari v. Chidambara Mudaliar	...	(1920) M W N 426; 12 L W 151; 39 M L J 341.
231	Mohan Lal v. Maya Mal	...	18 P L R 1921; 11 P W R 1921.
233	Mahomed Sirajuddin v. Gulam Jailani	...	12 L W 25.
238	Kartar Singh v. Lal Singh	...	11 P L R 1921; 9 P W R 1921.
240	Shambhoo v. Tika Ram	...	*Nagpur Judicial Commissoner Court.
241	Chinnammal v. Ratnasabapathy Chettiar	..	12 L W 191; (1920) M W N 532.
243	Amir Chand v. Hem Raj	...	19 P L R 1921; 12 P W R 1921.
245	Motilal Mansukhram v. Manoklal Dayabhai	...	22 Bom L R 1195; 45 B 225.
245	Lakshminarasimha v. Ramalingam Pillai	...	12 L W 202; (1920) M W N 519; 39 M L J 319; 28 M L T 205.
251	Narsappa Ningappa v. Bharmappa Rayappa	...	22 Bom L R 1196; 45 B 296.
252	Girdaridoss Radhakishen Doss v. Ponnu Pillai	...	12 L W 19; 39 M L J 233; 28 M L T 464.
253	Parmanand v. Sheo Charandas	...	2 L 69; 21 P L R 1921; 15 P W R 1921.
258	Butchiraju v. Seetaramayya	...	12 L W 86.
258	Genu Tukaram v. Narayan Raghu	...	22 Bom L R 1147; 45 B 117.

262	Muhammed Khalil v. Alathadi Malwa Kunhi Rama Nair	...	12 L W 180; (1920) M W N 477.
263	Hiralal Ambalal v. Gopalji Kallianji	...	22 Bom L R 338.
265	Mathosri Rama Boi v. Sivaji Rajah Sahib	...	12 L W 171; (1920) M W N 501.
267	Nathuram Shivanarayan v. Dhularam Hariram	...	22 Bom L R 1199; 45 B 292.
268	Ramakrishna Rao v. Subbanna Rao	...	12 L W 155; 39 M L J 183; (1920) M W N 474; 43 M 830.
271	Girjashankar Daji v. Murlidhar Narayan	...	22 Bom L R 1202; 45 B 234.
273	Basanta Kumar Chowdhuri v. Secretary of State	...	*Calcutta High Court.
275	Krishnama Chariar v. Tiruvengada Chariar	...	12 L W 149.
277	Manujendra Dutt v. Beswanath Roy	...	*Calcutta High Court.
278	Rama Ranchhod v. Abdul Rahim	...	22 Bom L R 1214; 45 B 303.
282	Braja Sundar Deb v. Sivaranjan Dei	...	1 P L T 647.
285	Ismail v. Wasudeo	...	16 N L R 129.
287	Lakshmindrathirtha Swamiar v. Raghavendra Rao	...	12 L W 139; 39 M L J 174; (1920) M W N 568; 43 M 795; 28 M L T 269.
290	Tilkdhari Singh v. Gour Narain	...	5 P L J 715; 2 P L T 95; (1921) Pat 122.
292	Gajindra Singh v. Akal Koer	...	*Patna High Court.
296	Aziz-un-nissa Bibi v. Chiene	...	18 A L J 745; 2 U P L R (A.) 251; 42 A 593.
298	Bibi Wakilan v. Deo Nandan Prosad	...	5 P L J 681; 2 P L T 81.
303	Ashiruddin Mohammad v. Taher Mohammad	...	*Calcutta High Court.
307	Govinda Malavarayan v. Velu Mazhavarayan	...	(1920) M W N 701; 12 L W 530.
308	Kali Kant Chakerbutty v. Rajani Kanta Chakravarty	...	*Calcutta High Court.
311	Dhada Sahib v. Muhammad Sultan Sahib	...	39 M L J 706; (1920) M W N 710; 12 L W 603; 44 M 167.
312	Basanta Kumari Chaudhurani v. Krishna Nalini Dassya	...	*Calcutta High Court.
314	Midnapur Zemindary Co. Ltd. v. Jaga Nath Sarangi		*Patna High Court.
316	Dinesh Chandra Banerjee v. Romesh Chandra Das	...	*Calcutta High Court.
319	Balai Chand Pal v. Panchu Gopal Seal	...	*Calcutta High Court.
321	Gokal Chand v. Emperor	...	22 Cr L J 65.
322	Mohan Das Pujhari v. Emperor	...	(1919) Pat 273; 22 Cr L J 66 **S. B.**
323	Radha Kissen v. Fateh Chand	...	23 C W N 543; 22 Cr L J 67.
324	Emperor v. Cunna	...	22 Bom L R 1247; 22 Cr L J 68.
335	Behari Lal v. Emperor	...	22 Cr L J 79.
337	Inu Mandal v. Bimalendu Roy	...	*Calcutta High Court.
338	Gulab Chand Ram v. Pancham Ram	...	*Patna High Court.
340	Nagendra Lal Das v. Municipal Commissioners of Chittagong	...	47 C 426.
344	Bai Monghibai v Bai Rambhalaxmi	...	22 Bom L R 1286.
345	Madras Estates Land Act, 1908, s. 205, *In re*	...	12 L W 145 Rev.
346	Murad Bibi v. Rahim Bakhsh	...	20 P L R 1921; 13 P W R 1921.
347	Dalechand Balaram v. Appi Khema Sasto	...	22 Bom L R 1093; 45 B 55.
350	Ram Sahu v. Gowro Ratho	...	(1920) M W N 711; 12 L W 649; 39 M L J 638; 29 M L T 10; 44 M 55 **F. B.**
355	Samsul Nehar Bibi v. Mohiud-Din Ahmad	...	25 C W N 810.
357	Gabu Naroba v. Zipru Ramsing	...	22 Bom L R 1289; 45 B 313.
359	Ram Lal v. Bhola Nath	...	18 A L J 749; 2 U P L R (A) 254; 42 A 619.
361	Bai Parvati v. Mansukh Jetha	...	22 Bom L R 1097; 44 B 972.
363	Duggempudi Nagamma v. Tirumala Reddi	...	12 L W 147.
364	Lachhmi Narayan v. Ganga Bakhsh Singh	...	7 O L J 268; 2 U P L R (J. C.) 103.
366	Izzat Husain Khan v Ram Chander	...	18 A L J 120; 2 U P L R (A) 39.
366	Goba Nathu Barola v. Sakharam Teju Patil	...	22 Bom L R 1101; 44 B 977.
368	Raiji v. Shriram	...	*Nagpur Judicial Commissioner's Court.
369	Sheo Balak v. Emperor	...	22 Cr L J 81.
370	Rupa Singh v. Emperor	...	1 P L T 679; 22 Cr L L J 82.
372	Mohan Singh v. Emperor	...	18 A L J 633; 2 U P L R (A.) 360; 42 A 522; 22 Cr L J 84.
374	Lachmi Singh v. Emperor	...	1 P L T 681; 22 Cr L J 86.
376	Abdul Rab v. Azmat Ali	...	18 A L J 1145; 22 Cr L J 88.
378	Velu Malavarayan v. Kuppusawmi Pillai	...	12 L W 315; 22 Cr L J 90.
383	Emperor v. Jhabdey	...	22 Cr L J 95.
384	Bodha v. Emperor	...	22 Cr L J 9[illegible]; 16 P L R 1921; 4 P W R 1921 Cr.
385	Natharsa Rowthar v. Muhammad Rowthar	...	*Madras High Court
389	Surat City Municipality v. Maneklal Ichharam	...	22 Bom L R 1104.

390	Sundara Goundan v. Arumuga Goundan	...	12 L W 159.
391	Shidramappa v. Mahomed Yusaf	...	22 Bom L R 1107.
393	Wasinda Ram v. Sita Ram	...	1 L 389; 51 P W R 1920.
396	Esufalli Alibhai v. Abdealli Gulam Hussein	...	22 Bom L R 1117; 45 B 75.
398	Somasundaram Chetty v. Unnamalai Ammal	...	12 L W 163; (1920) M W N 458; 39 M L J 179; 43 M 800; 28 M L T 317.
399	Pandurang Balkrishna v. Jagya Bhau	...	22 Bom L R 1120; 45 B 91.
401	Har Piari v. Nathe Lal	...	18 A L J 1140; 2 U P L R (A) 428; 22 Cr L J 97.
403	Indian Iron and Steel Co. Ltd., v. Banso Gopal	...	32 C L J 54; 22 Cr L J 89.
411	Molai v. Emperor	...	2 U P L R (A) 335; 22 Cr L J 107.
412	Emperor v. Suhela	...	1 L 614; 22 Cr L J 108; 17 P L R 1921; 5 P W R 1921 Cr.
413	Ziaullah Khan v. Emperor	...	22 Cr L J 109.
414	Adepu Reddi v. Ramayya	...	12 L W 227; 22 Cr L J 110.
415	Mahar Singh v. Emperor	...	18 A L J 1149; 22 Cr L J 111.
416	Taqi Shah v. Emperor	...	22 Cr L J 112.
417	Thayarammal v. Lakshimi Ammal	...	12 L W 161; (1920) M W N 457; 39 M L J 181; 43 M 822.
418	Pranjivandas Narsidas v. Mia Chand Bahadur	...	22 Bom L R 1123; 45 B 87.
419	Jagannath v. Behari	...	*Nagpur Judicial Commissioner's Court.
421	Shriniwas Kuppuswami Mudliar v. M C Waz	...	22 Bom L R 1126; 45 B 99.
424	Firm Kotu Mal-Charan Das v. Firm Bihari Lal-Jagga Mal	...	22 P L R 1921; 16 P W R 1921.
426	Chintamani Hargovan v. Ratanji Bhimbhai	...	22 Bom L R 1131.
428	Sidh Gopal v. Harilal	...	*Nagpur Judicial Commissioner's Court.
429	Kooverbai Sorabji v. Assistant Collector, Surat	...	22 Bom L R 1136.
432	Surendra Kristo Ray v. Gooroo Prasad Ghose	...	24 C W N 536.
433	Kulsambi v. Abdul Kadir	...	22 Bom L R 1142; 45 B 151.
435	Sachindra Narain Sah v. Hironmoyee Dasi	...	24 C W N 538.
437	Manak v. Narayan	...	22 Bom L R 1114 *foot-note*.
439	Baijnath Kalooram and Alibhoy Mahomed, *In the matter of* an arbitration between	...	24 C W N 567.
440	Bhaga Motiji v. Dorabji Sorabji	...	22 Bom L R 1111; 45 B 67.
442	Khetra Nath Mondal v. Lakhan Sardar	...	*Calcutta High Court.
444	Lakhmiram Kevalram Bhatt v. Punamchand Pitamber	...	22 Bom L R 1173; 45 B 550.
445	Bhagwat Koer v. Dhanukhdhari Prashad Singh	...	12 L W 105 **P. C.**
450	Firm Makhan Lal-Tej Pal v. Firm Jai Narain-Birj Raj	...	17 P W R 1921.
451	Udebhan v. Rangrao	...	*Nagpur Judicial Commissioner's Court.
452	Madhavrao v. Secretary of State for India	...	22 Bom L R 1176; 45 B 196.
454	Bipin Chandra Sarkar v. Basanta Kumar Chakravarti	...	23 C W N 773.
455	Gopal Rao v. Ambabai	...	16 N L R 182.
458	Ramkrishna Timmanna v. Laxminarayan	...	22 Bom L R 1181.
458	Noor Mahomed v. Belasiram	...	47 C 515.
461	Suratsingh v. Rani	...	*Nagpur Judicial Commissioner's Court.
464	Meenakshi Achi v Somasundaram Pillai	...	12 L W 232; (1920) M W N 507; 39 M L J 463; 44 M 205.
469	Joynath Sarkar v. Hari Mohan Das	...	*Calcutta High Court.
472	Muthuveerappa Chetty v. Adikappa Chetty	...	43 M 845; 12 L W 240; (1920) M W N 505; 39 M L J 312.
473	Mahomed Siraj-ud-din v. Fayaz-ud-din	...	*Nagpur Judicial Commissioner's Court.
475	Official Assignee of Madras v. Ramaswami Chetty	...	12 L W 89; (1920) M W N 424; 39 M L J 135; 43 M 747.
477	Sitaram v. Donger Singh	...	*Nagpur Judicial Commissioner's Court.
478	Shah Nawaz v. Ahmad	...	1 L 549.
480	Sitaram Ravaji v. Khandu Mairala	...	22 Bom L R 1155; 45 B 105.
482	Secretary to the Board of Revenue, Income-tax, Madras v. Arunachalam Chettiar	...	39 M L J 649; (1920) M W N 789; 29 M L T 16; 13 L W 326; 44 M 65 **F. B.**
499	Sua v. Dukalu	...	*Nagpur Judicial Commissioner's Court.
501	Venkatachellam Chetty v. Ramanathan Chetty	...	12 L W 228; (1920) M W N 602; 39 M L J 269.
503	Bhola Singh v. Babu	...	1 L 464.
506	Gordhandas Vithaldas v. Mohanlal Maneklal Doshi	...	22 Bom L R 1158; 45 B 170.
507	Muthusami Swamiar v. Somoo Kandiar	...	12 L W 262; (1920) M W N 537; 39 M L J 435; 43 M 869.

511	Krishnabai Govind v. Keshav Gajanan	...	22 Bom L R 1162.
511	Gulam Nabi v. Kanhaisingh	...	16 N L R 180.
513	Ashutosh Rai v. Babu Lal Jhungar	...	5 P L J 650; 2 P L T 110.
513	Dalip Singh v. Balwant Singh	...	1 L 500.
515	Rustamji A. Dubash v. Haji Hussein Lari	...	22 Bom L R 1165.
517	Manmatha Nath Bose v. Jagat Ram Roy	...	*Calcutta High Court.
520	Jamnadas Shivram v. Chunilal Hambirmal	...	22 Bom L R 1207; 45 B 227.
522	Jiwan Singh v. Garbha Singh	...	*Lahore High Court.
523	Janardan Trimbak Gadre v. Martand Trimbak Gadre		22 Bom L R 1212; 45 B 241.
524	Cowasji v. Nath Singh Oil Company Ltd.	...	13 Bur L T 51.
532	Krishnamacharry v Komalammal	...	(1920) M W N 599, 39 M L J 490; 28 M L T 275; 43 M 903.
533	Charandas Chaturbhuj v. Chhaganlal	...	22 Bom L R 1169; 45 B 428.
535	Paul, G H v. T Thomson	...	13 Bur L T 80.
539	Ram Chunder-Gouri Shanker v. Ganputram-Biswanath	...	47 C 583.
541	Vithaldas Prabhu v. Subraya Manjappa	...	22 Bom L R 1204; 45 B 343.
542	Murlidhar Roy v. Bengal Steamship Co. Ltd.	...	47 C 654.
545	Pillay P. S v. Moulmein Municipal Committee	...	13 Bur L T 107; 22 Cr L J 113.
547	Rahu v. Emperor	...	18 A L J 1114; 22 Cr L J 115; 43 A 186.
550	Anant Ram v. Emperor	...	22 Cr L J 118; 8 P W R 1921 Cr.
551	Madhu Majhi v. Emperor	...	2 P L T 129; 22 Cr L J 119.
551	Mangal Singh v. Emperor	...	6 P W R 1919 Cr; 22 Cr L J 119.
552	Faiz Mahomed v. Emperor	...	14 S L R 168; 22 Cr L J 120.
554	Bai Das v. Ali Bux Khan	...	23 C W N 1053; 22 Cr L J 122.
554	Chaubey Kunj Behari Lal v. Lauua	...	19 A L J 77; 22 Cr L J 122.
555	Ma Twe v. Lwe Hain	...	13 Bur L T 105; 22 Cr L J 130.
556	Surta Singh v. Emperor	...	1 L 508; 22 Cr L J 124.
557	Baijnath Mahton v. Emperor	...	1 P L T 708; 22 Cr L J 1251.
559	Jaisukh v. Emperor	...	19 A L J 1; 22 Cr L J 127; 43 A 25.
559	Bo Gyi v. Ma Nyein	...	13 Bur L T 104; 22 Cr L J 127.
560	Daulat v. Emperor	...	22 Cr L J 128.
561	Dundappa Basappa v. Bhimawa Baswantiappa	...	22 Bom L R 1306; 45 B 557.
562	Hazara Bibi v. Suleiman Haji Mohammad	...	13 Bur L T 86.
564	Ram Bahadur Singh v. Nirbhai Singh	...	23 O C 339.
565	Chandra Kanta Chakrabarty v. Adinath Shom	...	32 C L J 81.
566	Kishan Dayal v. Deputy Commissioner, Partabgarh		23 O C 342.
568	Karooth Parakote Ammukutty v. Manavikraman	...	12 L W 331; 43 M 793.
569	Chokhu Raoji v. Tatya Nama	...	22 Bom L R 1297.
570	Basdeo Lal v. Mahabir	...	23 O C 344; 8 O L J 18; 3 U P L R (J. C.) 1.
572	Sasanka Sekhar Banerjee v. Sudhangsu Mohan Ganguli	...	24 C W N 891; 48 C 45.
575	Gauri v Hinga	...	23 O C 349.
576	Kondan Damu v. Indarchand Bacharaj	...	22 Bom L R 1299; 45 B 323.
578	Puran Chand v. Punjab National Bank, Ltd.	...	3 U P L R (L.) 6.
580	Nizam Din v. Shadi	...	*Lahore High Court.
581	Sourendra Mohan Sinha v. Murari Lal Sinha	...	24 C W N 888.
583	Gangabai v. Jankibai	...	22 Bom L R 1309; 45 B 337.
585	Sooratha Singa v. Kanaka Singa	...	12 L W 245; (1920) M W N 528; 43 M 867.
588	Doaba Bank Ld. v. Kundan Lal	...	18 P W R 1921.
589	Brojendra Chandra Sarma v. Prosunna Kumar Dhar		32 C L J 48; 24 C W N 1016.
592	Ghamandi v. Buta	...	3 U P L R (L.) 1.
593	Sughra v. Ram Lal Misra	...	23 O C 352.
594	Maluka v. Sundar Singh	...	20 P W R 1921.
595	Jatindra Mohon v. Abdul Aziz	...	32 C L J 83.
596	Jagrup Singh v. Ram Kishen Das	...	23 O C 353; 7 O L J 705.
601	Motiram v. Bhikan Rao	...	*Nagpur Judicial Commissioner's Court.
604	Oudh Commercial Bank Ld. v. Gur Din	...	23 O C 364.
607	Bahadur v. Gelomal	...	14 S L R 128.
609	Vadrevu Ranganayakamma Garu v. Ryali Somasundara Rao	...	43 M 876.
632	Ramanand v. Jai Ram	...	18 A L J 1001; 2 U P L R (A.) 379; 43 A 170.
636	Rameshvar Singh v. Homeshvar Singh	...	1 P L T 731; 19 A L J 26; 40 M L J 1; (1921) M W N 21; 33 C L J 109; 25 C W N 337; 6 P L J 132; 13 L W 546; 23 Bom L R 721 **P. C.**
639	Lachman Prasad v. Shitaba Kunwar	...	18 A L J 1008; 2 U P L R (A.) 386; 43 A 177.

641	Kali Nath Roy v. Emperor	...	19 A L J 65; 23 C L J 124; 40 M L J 101; 13 L W 253; (1921) M W N 49; 29 M L T 142; 22 Cr L J 129; 2 L 34; 25 C W N 701; 23 Bom L R 709 P. C.
643	Ali Mohammad v. Fakiruddi Munshi	...	24 C W N 1039; 32 C L J 255; 22 Cr L J 131.
653	Bishna v. Emperor	...	22 Cr L J 141; 9 P W R 1921 Cr
654	Khushi Ram v. Emperor	...	22 Cr L J 142; 6 P W R 1921 Cr.
655	Lal Lokpal Singh v. Emperor	...	19 A L J 56; 22 Cr L J 143.
656	Kanwar v. Emperor	...	22 Cr L J 144; 3 U P L R (L.) 3; 7 P W R 1921 Cr.
657	Shantidas v. Hiralal	...	*Nagpur Judicial Commissioner's Court.
659	Bansi v. Kanhaya	...	18 A L J 983; 43 A 159.
662	Kuppusawmi Iyengar v. Kamalammall	...	12 L W 243; 39 M L J 375; 43 M 812.
664	Radhashyam Dasya v. Ranga Sundari Dasya	...	24 C W N 541.
667	Wadhawa Singh v. Sundar Singh	...	21 P W R 1921.
667	Basdeo Mal v. Kanhaiya Lal	...	18 A L J 952; 43 A 101.
669	Ratan Chand Jwala Das v. Asa Singh Bogha Singh		3 U P L R (L.) 3.
671	Chhatter Singh v. Tej Singh	...	18 A L J 956; 2 U P L R (A.) 384; 43 A. 101.
673	Lakhambai v. Devibai	...	14 S L R 132.
675	Sanehi Lal v. Onkar Mal	...	18 A L J 981; 2 U P L R (A.) 375.
676	Firm Budhu Ram-Honda Ram v. Ramzan	...	*Lahore High Court.
677	Mahesh Prasad v. Bharath	...	23 O C 252.
678	Lachman Das v. Sundar Das	...	1 L 558.
679	Jagat Singh v. Baldeo Prasad	...	18 A L J 974; 2 U P L R (A.) 373; 43 A 137.
680	Sawan Mal v. Kanhaya Lal-Gopal Das	...	*Lahore High Court.
681	Pandipati Subbarami Reddi v. Pandipati Ramamma		12 L W 249; (1920) M W N 529; 43 M 824.
685	Ram Lal v. Ganeshi Lal	...	Lahore High Court.
685	Muthu Reddi v. Chinnasawmy Reddi	...	12 L W 403; (1920) M W N 613; 39 M L J 486 28 M L T 308.
688	Baldeo Singh v. Chhail Behari Lal	...	18 A L J 944.
689	Wadhawa Singh v. Sundar Singh	...	*Lahore High Court.
690	Chinna Pichu Iyengar v. Padmanabha Iyengar	...	12 L W 397; (1920) M W N 609; 39 M L J 417; 28 M L T 303; 44 M. 121.
694	Umda Begum v. Zaib-ul-nisa	...	*Lahore High Court.
697	South Indian Railway Co. Ld. v. Municipal Council, Trichinopoly	...	12 L W 411 (1920) M W N 618; 43 M 905.
703	Pir Muhammad-Sadr-ud-Din v. Khair-ud-din	...	*Lahore High Court.
705	Ganpat Rao Mohitey v. Kesrichand	...	17 N L R 15.
706	Narain Das v. Mahnga Ram	...	*Lahore High Court.
707	Chandoo v. Parbhoo	...	*Nagpur Judicial Commissioner's Court.
708	Ladha Ram-Wadhawa Ram v. Muhammad	...	*Lahore High Court.
709	Jago v. Mahadeo	...	*Nagpur Judicial Commissioner's Court.
710	Kishen Chand v. Sohan Lal	...	2 L 95.
711	Dattatraya v. Rajaya	...	*Nagpur Judicial Commissioner's Court.
712	Hira v. Sardara	...	*Lahore High Court.
713	Vishnu Dhonddev Palkar v. Rampratap Daulatram Marwadi	...	22 Bom L R 1407; 45 B 360.
715	Honda Ram v. Hotu Ram	...	2 L 25.
715	Ramchandra Govind v. Jayanta Ravji	...	22 Bom L R 1409; 45 B 403.
717	Hanskuarbai v. Imam Ali	...	*Nagpur Judicial Commissioner's Court.
718	Babusing Ramchandra Rajeshirke v. Pandu Tatya Kate	...	22 Bom L R 1413; 45 B 508.
719	Harish Chandra Guha v. Nripendra Coomar Chakravarti	...	24 C W N 1024.
721	Indar Singh v. Fateh Singh	...	1 L 511.
734	Indar Singh v. Fateh Singh	...	1 L 540.
743	Basvanappa Shivrudrappa v. Krishnadas Govardhandas	...	22 Bom L R 1387; 45 B 443.
744	Beli Ram v. Hari Chand	...	*Lahore High Court.
747	Prabhulingappa Khangouda v. Gurunath Balaji	...	22 Bom L R 389; 45 B 453.
748	Nanda Kumar v. Dinabandhu Nandi	...	*Calcutta High Court.
751	Manoklal v. Bai Amba	...	22 Bom L R 1394; 45 B 350.
752	Kiran Chandra v. Bono Behari Datta	...	*Calcutta High Court.
755	Rajmal Girdharlal v. Maruti Shivram	...	22 Bom L R 1377; 45 B 329.
757	Adkia v. Shankar Rao	...	*Nagpur Judicial Commissioner's Court
759	Bapu Tatya v. Bala Raojee Desai	...	22 Bom L R 1383; 45 B 446.

760	Abeda Khatun v. Majubali Chowdhury	...	24 C W N 1020; 33 C L J 304.
762	Lalchand Sakharam v. Khandu Kedu	...	22 Bom L R 1431.
764	Surapu v. Diwan Chand	...	*Lahore High Court.
765	Manikchand Maganchand v. Rangappa Kondappa	...	22 Bom L R 1435; 45 B 523.
767	Malraju Lakshmi Venkayyamma Row v. Venkatadri Appa Row	...	19 A L J 97; 33 C L J 171; 40 M L J 144; 13 L W 256; (1921) M W N 77; 29 M L T 164; 25 C W N 654; 23 Bom L R 713 **P. C.**
769	Krishnaji Govind v. Sitaram Hanmant	...	22 Bom L R 1439; 45 B 300.
770	Ram Chand v. Jana	...	*Lahore High Court.
771	Balkrishna Bhimaji v. Ramkrishna Gangadhar	...	22 Bom L R 1442; 45 B 353.
772	Moto Dasi v. Behari Lal	...	*Calcutta High Court.
774	Manilal Girdhar Patel v. Nathalal Mahasukhram Vyas	...	22 Bom L R 1446; 45 B 561.
776	Punjab Singh v. Arjan	...	2 L 22.
777	Govinda Krishna Sathe v. Hanmaya Lingaya Fulmali	...	22 Bom L R 1450; 45 B 567.
778	Surendra Nath Ghosh v. Keshab Lal Ghosh	...	25 C W N 36.
780	Nurdin Najbudin v. Umrav Bu	...	22 Bom L R 1429; 45 B 519.
781	Bis Ram v. Kewal Ram	...	*Lahore High Court.
782	Maharaj Bahadur Singh v. Forbes	...	19 A L J 107; 33 C L J 176; 25 C W N 366; 40 M L J 141; 13 L W 217; (1921) M W N 26; 2 P L T 115; 6 P L J 129; 23 Bom L R 727 **P. C.**
783	Pandu Krishna Jadhav v. Dhondi Krishna Patil	...	22 Bom L R 1403.
784	Strauss and Co Ld. v. Raghubar Dayal	...	2 U P L R (A.) 387; 19 A L J 19.
785	Gopal Dinkar v. Ganesh Narayan	...	22 Bom L R 1416; 45 B 512.
787	Shahzadi Begam v. Muhammad Ibrahim	...	19 A L J 14.
788	Sari v. Sailabala Dasi	...	*Calcutta High Court.
790	Gopaldas Ganpatdas v. Tribhovan Jethiram	...	22 Bom L R 1420; 45 B 365.
791	Bhagwan Singh v. Bhawani Das-Bhagwan Das	...	18 A L J 1119; 2 U P L R (A.) 411; 43 A 223.
795	Lajpat Rai v. Lachhman Das	...	*Lahore High Court.
796	Ganga Rama v. Sakharam Babaji	...	22 Bom L R 1396.
797	Lachmi Narayan v. Deoki	...	*Allahabad High Court.
798	Yoosof Oosman Bros. and Co. v. Win Ne Ya	...	10 L B R 191.
800	Basvant Mushappa v. Mallappa Kallappa	...	22 Bom L R 1400; 45 B 459.
801	Sukhnath Rai v. Nehal Chand	...	18 A L J 644; 2 U P L R (A.) 240; 42 A 661.
804	Khalilal Rahaman v. Marian Bibi	...	10 L B R 194; 13 Bur L T 89.
805	Ramchandra Balwant v. Balaji Ganesh	...	22 Bom L R 1452; 45 B 570.
806	Cohen v. Cohen	...	10 L B R 196; 13 Bur L T 78.
808	Indraj v. Ranji Lal	...	*Lahore High Court.
809	S. T. K. Chetty v. Balasundram	...	10 L B R 199; 13 Bur L T 100.
811	Ravjibhai Kashibhai v. Dahyabhai Zaverbhai	...	22 Bom L R 1454.
812	Karori Mal v. Ramji Lal	...	2 L 53.
814	Surendra Krishna Mondal v. Ranee Dassi	...	24 C W N 860; 33 C L J 34; 47 C 1043.
823	Rangoon Municipal Committee v. Burma Railways Co. Ltd.	...	10 L B R 203; 13 Bur L T 62 & 136.
840	Rafiq-un-nissa v. Keshwar Narain Singh	...	*Patna High Court.
842	Bhimaji v. Rajabhai Hussain Sahib	...	12 L W 114; 39 M L J 239; 43 M 808; 28 M L T 295.
844	Maung Po Thein v. Ma Waing	...	10 L B R 236; 13 Bur L T 91.
846	Shakir Ali v. Abdul Hakim	...	*Court of Election Commissioners, United Provinces.
849	Ghasita Mal v. Emperor	...	22 Cr L J 145.
850	Ganga Saran v. Emperor	...	19 A L J 6; 22 Cr L J 146.
853	Aishan v. Sher Muhammad	...	22 Cr L J 149.
853	Josmudin v. Isadally	...	10 L B R 240; 22 Cr L J 149.
854	Emperor v. Rab Nawaz	...	1 L 612; 22 Cr L J 150.
855	Krishnarao v. Sitaram	...	22 Cr L J 151.
857	Madan Mohan Lal v. Emperor	...	22 Cr L J 153.
858	Raghunandan Koeri v. Emperor	...	1 P L T 684; 22 Cr L J 154.
863	Muhammad Sher Ali Khan v. Ghasi Ram	...	22 Cr L J 159; 3 U P L R (A.) 35.
865	Hira Singh v. Sheikh Mosaheb	...	2 P L T 207; (1921) Pat 147.
868	Bidhumukhi Dasi v. Bhaba Sundari Dasi	...	24 C W N 961.
872	Krishna Lal Jha v. Mandeswar Jha	...	2 P L T 215; 3 U P L R (Pat.) 17.
873	Beni Madho v. Hira Lal	...	18 A L J 679; 2 U P L R (A.) 227.
875	Nand Lal Singh v. Ramphal Singh	...	*Patna High Court.

Advocate High Court
Jammu & Kashmir
Srinagar.

877	Surjan Mal-Kishen Chand v. Gian Chand-Chiranji Lal	*Lahore High Court.
880	Raja of Ramnad v. Velusami Tevar ...	19 A L J 168; 40 M L J 197; 13 L W 290; (1921) M W N 51; 33 C L J 218; 25 C W N 581; 23 Bom L R 701 **P. C.**
882	Benode Behary Audhikary v. Shashi Bhusan Bhur...	24 C W N 958.
883	Nena Ojha v. Sarbhoo Dutt Ojha ...	2 P L T 70.
885	Sarju v. Budha ...	*Lahore High Court.
887	Bisweswar Ram v. Paltu Ram Kahar ...	*Patna High Court.
889	Vaithialingha Chetty v. Kullappa Naicken ...	12 L W 354.
890	Jwala Prasad v. Kopeya Munda ...	*Patna High Court.
891	Mahmud v. Udo Bhan ...	*Lahore High Court.
893	Wazir Nonian v. Ram Prasad Lal ...	*Patna High Court.
894	Manicka Gramanai v. Parasuram Mudeley ...	12 L W 35[illegible]; (1920) M W N 787.
896	Ragho Prasad Singh v. Jadunandan Prasad Singh...	6 P L J 27; 2 P L T 28; (1921) Pat 34.
898	Arumuga Chettiar v. Ramanadan ...	12 L W 352.
899	Baidyanath Mahto v. Shyam Mahto ...	*Patna High Court.
903	Lachmi Narain v. Muhammad Yusuf ...	18 A L J 688; 42 A 540.
905	Rawlins v. Anant Lal Sahu ...	2 P L T 176; (1921) Pat 40.
906	Kandasami Chetty v. Ramalinga Chetty ...	12 L W 285.
908	Ramjanum Singh v. Khub Lal Singh ...	2 P L T 219; (1921) Pat 151.
909	Deba Nand v. Anandmani ...	18 A L J 1127; 2 U P L R (A.) 431; 43 A 213.
911	Nakimo Dewani v Pemba Dichen ...	19 A L J 171; 40 M L J 201; (1921) M W N 115; 29 M L T 202; 33 C L J 211; 23 Bom L R 698 **P. C.**
913	Jonnalagadda Appalanarasayya Bhukta, *In re* ...	12 L W 388; 39 M L J 484; (1920) M W N 785; 22 Cr L J 161; 44 M 51.
913	Kehr Singh v. Emperor ...	22 Cr L J 161.
917	Abdus Samad v. Yusuf ...	19 A L J 22; 2 U P L R (A.) 389; 22 Cr L J 165
918	Hazara Singh v. Emperor ...	2 L 27; 22 Cr L J 166.
921	Deodhari Mahto v. Emperor ...	(1921) Pat 12; 22 Cr L J 169; 2 P L T 211.
924	Emperor v. Samand ...	22 Cr L J 172.
926	Sayyapureddi Chinnayya Dhora v. Emperor ...	19 A L J 164; 40 M L J 194; 13 L W 223; (1921) M W N 26; 33 C L J 222; 22 Cr L J 174; 25 C W N 514; 3 U P L R (P. C.) 10; 44 M 297; 23 Bom L R 705 **P. C.**
929	Ram Kripal Singh v. Hanuman Singh ...	6 P L J 6; 2 P L T 122.
931	Borgonha v. Borgonha ...	22 Bom L R 361; 44 B 924.
936	Rajendra Prasad v. Probodh Chandra ...	2 P L T 116; 6 P L J 82; (1921) Pat 156.
937	Sheo Mohan Pande v. Kali Prasad Shukul ...	*Allahabad High Court.
939	Mulchand Kalwar v. Gobind Singh ...	*Patna High Court.
939	Atma Singh v. Hem Raj Shah ...	*Lahore High Court.
941	Curlender v. Abdul Hamid ...	18 A L J 1131; 2 U P L R (A.) 437; 41 A 216.
943	Kunhiparambath Parkum Kunhi Koranath Chandu v. Antholi Thoovakunnon Ramunni ...	39 M L J 273; (1920) M W N 600; 28 M L T 262; 13 L W 183.
946	Nawab v. Punjaba ...	*Lahore High Court.
947	Ramaswami Chettiar v. Mallappa Reddiar ...	(1920) M W N 572; 39 M L J 350; 28 M L T 170; 43 M 760; 12 L W 475 **F. B**
960	Burma Oil Co. Ltd. v. Baijnath Singh ...	3 U B R (1920) 212.
963	Matiwor Rasuk v Dhanu Molla ...	*Calcutta High Court.
965	Kanhaya v. Nur Muhammad ...	*Lahore High Court.
965	Dulabdass v. Ma Win ...	3 U B R (1920) 217.
971	Shamas Din Mehr Bakhsh v. Muhammad Khalil ...	*Lahore High Court.
973	Shunmugha Udayar v. Kandasami Asary ...	12 L W 170.
975	Debendra Prasad Sukul v. Surendra Prasad Sukul...	*Patna High Court.
977	Ram Sarup v. Jagat Ram ...	2 L 102.
978	Keesara Venkatapayya v. Nayani Venkataranga Rao	38 M L J 149; 43 M 288.
999	Ma Me I v. Maung Lauk Hnya ...	3 U B R (1920) 228.
1003	Deivanayaga Padayachi v. Muthu Reddi ...	12 L W 291; (1920) M W N 547; 39 M L J 525; 28 M L T 255; 44 M 329.
1005	Maung Nga v. Ma Pyu ...	3 U B R (1920) 251.

TABLE
OF
Cases Cited in Volume LIX of Indian Cases, 1921.

A

A & B (Infants) *In re*, (1897) 1 Ch 786; 63 L J Ch 592 ... 563
Abdul Hakim v. Tej Chander, 3 A 815; A W N (1881) 81; 6 Ind Jur 320; 2 Ind Dec (N. s.) 521 ... 144
Abdul Hassan Khan v. Rangi Lal, 37 P R 1902; 23 P L R 1902 ... 971
Abdul Husen v. Emperor, 22 Ind Cas 177; 9 N L R 184; 15 Cr L J 33 ... 856
Abdul Kader v. Aishamma, 16 M 61 (F. B.); 2 M L J 200; 5 Ind Dec (N. s) 750 ... 347
Abdul Kader v. Ali Meah, 14 Ind Cas 715; 15 C L J 649; 16 C W N 717 ... 918
Abdul Latif Khan v. Niyaz Ahmad Khan, 1 Ind Cas 538; 31 A 343; 6 A L J 423 ... 434
Abdul Majid v. Hari Charan Haldar, 53 Ind Cas 17; 23 C W N CLXVII (167) notes ... 789
Abdul Majid v. Jawahir Lal, 23 Ind Cas 649; 26 A 350; 12 A L J 624; 16 Bom L R 395; 18 C W N 963; 19 C L J 626; 27 M L J 17; (1914, M W N 485; 16 M L T 44; 1 L W 483 (P. C.) ... 896
Abdulla Sahib v. Doctor Oosman Sahib, 28 M 224 ... 793
Abdullah Khan v. Basharat Hussain, 17 Ind Cas 737; 17 C W N 233; 40 I A 31; 13 M L T 182; (1913) M W N 131; 35 A 48; 17 C L J 312; 15 Bom L R 432; 25 M L J 91 (P. C.) ... 789
Adamson, *In the goods of*, (1875, 9 P & D 253 at p 255 ... 822
Administrator-General of Bengal v. Prem Lall Mullick, 21 C 732 at p 770; 10 Ind Dec (N. s.) 1118 ... 793
Adrishappa v. Gurushidappa, 4 B 494 (P. C.); 7 I A 162; 4 Sar P C J 154; 3 Suth P C J 757; 4 Ind Jur 421; 3 Shome L R 206; 7 C L R 1; 2 Ind Dec (N. s.) 338 ... 982
Adusumalli Krishnayya v. Adusumalli Lakshmipathi, 32 Ind Cas 253; 30 M L J 265 at p 269; 19 M L T 286 ... 610
Afzul Hossain v. Umda Bibi, 1 C W N 93 ... 52
Agar Ellis, *In re*; Agar Ellis v. Lascelle, (1883) 24 Ch D 317; 53 L J Ch 10; 50 L T 161; 32 W R 1 ... 563
Agnew v. Jobson, (1877) 47 L J M C 67; 13 Cox C C 625 ... 574
Agra Bank Limited v. Leishman, 18 M 41; 2 Weir 100; 6 Ind Dec (N. s.) 378 ... 401
Agricultural Cattle Insurance Co., *In re*, (1884) 84 R R 41; 1 Mac & G 170; 1 H & Tw 227; 18 L J Ch 261; 41 E R 1228 ... 525
Ahmadi Begum v. Taraknath Ghosh, 21 Ind Cas 233; 18 C L J 399 at p 448; 17 C W N 1173 ... 138

A—contd.

Ahmed Ali v, Keenoo Khan, 1 Ind Cas 202; 36 C 44; 13 C W N 77; 9 Cr L J 294 ... 415
Ajam Sahib v. Meenatchi Devastanam, 8 Ind Cas 668; 35 M 95 at p. 99, (1910) M W N 766; 8 M L T 437; 21 M L J 202 ... 352
Ajnasi Kuar v. Suraj Prasad, 1 A 501; 1 Ind Dec (N. s.) 345 ... 889
Ajodhya Prasad Singh v. Emperor, 35 C 929; 12 C W N 992; 8 Cr L J 207 ... 375
Akhoy Kumar Soor v. Bejoy Chand Mohatap, 29 C 813 ... 869
Alayakammal v. Subbaraya Goundan, 28 M 493; 15 M L J 219 ... 262
Albrecht v. Bathee Jellamma, 13 Ind Cas 453; 22 M L J 247; 11 M L T 53; (1912) M W N 53 ... 910
Ali Hasan v. King-Emperor, 3 A L J 149; A W N (1906) 48; 3 Cr L J 249; 28 A 358 ... 201
Allah Din v. Fateh Din, 45 Ind Cas 101; 31 P R 1918; 54 P W R 1918; 27 P L R 1918 ... 878
Allapichai v. Kuppai Pichai Rowther, 39 Ind Cas 429; 40 M 752; 32 M L J 449 ... 508
Alraja Naidu, *In re*, 30 M 222; 6 Cr L J 130 ... 156
Aman Ali v. Imambi, 22 Ind Cas 89; 9 N L R 188 ... 475
Amanat Bibi v. Imdad Husain, 15 I A 103; 15 C 800; 5 Sar P C J 214; 12 Ind Jur 255; 5 Sar P C J 214; Rafique and Jackson's P C No. 103 7 Ind Dec (N. s.) 1117 ... 518
Amar Chand v. Nathu, 7 Ind Cas 408; 7 A L J 887 ... 418
Ambrose Summers, *In the matter of*, 23 C 592 at p 598; 12 Ind Dec (N. s.) 394 ... 943
Ameer Ali v. Yakub Ali Khan, 25 Ind Cas 509; 41 C 347; 19 C L J 428 ... 464
American Pioneer Leather Co, *In re*, (1918) 1 Ch 556; 87 L J Ch 493; 118 L T 695 ... 525
Amolak Chand Parak v. Sarat Chandra Mukherjee, 11 Ind Cas 943; 38 C 913; 16 C W N 49 178
Amrit Manjhi v. Emperor, 51 Ind Cas 668; 46 C 854 at p 860; 23 C W N 623; 29 C L J 322; 20 Cr L J 508 ... 645
Amrita Bazar Patrika, *In the matter of* (Moti Lal Ghose, *In re*), 45 Ind Cas 338; 45 C 169; 26 C L J 459; 21 C W N 1191; 19 Cr L J 530 ... 150
Amritrao v. Govind, 21 Ind Cas 590; 9 N L R 145 ... 429
Amma Bibi v. Udit Narain Misra, 1 Ind Cas 890; 31 A 68; 11 Bom L R 525; 19 M L J 295; 6 M L T 89; 9 C L J 512; 36 I A 44 (P. C.) ... 104
Ammalu Ammal v. Namagiri Ammal, 43 Ind Cas 760; 33 M L J 631; 22 M L T 391; 6 L W 722; (1918) M W N 110 ... 287

A—contd. Page.

Amtul Qadier v. Munammad Yusaf, 49 Ind Cas 87 ; 37 P W R 1919; 8 P L R 1919 ... 667
Anandram v. Nityananda Barham, 32 Ind Cas 744 ... 186
Anandrao Balkrishna v. Emperor, 27 Ind Cas 657; 17 Bom L R 82; 3 Bom Cr C 15; 16 Cr L J 177 ... 202
Anant Ram v. Takatsingh, 4 C P L R 57 ... 421
Anant Ramrao v. Gopal Balwant, 19 B 269; 10 Ind Dec (N. s.) 182 ... 976
Andiappa Chetty v. Devarajulu Naidoo, 12 Ind Cas 378; 36 M 68; 10 M L T 251; (1911) 2 M W N 225; 21 M L J 1024 ... 899
Andrew v. Motley, (1862) 12 C B (N. s.) 514; 32 L J C P 128; 133 R R 421; 142 E R 1243 ... 821
Andrew Yule v. A. H. Skone, 49 Ind Cas 647; 4 P L J 154; 20 Cr L J 199 ... 404
Annamalai Chetti v. Annamalai Chetti, 52 Ind Cas 456; 10 L W 67 ... 476
Annasami Pillai v. Ramakrishna Mudaliar, 24 M 219; 11 M L J 1 ... 185
Annie Besant v. Advocate-General of Madras, 52 Ind Cas 209; 43 M 146; 37 M L J 139; 17 A L J 925; 23 C W N 986; 21 Bom L R 867; (1919) M W N 555; 10 L W 451; 20 Cr L J 593; 26 M L T 408; 1 U P L R (P. C.) 74; (1919) 35 T L R 500; 46 I A 176 (P. C.) 138, 642
Annie Besant v. Emperor, 37 Ind Cas 607; 39 M 1164 at p 1176; (1916) 2 M W N 497; 4 L W 625; 32 M L J 151; 18 Cr L J 239; 21 M L T 190 ... 138
Annie Besant v. Narayaniah, 24 Ind Cas 290; 38 M 807 at p 820; 27 M L J 30; 18 C W N 1089; 1 L W 520; (1914) M W N 585; 16 M L T 165; 20 C L J 253; 16 Bom L R 525; 12 A L J 1155; 41 I A 314 (P. C.) ... 563
Annoda Prasad v. Nobo Kishore Roy, 33 C 500; 9 C W N 952 ... 634
Anusoori Sanyasi, *In the matter of*, 28 M 37; 1 Weir 671; 2 Cr L J 149 ... 45
Appan Patra Chariar v. Srinivasa Chariar, 40 Ind Cas 118; 40 M 1122; 32 M L J 364; 5 L W 544; (1917) M W N 855; 21 M L T 408 ... 682
Appavu Rowther v. Seeni Rowther, 42 Ind Cas 514; 41 M 115; 33 M L J 177; 6 L W 243 ... 803
Appayya Bhattar v. Vengu Bhattar, 15 M L J 211 585, 623
Ardeshir Sorabsha Moos v. Khushaldas Gokuldas, 32 B 247; 10 Bom L R 268 ... 606
Arthur Henry Forbes v. Maharaj Bahadur Singh, 23 Ind Cas 632; 41 I A 91; 18 C W N 747; (1914) M W N 397; 15 M L T 380; 12 A L J 653; 27 M L J 4; 41 C 926; 1 L W 1059; 25 C L J 434 (P. C.) ... 782
Arunachellam Chetty v. Arunachellam Chetty, 15 I A 171 at p 174; 12 M 19 (P. C.); 5 Sar P C J 265; 12 Ind Jur 371; 4 Ind Dec (N. s.) 363 ... 170
Arunachelam Chetty v. Venkatachalapathi Guruswamigal, 53 Ind Cas 288; (1919) M W N 850; 37 M L J 460; 17 A L J 1097; 10 L W 642; 26 M L T 479; 24 C W N 249, 46 I A 204; 43 10 (P. C.) 253; 22 Bom L R 457; 2 U P L R (P. C.) ... 288
Ashi Bhushan Dasi v. Pelaram Mandal, 21 Ind Cas 519; 18 C L J 362; 18 C W N 173 ... 635

A—concld. Page.

Ashidbai v. Abdulla, 31 B 271; 8 Bom L R 758 ... 234
Athakutti v. Govinda, 16 M 97; 5 Ind Dec (N s.) 775 ... 894
Atma Singh v. Jatta Singh, 64 P R 1883 ... 257
Attermoney Dossee v. Hurry Doss Dutt, 7 C 74; 4 Shome L R 192; 9 C L R 357; 3 Ind Dec (N. s) 597 ... 634
Attorney-General v. Council of the Borough of Birmingham, (1858) 4 K & J 521; 70 E R 220; 6 W R 811; 116 R R 445 ... 837
——— ——— v. Leeds Corporation, (1870) 5 Ch App 583; 39 L J Ch 711; 19 W R 19 ... 830
Atul Hazra v. Uma Charan Changdar, 33 Ind Cas 822; 20 C W N 793; 23 C L J 555; 17 Cr L J 182 ... 645
Augada Ram Shaha v. Nemai Chand Shaha, 23 C 867; 12 Ind Dec (N. s.) 576 ... 154
Ayerst v. Jenkins, (1873) 16 Eq Cas 275; 42 L J Ch 690; 29 L T 126; 21 W R 878 ... 1003
Ayrey v. Hill, (1824) 2 Add 206; 162 E R 269 ... 818
Aziz Khan v. Duni Chand, 48 Ind Cas 933; 23 C W N 130; 101 P R 1918; 165 P W R 1918 (P. C.) ... 277

B

B. & N. W Railway Co. v. Bandhu Singh, 2 Ind Cas 223; 31 A 342; 6 A L J 400 ... 596
Baba v. Vishvanath Joshi, 8 B 228; 4 Ind Dec (N. s.) 526 ... 279
Baboo Chunder Narain Singh v. Brojo Bullub Gooie, 21 W R 391; 14 B L R 254 ... 138
Baboo Gunesh Dutt Singh v. Mugneeram, 17 W R 283; 11 B L R (P. C.) 21 ... 144
Babu Lal v. Nanku Ram, 22 C 339; 11 Ind Dec (N. s) 228 ... 691
Bachan Singh v. Kamta Pershad, 5 Ind Cas 585; 32 A 392; 7 A L J 337 ... 590
Baddu v. Babu Lal, 11 O C 212 ... 677
Badham v. Williams, (1902) 86 L T 191 ... 484
Badi Bibi Sahibal v. Sami Pillai, 18 M 257; 6 Ind Dec (N. s.) 529 ... 75
Bahir Das Chakravarti v. Nobin Chunder Pal, 29 C 306 at p 319; 6 C W N 121 ... 788
Bai Gulbai v. Behramsha, 23 Ind Cas 441; 16 Bom L R 211; 33 B 615 ... 190
Bai Hiragaveri v. Gulabdas Jamnadas, 22 Ind Cas 71; 15 Bom L R 1123 ... 778
Bai Jasoda v. Ramansha, 23 B 334; 12 Ind Dec (N. s.) 222 ... 907
Bai Rami v. Jaga Dullabh, 57 Ind Cas 556; 44 B 619; 22 Bom L R 801 ... 451
Bai Ujam v. Valiji Rasulbhai, 10 B 456; 5 Ind Dec (N s.) 692 ... 441
Baidya Nath De v. Ilim, 25 C 917; 2 C W N 44; 13 Ind Dec (N. s.) 597 ... 209
Baidya Nath Mondal v. Sudharam, 8 C W N 751 ... 209
Baij Nath Rai v. Dharam Deo Tewari, 35 Ind Cas 707; 38 A 315; 14 A L J 353 ... 663
Baijnath Prosád v. Raghunath Rai, 14 Ind Cas 817; 16 C W N 496 ... 789

B—contd.

Page.

Baijnath Sahai v. Ramgut Singh, 23 C 775; (P. C.); 23 I A 45; 7 Sar P C J 1; 12 Ind Dec (N. S.) 513 ... 472
Baily & Co. v. Clark, (1902) 1 Ch 649; 71 L J Ch 396; 86 L T 309; 50 W R 511; 18 T L R 364 ... 930
Baisweswar Singh v. Bhola Nath Pashuk (Emperor), 22 Ind Cas 751; 18 C W N 1146; 15 Cr L J 175 ... 415
Bajaba Bajirao v. Trimbak Vishvanath, 4 Ind Cas 255; 34 B 106; 11 Bom L R 1122 ... 570
Bajrangi Singh v. Manokarnika Bakhsh Singh, 35 I A 1 at pp 14, 15; 30 A 1; 12 C W N 74; 9 Bom L R 1348; 6 C L J 766; 3 M L T 1; 5 A L J 1; 17 M L J 605; 11 O C 78 P. C.) ... 611
Baker v. Batt, (1838) 2 Moo P C 317; 12 E R 1026; 46 R R 52 ... 816
Balabux v. Rukhmabai, 30 C 725; 30 I A 130; 7 C W N 642; 5 Bom L R 469; 8 Sar P C J 470 (P. C.) ... 499
Balak Ram v. Dadu, 7 Ind Cas 1000; 76 P R 1910; 98 P L R 1910; 112 P W R 1910 ... 395
Balakrishna Udayar v. Vasudeva Aiyar, 40 Ind Cas 650; 40 M 793; 11 Bur L T 48; 15 A L J 645; 2 P L W 101; 33 M L J 69; 26 C L J 143; 19 Bom L R 715; (1917) M W N 628; 6 L W 501, 22 C W N 50; 44 I A 261 (P. C.) ... 451
Balide Kamayya v Pragada Papayya, 37 Ind Cas 414; 40 M 259; 21 M L T 82; (1917) M W N 217 and 246; 5 L W 558; 32 M L J 477 ... 212
Baliram v. Ram Rao, 4 N L R 57 ... 420
Balkishen Das v. Ram Narain Sahu, 30 I A 139 at p 150; 7 C W N 578; 5 Bom L R 461; 30 C 738 ... 564
Balkishen Das v. Simpson, 26 I A 151; 25 C 833 (P. C.); 2 C W N 513; 7 Sar P C J 363; 13 Ind Dec (N. S.) 543 ... 120
Balla Mal v. Ahad Shah, 48 Ind Cas 1; 23 C W N 233; 35 M L J 614; 16 A L J 905; 124 P R 1918; 25 M L T 55; 180 P W R 1918; 29 C L J 165; 1 U P L R (P. C.) 25; 21 Bom L R 558 (P. C.) ... 277
Ballapragada Ramamurthi v. Thammanna Gopayya, 35 Ind Cas 575: 40 M 701; 4 L W 48; 20 M L T 129; 31 M L J 231 ... 899
Balli Singh v. Bindeswari Tewari, 35 Ind Cas 532; 1 P L J 133 at p 136; 2 P L W 432 ... 290
Bamandas Bhattacharyya v. Nilmadhab Saha, 35 Ind Cas 754; 24 C L J 541; 20 C W N 1340; 44 C 771 ... 750
Banbihari Kapur v. Khetra Pal Singh Roy, 13 Ind Cas 785; 38 C 923; 16 C W N 259 ... 869
Bandi Ali Fakir v. Amud Sarkar, 26 Ind Cas 380; 12 C W N 416; 20 C L J 227 ... 596
Bank of England v. Vagliano, (1891) A C 107 at p 144; 60 L J Q B 145; 64 L T 353; 39 W R 657; 65 J P 676 151, 793
Banka Behary Dass v. Raj Kumar Dass, 27 C 231; 4 C W N 289; 14 Ind Dec (N. S.) 153 ... 286
Banke Behari Lal v. Pokho Ram, 25 A 48; A W N (1902) 179 ... 3
Bankey Behary Lal v. Bhagwandas Marwari, 34 Ind Cas 897 ... 293

B—contd.

Page.

Bankruptcy Notice, *In re*, (1907) 1 K B 478; 76 L J K B 171; 96 L T 181; 14 Manson 1; 23 T L R 214 ... 79
Banks v. Goodfellow, (1870) 5 Q B 549 at p 567; 39 L J Q B 237; 22 L T 813 ... 818
Banku Behary Dey v. Harendra Nath Mukherjee, 8 Ind Cas 1; 15 C W N 64 ... 569
Banoo Tewary v. Doona Tewary, 24 C 302; 12 Ind Dec (N. S.) 873 ... 378
Bansi v. Girdhar Lal, A W N (1894) 143 ... 93
Bapanayya v. Peddichalamaiya, 9 M L J 33 ... 966
Bapu v. Anand, 21 Ind Cas 287; 9 N L R 143 ... 603
Bapuchand v. Mugutrao, 22 B 340; 11 Ind Dec (N. S.) 809 ... 748
Barachi v. Emperor, 35 Ind Cas 961; U B R (1916) II, 108; 10 Bur L T 73; 17 Cr L J 401 ... 371
Baray v. Butlin, (1838) 2 Moo P C 480; 1 Curt 614; 46 R R 123; 12 E R 1089 ... 537
Barkeley v. Hardy, (1826) 8 D & R 102; 4 L J (O. S.) K B 184; 5 B & C 355; 29 R R 261; 108 E R 132 ... 599
Barkhurdar v. Chhatta Mal, 48 Ind Cas 798; 119 P R 1918 ... 72
Baroda Prosad Banerji v. Gajendra Nath Banerji, Ind Cas 289; 9 C L J 383 at p 393; 13 C W N 557 ... 948
Baroda Prosad Bose v. Girijanath Row Chowdhury, 2 C L J 11 ... 284
Barry v. Rutlin, (1838) 2 Moo P C 480 at p 482; 1 Curt 614; 46 R R 123; 12 E R 1089 ... 816
Basa Mal v. Tajammal Husain, 16 A 78; A W N (1893) 223; 8 Ind Dec (N. S.) 52 ... 513
Basant Kumar v. Khulna Loan Company, 26 Ind Cas 197; 20 C L J 1 at p 8; 19 C W N 1001 ... 869
Basanti Lal v. Cheddu Singh, 16 Ind Cas 118; 39 C 1048; 16 C W N 664 ... 778
Basapa Ningapa v. Emperor, 31 Ind Cas 365; 17 Bom L R 892; 16 Cr L J 765 ... 130
Basarmal Awatmal v. Khemchand Daryanomal, 11 Ind Cas 433 ... 70
Basava v. Lingangauda, 19 B 428 at p 459; 10 Ind Dec (N. S.) 289 ... 627
Basdeo v. John Smidt, 22 A 55; A W N (1899) 172; 9 Ind Dec (N. S.) 1068 ... 284
Basharutulla v. Uma Churn Dutt, 16 C 794; 8 Ind Dec (N. S.) 527 ... 167
Basrur Venkata Row, *In re*, 14 Ind Cas 418; 11 M L T 93; 22 M L J 270; (1912) M W N 125; 13 Cr L J 226; 36 M 159 ... 224
Bassu Kuar v. Dhum Singh, 11 A 47; 15 I A 211; 5 Sar P C J 260; 12 Ind Jur 450; 6 Ind Dec (N. S.) 458 ... 101
Bathoo Lal v. Domi Lal, 21 C 777; 10 Ind Dec (N. S.) 1115 ... 406
Batuk Nath v. Munni Dei, 23 Ind Cas 644; 36 A 284; 18 C W N 750; 12 A L J 596; 19 C L J 574; 16 Bom L R 360; 27 M L J 1; 16 M L T 1; 1 L W 729; (1914) M W N 437; 41 I A 104 (P. C.) ... 893
Bawani Sankara v. Ambabay Ammal, 1 M H C R 363 ... 610

J3—contd.

Page.

Beg v. Allah Ditta, 38 Ind Cas 354; 45 P R 1917; 12 P W R 1917; 21 M L T 310; 32 M L J 615; 19 Bom L R 288; 15 A L J 525; 21 C W N 842; 44 C 749; 26 C L J 175; 44 I A 89 (P. C.) ... 505
Behari Lal v. Muhammad Muttaki, 20 A 482 (F. B.); A W N (1898) 123; 9 Ind Dec (N. S.) 669 ... 793
Behram Rashid Irani v. Sorabji Rustamji, 23 Ind Bas 140; 38 B 372; 16 Bom L R 35 ... 579
Bejoy Kumar v. Satish Chandra Ghose, 56 Ind Cas 1007; 24 C W N 444 ... 277
Bejoy Nath Chatterji v. Bengal Coal Company, Limited, 23 W R Cr 45 ... 404
Bengal Coal Company Limited v. Monoranjan Bagchi, 44 Ind Cas 297; 22 C W N 441 ... 789
Beniprasad v. Mulchand, 6 Ind Cas 817; 6 N L R 65 ... 421
Benyon v. Nettlefold, (1850) 3 Mac & G 94; 20 L J Ch 184, 15 Jur 209; 87 R R 25; 42 E R 196 ... 1004
Beradar Singh v. Bacha Mohto (Raghunandan Mahton 54 Ind Cas 39; 1 P L T 55; (1920) Pat 9; 5 P L J 32; 2 U P L R (Pat) 4 ... 891
Bethell v. Stanhope Co., (1601) Cro Eliz 810; Owen 132; 2 And 173 ... 952
Bhagbut Pershad Singh, v. Girja Koer, 15 C 717 (P. C.); 15 I A 89; 12 Ind Jur 289; 5 Sar P C J 186; 7 Ind Dec (N. S.) 1062 ... 390
Bhagela Kuer v. Abdul Rahman, 40 Ind Cas 79; 1 P L J 472n ... 294
Bhagwan Din v. Mani Ram, 5 O C 225 ... 677
Bhagwan Singh v. Bhagwan Singh, 21 A 412 (P. C.); 1 Bom L R 311; 3 C W N 454; 28 I A 153; 7 Sar P C J 476; 9 Ind Dec (N. S.) 971 ... 620
Bhagwant v. Kedari, 25 B 202 at p 209; 2 Bom L R 986 ... 62
Bhagwant Govind v. Kondi, 14 B 279; 7 Ind Dec (N S.) 645 ... 763
Bhagwati v. Banwari Lal, 1 Ind Cas 416; 31 A 82 (F. B.); 5 M L T 185; 6 A L J 71 ... 367
Bhai Bhagat Singh v. Harnam Singh, 49 P R 1892 725, 736
Bhaiaji Thakur v. Jharula Das, 24 Ind Cas 501; 42 C 244; 18 C W N 1029; 27 M L J 100; 1 L W 549; 16 M L T 210; (1914) M W N 636; 12 A L J 1176; 20 C L J 360; 16 Bom L R 845 (P. C.) ... 65
Bhairab Chandra Barua v. Emperor, 53 Ind Cas 695; 46 C 807; 29 C L J 318; 23 C W N 484; 20 Cr L J 794 ... 42
Bhaishankar v. Wadia, 2 Bom L R 3 ... 155
Bhaishankar Nanabhai v. Municipal Corporation of Bombay, 31 B 604; 9 Bom L R 417 ... 251
Bhajahari Saha Banikya v. Behary Lal Basak, 33 C 881 at p 886; 4 C L J 162 63, 191
Bhargava and Co. v Jagan Nath Bhagwan Dass, 51 Ind Cas 331; 41 A 602; 17 A L J 718; 1 U P L R (A) 120 ... 681
Bhausing Ragho v. Chaganiram Harchand, 45 Ind Cas 552; 42 B 363; 20 Bom L R 348 ... 717
Bhawandas Feroomal v. Menghraj, 45 Ind Cas 324; 11 S L R 120 ... 608
Bhawani Koer v. Mathura Prasad, 7 C L J 1 at p 20 ... 869

B—contd.

Page.

Bhawani Kumar v. Mathura Prasad Singh, 16 Ind Cas 210; 40 C 89; 16 C W N 985; 23 M L J 211; 12 M L T 352; (1912) M W N 244; 14 Bom L R 1046; 16 C L J 606; 39 I A 228 (P. C.) ... 870
Bhikabhai Muljibhai v. Panachand Odhavji, 52 Ind Cas 682; 43 B 707; 21 Bom L R 770 ... 948
Bhikumber Singh v. Becharam Sircar, 15 C 204; 7 Ind Dec (N. S.) 761 ... 144
Bhimanagowd v. Eswaragowd, 49 Ind Cas 189; 9 L W 79; (1918) M W N 929; 25 M L T 140 ... 234
Bhoba Tarini Debya v. Peary Lall Sanyal, 24 C 646 at p 658; 1 C W N 578; 12 Ind Dec (N. S.) 1160 ... 309
Bhola Roy v. Jung Bahadur Singh, 22 Ind Cas 798; 19 C L J 5 at p 7 ... 964
Bholi v. Man Singh, 86 P R 1908; 146 P W R 1908 ... 504
Bhoobun Moyee Debia v. Ram Kishore Acharji Chowdhury, 10 M I A 279; 3 W R P C 15; 1 Suth P C J 574; 2 Sar P C J 111; 19 E R 978 ... 611
Bhuban Ram v. Bibhuti Bhusan Biswas, 47 Ind Cas 287; 46 C 515; 22 C W N 1062; 29 C L J 262; 19 Cr L J 915 ... 145
Bhubaneswar Prasad Singh v. Tilakdhari Lall, 49 Ind Cas 617; 4 P L J 135; (1919) Pat 75 ... 576
Bhupa v. Kori Mal, 30 P R 1893 note ... 745
Bhupendra Nath Basu v. Ranajit Singh, 20 Ind Cas 676; 41 C 384 ... 251
Bhurey v. Vishwanath, 2 N L K 170 ... 420
Bibi Sahodra v. Rai Jang Bahadur, 8 C 224 (P. C.); 8 I A 210; 4 Sar P C J 294; 6 Ind Jur 108; 4 Ind Dec (N. S.) 143 ... 309
Bibi Sodhan v. Harsa Singh, 34 Ind Cas 585; 51 P R 1916; 138 P W R 1916; 155 P L R 1916 ... 125
Bibijan Bibi v. Sashi Bewah, 31 C 863; 8 C W N 684 ... 869
Bijoy Gopal Mukerji v. Krishna Mahishi Debi, 34 C 329 (P. C.); 11 C W N 424; 5 C L J 334; 9 Bom L R 602; 2 M L J 133; 17 M L J 154; 4 A L J 329; 34 I A 87 (P. C.) 368, 957
Bijoy Kumar Addya v. Rama Nath Barman, 43 Ind Cas 715 ... 86
Bilas Kunwar v. Desraj Ranjit Singh, 30 Ind Cas 299; 19 C W N 1207; 29 M L J 335; 2 L W 830; 18 M L T 248; 13 A L J 991; 17 Bom L R 1006; 37 A 557; 22 C L J 516; (1915) M W N 757; 42 I A 202 (P. C.) ... 313
Bindeshri Naik v. Ganga Saran Sahu, 14 A 164; A W N (1892) 13; 7 Ind Dec (N. S.) 469 ... 799
Bishan Dial v. Ghazi-ud-din, 23 A 175; A W N (1901) 41 ... 720
Bisseshur Sanamat v. Jasoda Lal Chowdhry, 19 Ind Cas 391; 40 C 704; 17 C W N 622 ... 791
Bissessur Lal Sahoo v. Maharaja Lachmessur Singh, 6 I A 233; 5 C L R 477 (P. C.) ... 637
Blanckenhagen v. Blundell, (1819) 106 E R 418; 2 B & Ald 417 ... 944
Bleriot Manufacturing Aircraft Company, Limited, *In re*, (1916) 32 T L R 253 ... 525
Bollapragada Ramamurthy v. Thammanna Gopayya, 35 Ind Cas 575; 40 M 701; 4 L W 48; 20 M L T 129; 31 M L J 231 ... 603

K. UNIVERSITY
Accession No 75428

B—contd.

Page.

Bombay Burmah Trading Corporation Limited v. F. Yorke Smith, 17 B 197; 9 Ind Dec (N.S.) 129 ... 810
Bombay Cotten Manufacturing Co. v. Motilal, 29 Ind Cas 229; 39 B 386; 42 I A 110; 19 C W N 917; 17 M L T 408; 28 M L J 593; 21 C L J 528; 17 Bom L R 455; 2 L W 521; (1915) M W N 788 (P. C.) ... 820
Bommadevara Venkata Narasimha Naidu v. Rani Venkatappayya, 54 Ind Cas 647; 37 M L J 591 ... 109
Booth v. Clive, (1851) 20 L J C P 151; 10 C B 827; 2 L M & P 283; 15 Jur 563; 84 R R 765; 138 E R 327 ... 575
Born v. Turner, (1900) 2 Ch 211 at p 217; 69 L J Ch 593; 83 L T 148; 48 W R 697 ... 19
Boughton v. Knight, (1873) 3 P & D 64; 42 L J P 25; 28 L T 562 ... 817
Bowman v. Bowman, (1840-44) 2 Moo & Rob 501 ... 819
Brahmanath v. Sundar Nath, 51 Ind Cas 170, 17 A L J 434 at p 442; 20 Cr L J 410 ... 401
Braithwaite v. Foreign Hardwood Co, (1905) 2 K B 543; 47 L J K B 683; 92 L T 637; 10 Com Cas 189; 10 Asp M C 52; 21 T L R 413 ... 516
Brajasunder Deb v. Sarat Kamari, 38 Ind Cas 791; 2 P L J 55 (1917) Pat 67; 3 P L W 202 ... 284
Bright v. Bright, 4 Ind Cas 419; 36 C 964 ... 934
Brij Lal v. Ram Rattan, 17 Ind Cas 581; 268 P W R 1912 ... 72
Brij Narain Rai v. Mangla Prasad, 50 Ind Cas 101; 41 A 235; 17 A L J 249; 1 U P L R (A) 49 798
Brij Nath v. Jita, 139 P R 1894 ... 886
Brindaban Chander Das v. Ishaquddin Chowdhury, 4 Ind Cas 67; 13 C W N 550; 10 Cr L J 492 ... 371
Brindavana v. Radhamoni, 12 M 72; 4 Ind Dec (N. S.) 399 ... 631
Brocklesby v. Temperance Permanent Building Society, (1895) A C 173; 64 L J Ch 473; 11 R 159; 72 L T 477; 43 W R 606; 59 J P 676 ... 601
Brohmo Dutt v. Dharmo Das Ghose, 26 C 381; 3 C W N 468; 13 Ind Dec (N S.) 346 ... 395
Brojendra Kumar Das v. Gobinda Mohan Das, 34 Ind Cas 786; 20 C W N 752 ... 234
Brown v. Fisher, (1891) 63 L T 465 ... 537
Brown v. McLachlan, (1872) 5 P C 443 at p 450; 42 L J P C 18; 21 W R 277; 9 Moo P C (N. S.) 384; 17 E R 559 ... 150
Buddha Singh v. Laltu Singh, 30 Ind Cas 529; 37 A 604; 29 M L J 434; 2 L W 897; 13 A L J 1007; 18 M L T 409; 17 Bom L R 1022; 20 C W N 1; 22 C L J 481; (1915) M W N 772; 42 I A 208 (P. C.) ... 690
Budesab v. Hanmanta, 21 B 509; 11 Ind Dec (N. S.) 341 ... 718
Budh Singh v. Parbati, 29 A 652; 4 A L J 556; A W N (1907) 231 ... 894
Budh Singh Doodhooria v. Gunesh Chunder Sen, 12 B L R 317 (P. C.); 19 W R 356; 3 Sar P C J 253 ... 776
Bugga v. Emperor, 56 Ind Cas 410; 47 I A 128; (1920) M W N 326; 2 U P L R (P. C 59; 24 C W N 650; 18 A L J 455; 22 Bom L R 609; 39 M L J 1; 12 L W 296; 1 L 328; 21 Cr L J 456 (P. C.) ... 641

B—concld.

Page.

Buhuns Kowur v. Lalla Buhooree Lal, 14 M I A 496; 18 W R 157; 13 B L R 159; 3 Sar P C J 69, 20 E R 871 ... 720
Bulli Coal Mining Company v. Osborne, (1899) A C 351; 68 L J P C 49; 80 L T 430; 47 W R 545; 15 T L R 257 ... 11
Burdett v. Thompson, (1873) 3 P & D 72n ... 817
Burland v. Earle, (1902) A C 83; 71 L J P C 1; 50 W R 241; 85 L T 553; 18 T L R 4; 9 Manson 17 ... 532
Burling v. Harley, (1858) 3 H & N 271; 27 L J Ex 258; 4 Jur (N. S.) 789; 117 R R 684; 157 E R 473 ... 575

C

Cadge, *In the goods of*, (1868) 1 P & D 543; 37 L J P 15; 17 L T 484; 16 W R 406 ... 823
Caerlson Tinplate Company v. Hughes, (1801) 60 L J Q B 640; 65 L T 118 ... 76
Calcott and Flvin's Contract, *In re*, (1898) 2 Ch 460; 67 L J Ch 553; 78 L T 826; 46 W R 673; 5 Manson 208 ... 510
Candas Narrondas, *In the matter of*, 11 B 138 at p 143; 6 Ind Dec (N. S) 91 ... 62
Capital Fire Insurance Association, *In re*, (1882) 21 Ch D 209; 52 L J Ch 20; 47 L T 123; 30 W R 941 ... 543
Carron Iron Co. v. Maclaren, (1855) 5 H L C 416; 24 L J Ch 620; 3 W R 597; 101 R R 229; 10 E R 961 ... 445
Casborne v. Searfe, (1737) 1 Atk 603; 2 Wh & T L C (7th Ed.) 6; 26 E R 377 ... 480
Chadha v. Emperor, 36 Ind Cas 878; 14 A L J 851; 18 Cr L J 46 ... 370
Chain Sukh Ram v. Parbati, 14 A 53 at p 57; A W N (1891) 222; 7 Ind Dec (N. S,) 406 ... 621
Chakrapani Nandi v. Srimati Gayamoni Dasi, 48 Ind Cas 228; 5 P L W 219; (1918) Pat 278 ... 276
Chalavadi Kotiah v. Poloori Alimelammah, 31 M 71; 18 M L J 46; 3 M L T 329 ... 637
Chanan Singh v. Emperor, 56 Ind Cas 774; 1 L 218; 108 P L R 1920; 21 Cr L J 518 ... 560
Chandan v. Kallu, 9 Ind Cas 274; 8 A L J 45; 12 Cr L J 45 ... 193
Chandi Charan Dey, *In re*, 12 C W N 842 ... 323
Chandi Charan Nath v. Somla Bibi, 44 Ind Cas 254; 22 C W N 179; 28 C L J 91 ... 749
Chandi Pershad v. Abdur Rahman, 22 C 131; 11 Ind Cas (N. S.) 89 ... 145
Chandra Kanta Kanjilal v. Emperor, 36 Ind Cas 144; 20 C W N 981; 17 Cr L J 464 ... 406
Chandra Kumar Das v. Emperor, 7 C W N 176 ... 199
Channing Arnold v. Emperor, 23 Ind Cas 661; 41 C 1023 at p 1048; 41 I A 149 at p 157; 20 C L J 161 at p 165; 18 C W N 785; 26 M L J 621; 15 Cr L J 309; 1 L W 461; 7 Bur L T 167; (1914) M W N 506; 16 M L T 79; 12 A L J 1042; 16 Bom L R 514, 8 L B R 16 (P. C) ... 147
Chaurasi v. Rama Shankar, 23 A 266; A W N (1905) 278; 3 A L J 13; 3 Cr L J 52 ... 615
Chedi Mala v. King-Emperor, 8 C W N 349; 1 Cr L J 205 ... 133

C—contd.

Page.

Cheruthazhath Abdulla Haji v. Cheriyandi Ibrayan Kutti, 50 Ind Cas 959 at p 962 ... 948
Chhannu Lal v. Asharfi Lal, 29 A 649; 4 A L J 535; A W N (1907) 220 ... 173
Chhanubhai v. Dahyabhai, 57 Ind Cas 530; 22 Bom L R 774; 44 B 598 ... 212
Chidambaram Pillai, *In re*, 1 Ind Cas 36; 32 M 3; 5 M L T 16; 9 Cr L J 130 ... 42
Chidambaram Pillai v. Veerappa Chettiar, 43 Ind Cas 865; 6 L W 640; (1917) M W N 744; 22 M L T 380 ... 287
Chidambaranatha Gounden v. Sellappa Reddi, 54 Ind Cas 524; 10 L W 620; 27 M L T 37 ... 233
Chinna Krishna Reddi v. Dorasami Reddi 20 M 19; 7 Ind Dec (N. S.) 13 ... 418
Chinna Venkatasami Naicken v. Venkatasami Naicken, 51 Ind Cas 827; 42 M 625; 36 M L J 291; (1919) M W N 221; 25 M L T 397 ... 60
Chinnaramanuja Ayyangar v. Padmanabha Pillaiyan, 19 M 471; 6 M L J 115; 6 Ind Dec (N.S.) 1033 ... 600
Chintala Ragava Reddi v. Chintala Krishna Reddi, 16 Ind Cas 201; 12 M L T 206; (1912) M W N 810; 23 M L J 193 ... 533
Chintaman v. Chintaman Bajaji, 22 B 475; 11 Ind Dec (N. S.) 899 ... 716
Chintamanrav Mehendale v. Kashinath, 14 B 320 7 Ind Dec (N, S.) 674 ... 390
Chintamoni Jena v. Jagannath Ramanuja Das, 28 Ind Cas 651; 19 C W N 123; 16 Cr L J 315 ... 614
Chintamony Dassi v. Ragoonath Sahoo, 22 C 981; 11 Ind Dec (N. S.) 651 ... 676
Chiodith v. Tulsi Singh, 18 Ind Cas 130; 40 C 428; 17 C W N 167 ... 761
Chon Lal Dass v. Anant Pershad Misser, 25 C 233; 13 Ind Dec (N. S.) 157 ... 145
Chokkalingam Chetty v. Annamalai Chetty, 34 Ind Cas 417 ... 364
Chotey Narain Singh v. Ratan Koer, 22 C 519 (P. C.); 22 I A 12; 6 Sar P C 564; 11 Ind Dec (N. S.) 346 ... 820
Chotun Bebee v. Ameer Chund, 6 W R 105; 1 Ind Jur (N. S.) 317 ... 888
Christian v. Tekaitni Narbada Koeri, 27 Ind Cas 471; 19 C W N 796; 20 C L J 527 ... 405
Christopherson v. Burton, (1848) 3 Ex 160; 18 L J Ex 60; 77 R R 572; 154 E R 798 ... 953
Chunder Sikhur Bundopadhya v. Obhoy Churn Bagchi, 6 C 8 (F. B.); 3 Ind. Dec (N. S.) 6 ... 575
Clarke v. Brojendra Kishore Roy, 16 Ind Cas 501; 39 C 953 at p 966; (1912) M. W. N 760; 12 M L T 171; 10 A L J 193; 16 C L J 231; 16 C W N 865; 23 M L J 32; 14 Bom L R 717; 13 Cr. L J 693; 39 I A 163 (P. C.) ... 138
Clough v. London and North-Western Railway Co., (1872) 7 Ex 26; 41 L J Ex 17; 25 L T 708; 20 W R 189 ... 948
Coghlan v. Cumberland, (1898) 1 Ch 704; 67 L J Ch 402; 78 L T 540 ... 819
Cohen, *In re*, Trustee, *Ex parte*, (1905) 2 K B 704; 74 L J K B 864; 93 L T 659; 54 W R 83; 12 Manson 358; 21 T L R 725 ... 510
Coles v. Coles, (1866) 1 P & D 70 at p 71; 35 L J P 40; 13 L T 608; 14 W R 290 ... 819

C—concld.

Page.

Collector of Madura v. Moottoo Ramalinga Sathupathy, 12 M I A 397; 10 W R P C 17; 1 B L R P C 1; 2 Suth P C J 135; 2 Sar P C J 361; 20 E R 389; 3 Mad Jur 298; 1 Ind Dec (N. S.) 1 ... 610
Collector of Masulipatam v. Cavaly Vencata Narrainapah, 8 M I A 529; 2 W R P C 61; 1 Suth P C J 476; 1 Sar P C J 820; 19 E R 631 ... 611
Colquhoun v. Brooks, (1888) 21 Q B D 52 at p 65; 57 L J Q B 439; 59 L T 661; 36 W R 657; 52 J P 615 ... 482
Colquhoun v. Brooks, (1889) 14 A C 493 at pp 495; 502; 59 L J Q B 53; 61 L T 518; 38 W R 282; 54 J P 277 ... 482
Coltness Iron Company v. Black, (1881) 6 A C 315; 51 L J Q B 626; 45 L 145; 29 W R 717; 46 J P 20 ... 483
Combe's case, (1606) Moo K B 760; 72 E R 888 ... 818
Continental Tyre Rubber Co. v. Daimler Co., (1915) 1 K B 893; 84 L J K B 926; 112 L T 324; 20 Com Cas 208; 59 S J 232; 31 T L R 159 ... 157
Converse v. Converse, (1849) 21 Ver 68; 52 Am Dec 58 ... 817
Cooke v. Charles A. Vogeler Co., (1901) A C 102 70 L J Q B 181; 84 L T 10; 17 T L R 153; 8 Manson 113 ... 986
Cooke v. Gill, (1873) 8 C P 107; 42 L J C P 98; 28 L T 32; 21 W R 334 ... 540
Cooper v. Bockett, (1844) 4 Moo P C 419; 10 Jur 931; 59 R R 371; 13 E R 365 ... 822
Coulson v. Allison, (1860) 2 D F & J 526; 3 L T (N S) 763; 129 R R 176; 45 E R 723 ... 1004
Cree v. St Pancras Vestry, (1899) 1 Q B 693; 68 L J Q B 389; 80 L T 338 ... 574
Crowdy v. Reilly, 18 Ind Cas 737; 17 C W N 554; 17 C L J 105 ... 144
Crown v. Gholam Fatima, 32 P R 1870 Cr ... 33
Crown v. Kadu, 31 P R 1904 Cr; 176 P L R 1905; 1 Cr L J 1082 ... 560
Crown v. Neki Ram, 23 P W R 1908 Cr; 8 Cr L J 455 ... 855

D

Dada Honaji v. Babaji Jogushet, 2 B H C R 36 ... 152
Dal Singh v. Emperor, 39 Ind Cas 311; 44 I A 187; 15 A L J 475; 1 P L W 661; 19 Bom L R 510; 21 C W N 818; 26 C L J 13; 6 L W 71; 22 M L T 31; (1917) M W N 522; 18 Cr L J 471; 33 M L J 555; 44 C 876; 11 Bur L T 54; 13 N L R 100; 86 L J P C 140; 116 L T 621; 61 S J 351; 33 T L R 249 (P. C.) ... 927
Dalchand v Ganga Singh, 15 C P L R 123 ... 462
Dammar Singh v. Pirbhu Singh, 29 A 290; 4 A L J 155; A W N (1907) 70 ... 842
Damodhar Vithal v. Damodhar Hari, 1 B H C R 182 ... 603
Darshan Khan v. Sohaura Mal, 124 P R 1907; 3 P L R 1907; 48 P W R 1907 ... 746
Datoobhoy v. Vallu, 1 Bom L R 828 ... 501
Dattatraya Vishnu v. Vishnu Narayan, 12 Ind Cas 949; 36 B 68; 13 Bom L R 1161 ... 390

D—contd.

Page.

Davis v. Shepherd, (1866) 1 Ch 316; 35 L J Ch 581; 15 L T 122 ... 405
Dawal Piranshah v. Dharma Rajaram, 41 Ind Cas 273; 41 B 550; 19 Bom L R 622 ... 353
Dawan Singh v. Mahip Singh, 10 A 425; A W N (1888) 157; 6 Ind Dec (N. S.) 286 ... 144
Dawkins v. Rokeby, (1875) 7 H L 744; 45 L J Q B 8; 33 L T 196; 23 W R 931 ... 157
Deb Narain Dutt v. Ram Sadhan Mandal, 20 Ind Cas 630; 41 C 137 at p 146; 18 C L J 603; 17 C W N 1143 ... 152
Deb Nath Ghose v. Pachoo Mollah, 6 W R Civ Ref 8 ... 596
Debendra Nath Sen v. Mirza Abdul Samed Seroji, 1 Ind Cas 264; 10 C L J 150 ... 513
Debi Prosad Chowdhry v. Golap Bhagat, 19 Ind Cas 273; 40 C 721 (F. B.) at pp 766, 783; 17 C W N 701; 17 C L J 499 ... 611
Debi Sahai v. Ramji Lal, 46 Ind Cas 460; 56 P R 1918; 127 P W R 1918 ... 813
Debiruddi v. Abdur Rahim, 17 C 196; 8 Ind Dec (N. S.) 669 ... 317
Deen Dyal Paramanick v. Radha Kishoree Debee, 17 W R 415 at p 416; 8 B L R 536 ... 315
Dehu Ghunya v. Srimati, Barabihira Debi, 38 Ind Cas 543; 2 P L J 15 ... 293
Delhi and London Bank, Limited v. Orchard, 3 C 47 (P. C.); 4 I A 127; 3 Sar P C J 721; 3 Suth P C J 423; 7 P R 1878; 1 Ind Jur 457; 1 Ind Dec (N. S.) 622 ... 791
Den v. Vancleve, (1819) 2 Southard N J Law 660 ... 818
Deochand v. Moti, 1 N L R 178 ... 421
Deokinandan v. Sri Ram, 12 A 234 at p 236; 6 Ind Dec (N. S.) 898 ... 746
Deonandan Prasad Singh v. Ramdhari Chowdhury, 39 Ind Cas 958; 44 C 675; 32 M L J 459; 1 P L W 527; 15 A L J 375; 21 C W N 786; 25 C L J 573; 19 Bom L R 437; 6 L W 65; (1917) M W N 470 & 811; 22 M L T 196; 44 I A 80 (P. C.) ... 746
Deputy Legal Remembrancer v. Mir Sarwar Jan, 6 C W N 845 ... 841
Deputy Legal Remembrancer v. Upendra Kumar Ghose, 12 C W N 140 at p 143; 6 Cr L J 434 371
Derby Corporation v. Derbyshire County Council, (1897) A C 550; 66 L J Q B 701; 77 L T 107; 46 W R 48; 62 J P 4 ... 45
Desaiappa Khalilappa Desai v. Dundappa Malkappa, 55 Ind Cas 329; 22 Bom L R 76; 44 B 227 ... 748
Desraj Singh v. Raram Khan, 19 A 71; A W N (1896) 188; 9 Ind Dec (N. S.) 46 ... 637
Dhania v. F. L. Clifford, 13 B 376; 7 Ind Dec (N. S.) 250 ... 37
Dhanmull v. Ram Chunder Ghose, 24 C 265; 1 C W N 270; 12 Ind Dec (N. S.) 844 ... 394
Dhanput Singh v. Chatterput Singh, 20 C 513; 10 Ind Dec (N. S.) 348 ... 404
Dhanraj Singh v. Lakhrani Kuar, 35 Ind Cas 601; 14 A L J 709; 38 A 509 ... 632
Dhondi v. Lakshman, 19 B 553; 10 Ind Dec (N. S.) 369 ... 577
Dhondo Ramchandra Kulkarni v. Bhikoji Gopal, 27 Ind Cas 1005; 17 Bom L R 144 at p 152; 39 B 138 ... 348

D—contd.

Page.

Dhora Kairi v. Ram Jewan Kairi, 20 C 101; 10 Ind Dec (N. S.) 68 ... 317
Dhuipallia Buchayya v. Kuppa Venkatakrishnayya, 58 Ind Cas 797; 36 M L J 296 ... 390
Dhurmo Dass Ghose v. Brahmo Dutt, 25 C 616; 2 C W N 330; 13 Ind Dec (N. S.) 405 ... 395
Diljan Mihha Bibi v. Hemanta Kumar Roy, 29 Ind Cas 395; 19 C W N 758 W 576
Dillet, *In re*, (1887) 12 A C 459; 56 L T 615; 36 W R 81; 16 Cox C C 241 ... 927
Dina Nath v. Emperor, 18 Ind Cas 665; 35 A 173 at p 176; 11 A L J 196; 14 Cr L J 105 ... 849
Dinanath Chanda v. Nawabali, 49 Ind Cas 984 964
Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani, 29 C 187 (P. C.); 29 I A 24; 6 C W N 386 12 M L J 83; 4 Bom L R 167; 8 Sar P C J 224 ... 964
Dinonath Mullick v. Girji Prosonno Mookerjee, 12 C 133; 6 Ind Dec (N. S.) 91 ... 414
Dnyanoba v. Radhabai, (1894) P J 22 ... 800
Dobson and Barlow Limited v. Bengal Spinning and Weaving Company, 21 B 126 at p 133; 11 Ind Dec (N. S.) 86 ... 540
Doleman & Sons v. Osecit Corporation, (1912) 3 K B 257; 81 L J K B 1092; 107 L T 581; 16 J P 457; 10 L G R 915 60, 439
Doobee Singh v. Jowkee Ram, 3 Agra H C R 381; Agra F B Ed 1874, 172 ... 633
Doorga Churn Dhur v. Kally Coomar Sein, 7 C 145; 8 C L R 375; 3 Ind Dec (N. S.) 643 ... 319
Doraisami Padayachi v. Vaithilinga Padayachi, 41 Ind Cas 581; 33 M L J 46 ... 472
Doraisami Sirumadan v. Nondisami Saluvan, 21 Ind Cas 410; 38 M 118; 25 M L J 405; 14 M L T 401 663, 760
Dosabhai Bezanji v. Special Officer, Salsette Building Sites, 16 Ind Cas 549; 36 B 599; 14 Bom L R 592 ... 430
Doulat Koer v. Rameswari Koeri, 26 C 625; 3 C W N 461; 13 Ind Dec (N. S.) 1002 ... 645
Dubey Sahai v. Ganeshi, 1 A 34 at p 36 (F. B.); 1 Ind Dec (N. S.) 23 ... 147
Dugappa Chetti v. Vidhia Purna Tirthasami, 6 M 263; 2 Ind Dec (N. S.) 462 ... 313
Dulaney v Merry & Son, (1901) 1 Q B 539; 70 L J K B 377; 84 L T 156; 49 W R 331; 8 Manson 152; 17 T L R 253 ... 986
Duni Chand v. Padman, 19 Ind Cas 4[illegible]; 2 P R 1913; 30 P W R 1913; 71 P L R 1913 ... 84
Durga Parshad v. Hazari Singh, 11 Ind Cas 116; 33 A 799; 8 A L J 1025 ... 640
Durga Prashad Singh v. Brojo Nath Bose, 15 Ind Cas 219; 39 C 696; 16 C W N 482; (1912) M W N 425; 11 M L T 337; 9 A L J 462; 15 C L J 461; 14 Bom L R 445; 23 M L J 26; 39 I A 133 (P. C.) ... 403
Durga Prashad Singh v. Trebini Singh, 48 Ind Cas 527; 45 I A 251; 24 M L T 407; 28 C L J 508; 9 L W 60; 21 Bom L R 539; 40 C 362 (P. C.) ... 65
Durgi Nikarini v. Goberdhan Bose, 24 Ind Cas 183; 19 C W N 525; 20 C L J 448 ... 789
Dwarka Nath Sarkar v. Haji Mahomed Akbar, 24 Ind Cas 307; 27 M L J 192; 18 C W N 1025 1 L W 667; (1914) M W N 876; 16 M L T 521; 21 C L J 1; 17 Bom L R 5 (P. C.) ... 502

D—concld.

Page.

Dwarkanath Roy v. Ram Chand, 26 C 428 (F. B.); 3 C W N 266; 13 Ind Dec (N. S.) 876 ... 317
Dwijendra Narain Roy v. Purnendu Narain Roy 5 Ind Cas 171; 11 C L J 189 ... 976
Dwijendra Nath v. Golok Nath Sarma, 28 Ind Cas 574; 21 C L J 287; 19 C W N 747 ... 666

E

Egerton v. Brownlow, (1853) 4 H L C 1 at p 123; 23 L J Ch 348; 18 Jur 71; 8 St Tr (N. S.) 194; 10 E R 359; 94 R R 1 ... 157
Ekabar Sheikh v. Hara Bewah, 8 Ind Cas 666; 15 C W N 335; 13 C L J 1 ... 317
Eknath Ranoji v. Ranoji Bawaji, 10 Ind Cas 813; 35 B 261; 13 Bom L R 237 ... 212
Emperor v. Abani Bhushan Chuckerbutti, 8 Ind Cas 721; 37 C 845; 11 Cr L J 702 ... 560
——— v. Abbas, 12 Ind Cas 832; 39 C 150; 14 C L J 429; 16 C W N 83; 12 Cr L J 569 ... 404
——— v. Balu Saluji, 1 Ind Cas 387; 33 B 25; 10 Bom L R 1126; 8 Cr L J 409 ... 918
——— v. Bishen Das, 8 Ind Cas 116; 33 P R 1910 Cr; 57 P L R 1911; 12 Cr L J 50 ... 655
——— v. Chattar Singh, 7 P R 1904 Cr; 97 P L R 1904; 1 Cr L J 781 ... 926
——— v. Chedi, 28 A 212; A W N (1905) 258; 2 A L J 745; 2 Cr L J 809 ... 384
——— v. Dhondu, 1 Ind Cas 378; 33 B 22; 6 Bom L R 255; 1 Cr L J 263 ... 918
——— v. Ganesh Lal, 27 A 258; A W N (1904) 229; 1 Cr L J 896; 1 A L J 595 ... 412
——— v. Ganga Prasad, 29 A 685; 4 A L J 605; 6 Cr L J 197; A W N (1907) 235 ... 144
——— v. Harischandra, 10 Bom L R 201; 7 Cr L J 194 ... 132
——— v. Heman Gope, 58 Ind Cas 459; 1 P L T 349; 21 Cr L J 779 ... 41
——— v. Ibrahim Khan, 7 Ind Cas 886; 33 A 36; 7 A L J 837; 11 Cr L J 442 ... 372
——— v. Kathia, 20 B 611; 8 Bom L R 740; 4 Cr L J 346 ... 160
——— v. Mian Jan, A W N (1906) 22; 3 Cr L J 207; 28 A 313 ... 208
——— v. Mohammadbuksh Karimbuksh 8 Bom L R 507 at p 512; 4 Cr L J 49 ... 327
——— v. Nanhua, 23 Ind Cas 722; 36 A 315; 12 A L J 467; 15 Cr L J 354 ... 371
——— v. Purshottamdas, 9 Bom L R 1287; 6 Cr L J 387 ... 155
——— v. Raju Ahilaji, 9 Bom L R 730; 6 Cr L J 74 ... 130
——— v. Ram Baran Singh, 28 A 406; A W N (1906) 61; 3 Cr L J 323 ... 404
——— v. Ruri, 48 Ind Cas 493; 5 P R 1919 Cr; 20 Cr L J 3; 13 P W R 1919 Cr ... 33
——— v. Savalya, 9 Bom L R 356; 5 Cr L J 332 ... 130
——— v. Shib Singh, 25 A 137; A W N (1902) 197 ... 134
——— v. Sonalal, 20 Ind Cas 613; 37 B 658; 15 Bom L R 694; 14 Cr L J 453 ... 208
——— v. Sultan Singh, 4 Ind Cas 24; 31 A 606; 6 A L J 882; 10 Cr L J 473 ... 921

E—concld.

Page.

Emperor v. Sumar, 48 Ind Cas 980; 12 S L R 76; 20 Cr L J 100 ... 553
——— v. Syed Sajjad Husain, A W N (1906) 201; 3 A L J 825; 4 Cr L J 40 ... 555
Empress v. Jadu, A W N (1886) 260 ... 852
——— v. Nobin Chandra Banikya, 8 C 560 at p 565; 10 C L R 369; 4 Shome L R 232; 4 Ind Dec (N. S.) 360 ... 327
Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri, 7 M 3 at p 10 (F. B.); 2 Ind Dec (N. S. 585 ... 622
Eshan Chunder Roy v. Khwajah Assanoollah, 16 W R 79; 8 B L R 537 note ... 315
Eshenchunder Singh v. Shamachurn Bhutto, 11 M I A 7; 6 W R P C 57; 2 Ind Jur (N. S.) 87; 2 Sar P C J 209; 20 E R 3 ... 769
Esubai v. Damodar Ishvardas, 16 B 552; 8 Ind Dec (N. S.) 847 ... 427
Eusuffzeman Sarkar v. Sanchia Lal Nahata, 34 Ind Cas 606; 43 C 207; 20 C W N 27; 23 C L J 390 ... 400

F

Fahamidanissa Begum v. Secretary of State, 14 C 67 (F. B.); 7 Ind Dec (N. S.) 46 ... 303
Fakira Appaya v. Emperor, 33 Ind Cas 309; 17 Bom L R 1059; 40 B 220; 17 Cr L J 133 ... 328
Fakirapa v. Pandurangapa, 6 B 7; 3 Ind Dec (N. S.) 461 ... 684
Fardunji v. Jamsedji, 5 Bom L R 705; 28 B 1 ... 160, 756
Farhall v. Farhall, (1872) 7 Ch 123; 41 L J Ch 146, 25 L T 685; 20 W R 157 ... 289
Farrar v. Winterton, (1842) 5 Beav 1; 6 Jur 204; 59 R R 392; 49 E R 476 ... 796
Farsand Ali v. Hanuman Prasad, 19 A 64; A W (1896) 177; 9 Ind Dec (N. S.) 41 ... 378
Fanjdar Thakur v Kasi Choudhuri, 27 Ind Cas 186; 42 C 612 at p 616; 19 C W N 184; 21 C L J 53; 16 Cr L J 122 ... 40
Faulkner v. Brine, (1858) 1 F & F 254 ... 819
Fayz Dhali v. Aftabuddin Sirdar, 6 C W N 575 ... 317
Fazil Howladar v. Krishna Bundhoo Roy, 25 C 580; 2 C W N 118; 13 Ind Dec (N. S.) 383 ... 793
Firm of Ramakrishna Iyer v. Official Receiver Tinnevelly, 40 Ind Cas 170; 5 L W 507; 32 M L J 520 ... 508
Fitzpatrick v. Wallace, 11 W R 231 ... 596
Foolibai v. Rampartab Samrathrai, 17 B 466 at p 467; 9 Ind Dec (N. S.) 303 ... 15
Formby Brothers v. Formby, (1910) 102 L T 116; 54 S J 269 ... 600
Framjee v. McGregor, 27 P R 1902; 81 P L R 1902 ... 970
Francesco Giordano v. Flora Giordano, 20 Ind Cas 512; 40 C 215; 17 C W N 491 ... 934
Fulchand v. Bai Ichha, 12 B 98; 6 Ind Dec (N. S.) 551 ... 385
Fulton v. Andrew, (1875) 7 H L 448; 44 L J P 17; 32 L T 209; 23 W R 566 ... 537

Page.

G

Gajanan Vinayak v. Waman Shamrao, 8 Ind Cas 189; 12 Bom L R 881 ... 791
Ganda Mal v. Radhi, 57 P R 1886 ... 257
Gandharp Singh v. Sahib Singh, 7 A 184; A W N (1884) 323; 4 Ind Dec (N. S.) 394 ... 604
Ganesh v. Babu Ram, 26 Ind Cas 427; 37 A 72; 13 A L J 9 ... 875
Ganesh v. Gyanu; 22 B 606; 11 Ind Dec (N. S.) 986 ... 670
Ganesh Lala v. Bapu, 21 B 198; 11 Ind Dec (N. S) 133 ... 395
Ganesha Row v. Tulja Ram Row, 19 Ind Cas 515; 40 I A 132 (P. C.); 17 C W N 765; 11 A L J 589; 18 C L J 1; 15 Bom L R 626; 14 M L T 1; (1913) M W N 575; 25 M L J 150; 36 M 295 ... 912
Ganga Dayal v, Mani Ram, 1 Ind Cas 824; 31 A 156; 6 A L J 62 ... 760
Ganga Ram v. Abdul Rahman, 28 P R 1907; 140 P W R 1907; 93 P L R 1908 ... 72
Ganga Sahai v. Kesri, 30 Ind Cas 265; 22 C L J 508; 9 C W N 1175; 18 M L T 203: 29 M L J 329, 2 L W 837; 13 A L J 999; 17 Bom L R 998; 37 A 545; (1915) M W N 713; 42 I A 177 (P. C.) ... 720
Ganga Sahai v. Lekhraj Singh, 9 A 253 at p 264; 5 Ind Dec (N. S.) 604 ... 611
Gangaji v. Sakharam, (1889) P J 156 ... 280
Ganno v. Beni, 43 Ind Cas 913; 14 N L R 82 ... 475
Gauri Shankar v. Ganga Ram, 52 Ind Cas 859; 77 P R 1919 ... 451
Gaya Prasad v. Bhagat Singh, 35 I A 189; 30 A 525; 10 Bom L R 1080; 4 M L T 204; 18 M L J 394 5 A L J 665; 14 Bur L R 3 8; 11 O C 371; 8 C L J 337; 12 C W N 10.7 (P. C.) ... 219
Gaya Singh v. Name Singh, 56 Ind Cas 983; 5 P L J 263; 1 P L T 701 ... 451
German Date Coffee Co., *In re*, (1882) 20 Ch D 169; 51 L J Ch 564; 46 L T 327; 30 W R 717 ... 514
Ghasi v. Queen-Empress, 13 P R 1888 Cr ... 384
Ghasi Ram v. Emperor, 49 Ind Cas 642 at p 645; (1919) Pat 98; 20 Cr L J 194 ... 375
Ghasiram v. Dhanraj, 5 C P L R 9 ... 456
Ghelabhai Gavrishankar v. Hargovan Ramji, 12 Ind Cas 928. 36 B 94 at p 104; 13 Bom L R 1171 ... 272
Ghellubhai v. Nandubai, 21 B 335 at p 341; 11 Ind Dec (N. S.) 227 ... 60
Ghulam Khan v. Muhammad Hassan, 29 C 167 at pp 182, 183 (P. C.); 29 I A 51; 12 M L J 77; 4 Bom L R 161; 6 C W N 226; 25 P R 1902; 8 Sar P C J 154 ... 55, 76, 756
Ghunsham Das v. Uma Pershad, 50 Ind Cas 2 4; 36 M L J 483; 17 A L J 410; 15 N L R 68; 21 Bom L R 472; 28 C W N 817; (1918) M W N 513; 10 L W 511 (P. C.) ... 948
Gill v. Gill, (1909) P 157; 78 L J P 60; 100 L T 861; 53 S J 359; 25 T L R 400 ... 819
Girdharilal Prayagdat v. Manikamma Narayanasami, 21 Ind Cas 50; 38 B 10; 15 Bom L R 805 ... 286
Giribala Dassi v. Pran Krishto Ghosh, 8 C W N 292 ... 145
Girish Chander Lahiri v. Sasi Sekhareswar Roy, 33 C 329 ... 800

Page.

G—contd.

Girish Chandra Chowdhury v. Kedar Chandra Roy, 27 C 472; 4 C W N 569; 14 Ind Dec (N. S.) 311 ... 337
Girja Rai v. Sadashiv, 37 Ind Cas 321; 12 N L R 113; 20 C W N 1085; 14 A L J 822; 20 M L T 78; (1916) 2 M W N 65; 18 Bom L R 621; 4 L W 114; 24 C L J 207; 31 M L J 455; 43 C 1031; 43 I A 151 (P. C.) ... 500
Glegg v. Bromley, (1912) 3 K B 474, 81 L J K B 1081; 106 L T 825 ... 949
Glyn v. Hawell, (1909) 1 Ch 666 at p 668; 78 L J Ch 39 ; 100 L T 324; 53 S J 269 ... 405
Gnanasambanda Pandara Sannadhi v. Velu Pandaram, 23 M 271 (P. C.); 2 Bom L R 597; 4 C W N 329; 27 I A 69; 10 M L J 29; 7 Sar P C J 671; 8 Ind Dec (N. S.) 591 65, 590
Gobind Chunder Moitra v. Abdul Sayed, 6 C 835; 8 C L R 217; 4 Shome L R 115; 3 Ind Dec (N. S.) 540 ... 645
Gobind Prasad, *In the matter of the petition of* 2 A 465 at p 467; 1 Ind Dec N. S.) 866 ... 851
Gobinda Chandra Ghose Biswas v. Nandadulal Sut, 45 Ind Cas 317; 27 C L J 523 at p 524 ... 894
Gokul Mandar v. Pudmanund Singh, 29 C 707 at p 715 (P. C.); 29 I A 196; 6 C W N 825; 4 Bom L R 793; 8 Sar P C J 323 ... 756
Golam Gaffar Mandal v. Goljan Bibi, 25 C 109; 13 Ind Dec (N. S.) 75 ... 52
Golap Jan v. Bhola Nath, 11 Ind Cas 311; 38 C 880; 15 C W N 917 ... 155
Goluck Chunder Mussant v. Gunga Narain Mussant, 20 W R 111 ... 186
Gooroo Pershad Roy v. Debee Pershad Tewaree, 6 W R 58 ... 570
Gopal Chetti v. Subbier, 26 M 604; 13 M L J 208 ... 676
Gopal Ganesh Abhyankar v. Ramchandra Sadashiv, 26 B 597; 4 Bom L R 325 ... 939
Gopal Purshotam v. Bai Divali, 18 B 241; 9 Ind Dec (N S.) 669 ... 775
Gopal Rao v. Chindu, 15 C P L R 29 ... 709
Gopalakrishna Kudva v. Bangle Narayana Kamthy, 45 Ind Cas 803: 34 M L J 517; 23 M L T 341; 7 L W 604; (1918) M W N 454 ... 974
Gopalayyan v Raghupatiayyan, 7 M H C R 250 at p 254 ... 622
Gopee Krishen Gossain v. W H Ryland, 9 W R 279 ... 575
Gopeshwar Pal v. Jiban Chandra, 24 Ind Cas 37; 41 C 1125; 18 C W N 804; 19 C L J 549 ... 792
Gopessur Dutt v. Bissessur Dutt, 13 Ind Cas 577; 16 C W N 265; 39 C 215 ... 820
Gopi Mohun Mullick v. Tara Moni Chowdhrani, 5 C 7; 4 C L R 309; 2 Shome L R 217; 2 Ind Dec (N. S.) 617 ... 35
Gopi Nath v Kashi Nath, 1 Ind Cas 35; 13 C W N 412; 9 C L J 934 ... 868
Gouri Dutt v. Gobind Singh, 53 Ind Cas 829; 1 P L T 44; 20 Cr L J 829 ... 376
Gouri Sahai v. Rukko, 3 A 45; 5 Ind Jur 486; 2 Ind Dec N. S.) 21 ... 125
Government of Bombay v. Ganga, 4 B 330; 5 Ind Jur 259; 2 Ind Dec (N. S.) 726 ... 33

G—concld.

Page.

Government of Eastern Bengal and Assam v. Seraj-ud-din (Emperor v. Hamid Ali), 5 Ind Cas 555; 37 C 24; 14 C W N 308; 12 Cr L J 178 ... 133
Governor of Bengal (Legal Remembrancer) v. Moti Lal Ghosh, 20 Ind Cas 81; 41 C 173 at p 177; 18 C L J 452; 14 Cr L J 321; 17 C W N 1253 ... 150
Grant v. Bangsi Deo, 15 W R 88; 6 B L R 652 ... 901
Great Western Railway v. Fisher, (1905) 1 Ch 316; 74 L J Ch 241; 92 L T 104; 53 W R 279 ... 19
Greene v. Delanney, 14 W R (Cr.) 27 ... 145
Greenwood v. Holquette, 12 B L R 42; 20 W R 467 ... 967
Gresham Life Assurance Society v. Bishop, (1902) A C 287; 71 L J K B 618; 66 J P 755, 50 W R 593; 86 L T 693; 18 T L R 626 ... 492
Gresham Life Assurance Society v. Styles, (1890) 25 Q B D 351 at pp 354; 355; 38 W R 696, 59 L J Q B 686 ... 484
Gresham Life Assurance Society v. Styles, (1892) A C 309 at p 315; 62 L J Q B 41; 67 L T 379; 41 W R 270; 56 J P 709 ... 492
Greville v. Tylee, (1851) 7 Moo P C 320; 83 R R 57; 13 E R 904 ... 822
Gujja Lal v. Fatteh Lal, 6 C 171 (F. B.); 6 C L R 439; 3 Shome L R 132; 3 Ind Dec (N. s.) 112 ... 737
Gulab Kunwar v. Thakur Das, 24 A 464; A W N (1902) 136 ... 676
Gulabrao v. Sitaram, 8 C P L R 11 ... 421
Gur Dayal v. Kaunsila, 5 A 367; A W N (1883) 65; 3 Ind Dec N. s) 315 ... 398
Gur Narain v. Gulzari Lal, 25 Ind Cas 917; 17 O C 318; 1 O. L J 503 ... 571
Gurbuksh Prosad v. Kali Prosad Narain Singh, 32 Ind Cas 167; 19 C W N 1322 ... 88
Gurmukh Singh v. Makhan Singh, 11 Ind Cas 846; 61 P R 19 1; 147 P W R 1911 ... 233
Gurupada Basapa v. Virbhadrapa Irsangapa, 7 B 459 at p 462; 4 Ind Dec (N. s) 309 ... 791

H

Habibullah v. Arman Dewan, 53 Ind Cas 875; 30 C L J 113; 24 C W N 40 ... 215
Habibullah v. Empress, 15 P R 1895 Cr ... 560
Hafezuddin Mandal v. Jadu Nath Saha, 35 C 298; 12 C W N 820; 7 C L J 279 ... 126
Hafiz Baha-ud-din v. Fateh Bibi, 16 P R 1893 ... 771
Haidar Ali v. Abru Mia, 32 C 756; 2 C L J 105; 9 C W N 911; 2 Cr L J 459 ... 154
Hambro & Son v. Burnand, (1904) 2 K B 10; 73 L J K B 669; 19 L T 803; 52 W R 583; 9 Com Cas 251; 20 T L R 398 ... 601
Hammersmith and City Railway v. Brand, (1869) 38 L J Q B 265; 4 H L 171; 21 L T 238; 18 W R 12 ... 826
Hanbury v. Upper Inny Drainage Board, (1883) 12 L R Ir 27 ... 583
Hanuman Persad Thakur v. Jadunandan Thakur, 29 Ind Cas 787; 20 C W N 147; 43 C 20 ... 720

H—contd.

Page.

Hanuman Prasad v. Muhammad Ishaq, 28 A 137; A W N (1905) 229; 2 A L J 615 ... 842
Har Parshad v. Sadhu, 32 Ind Cas 504; 31 P W R 96 ... 736
Har Sahai Mal v. Brij Lal, 58 Ind Cas 182; 18 A L J 373; 2 U P L R (A) 86 ... 451
Harak Narain Singh v. Luchmi Bux Roy, 5 C L R 287 ... 406
Harakhbai v. Jamnabai, 19 Ind Cas 786; 37 B 639; 15 Bom L R 340 ... 54
Hargu Lal Singh v. Govind Rai, 19 A 541; A W N (1897) 154; 9 Ind Dec (N. s.) 350 ... 290
Hari Narayan Singh Deo Bahadur v. Sriram Chakravarti, 6 Ind Cas 785; 37 C 723; 37 I A 136, 14 C W N 746; 11 C L J 653; 7 A L J 633; 8 M L T 51; 12 Bom L R 495; 20 M L J 569; (1910) M W N 309 (P. C.) ... 403
Hari Nath Chatterjee v. Mohunt Mothurmohun Goswami, 20 I A 183 at p 192; 21 C 8 (P. C.); 17 Ind Jur 481; 6 Sar P C J 334; 10 Ind Dec (N. s.) 638 ... 635
Hari Saha v. Faizlar Rahman, 18 Ind Cas 839; 40 C 619 at p 622; 17 C W N 636; 18 C L J 144; 19 C W N 1125 ... 460
Haribole Brohmo v. Tasimuddin Mondul, 2 C W N 620 ... 209
Harihar Roy v. Emperor, 52 Ind Cas 595; 23 C W N 48; 29 C L J 383; 20 Cr L J 675 ... 42
Harivalabdas Kalliandas v. Utamchand Manekchand, 4 B 1; 4 Ind Jur 410; 2 Ind Dec (N. s.) 51 ... 54
Harnaman v. Atma Ram, 24 P R 1900 ... 257
Harnandan Rai v. Kesho Prasad Singh, 40 Ind Cas 585; 2 P L J 553; 1 P L W 798 ... 209
Harrison v. Asher, (1848) 2 De G & Sm 436; 17 L J Ch 452; 12 Jur 833; 79 R R 280; 64 E R 196 ... 797
Hartas v. Scarborough, (1889) 33 Sol J 661 ... 19
Harwood v. Baker, (1840) 3 Mooro P C 282; 13 E R 117; 50 R R 37 ... 818
Hasan Raza Sahib v. Hasan Ali Sahib, 38 Ind Cas 528; 40 M 941; 5 L W 419; (1917) M W N 389; 33 M L J 348 ... 717
Hassan Kuli Khan v. Nakcheddi Nonia, 33 C 200 ... 258
Hattikudur Narain Rao v. Andar Sayad Abbas Sahib, 27 Ind Cas 785; 28 M L J 44 ... 276
Haur Kaur v. Munni Lal, 53 Ind Cas 441; 134 P R 1919; 46 P L R 1920 ... 451
Haven Gold Mining Co, *In re*, (1882) 20 Ch D 151; 51 L J Ch 242; 46 L T 322; 30 W R 389 ... 544
Haycraft v. Creasy, 2 East 92 at p. 108; 6 R R 380; 102 E R 303 ... 201
Hayes v. Christian, 15 M 414; 2 M L J 142; 1 Weir 588; 5 Ind Dec (N. s.) 641 ... 156
Hayward v. East London Waterworks Campany, (1885) 28 Ch D 138; 54 L J Ch 521; 52 L T 175 ... 246
Hazari Lal v. Tilok Chand, 136 P R 1893 ... 172
Hazeldine v. Grove, (1842) 3 Q B 997; 3 G & D 210; 12 L J M C 10; 7 Jur 262; 114 E R 791 ... 574
Heath v. Brewer, (1864) 9 L T (N. s.) 653; 15 C B (N. s.) 803; 137 R R 776; 143 E R 1000 ... 574

Page.

H—concld.

Hedayet Ali v. Kamalanand Singh, 20 Ind Cas 332; 17 C L J 411 ... 596
Heydorn & Co. v. Muhammad Shafi, 14 Ind Cas 507; 34 A 348; 9 A L J 294 ... 284
Hicks v. Hicks, 8 C 756; 4 Ind Dec (N. S.) 488 ... 89
Hicks v. Powell, (1869) 4 Ch 741; 17 W R 449 ... 987
Hill v. Manchester and Salford Water Works Co., (1831) 2 B & Ad 544 at p 553; 1 L J (N. S.) K B 230; 36 R R 656; 109 E R 1245 ... 214
Hindley v. Jainarain Marwari, 54 Ind Cas 439; 46 C 962 at pp 971, 972; 24 C W N 288 ... 451
Hindmarch, *In the goods of*, (1866) 1 P & D 307 at p 308; 36 L J P 24, 15 L T 391 ... 823
Hindson v. Kersey, (1765) 4 Burn Ecc L 116 at pp 119, 120 ... 821
Hiranmoy Kumar Saha v. Ramjan Ali Dewan, 29 Ind Cas 694; 20 C W N 48; 43 C 170 ... 313
Holker v. Positt, (1873) 8 Ex 107; 42 L J Ex 85; 21 W R 414 ... 930
Hooper v. Bromet, (1903) 89 L T 37 ... 19
Hooper v. Bromet, (1904) 90 L T 234 ... 19
Hubdar Khan v. Gajadhar Chaube, 15 Ind Cas 600; 17 O C 294 ... 479
Hukum Chand Boid Juscurn Boid v. Pirthichand Lal, 50 Ind Cas 444; 46 I A 52 at p 56; 17 A L J 514; 36 M L J 157; 23 C W N 721; 21 Bom L R 632; (1919) M W N 259; 20 C L J 71; 46 C 670; 26 M L T 131; 10 L W 416 (P. C.) ... 782
Hunoomanpersaud Panday v. Musammat Babooee Munraj Koonwaree, 6 M I A 393; 18 W R 81*n.*; Sevestre 253*n*; 2 Suth P C J 29; 1 Sar P C J 552; 19 E R 147 ... 572
Hurbullabh Narain Singh v. Luchmeswar Prasad Singh, 26 C 188; 3 C W N 49; 13 Ind Dec (N. S.) 725 ... 401
Huro Pershad Roy v. Gopal Das Dutt, 9 C 255 at p 259; 12 C L R 129; 9 I A 82; 4 Sar P C J 363; 9 Ind Jur 546; 4 Ind Dec (N. S.) 820 103, 472
Hurro Kumar Ghose v. Kali Krishna Thakur, 17 C 251; 8 Ind Dec (N. S.) 705 ... 105
Hurrogobind Saha v. Ramrutno Dey, 4 C 67; 2 Ind Dec (N. S.) 44 ... 470
Husain Ali v. Matukman, 6 A 39; A W N (1883) 185; 3 Ind Dec (N. S.) 593 ... 875
Hyman v. Helm, (1883) 24 Ch D 531; 49 L T 376; 32 W R 258 ... 218

I

Ibrahim v. Emperor, 23 Ind Cas 678; 18 C W N 705; 15 Cr L J 325; 1 L W 989; (1914) A C 599; 111 L T 20; 30 T L R 383; 83 L J P C 185 (P. C.) ... 927
Imambandi v. Mutsaddi, 47 Ind Cas 513; 45 C 878; 35 M L J 422; 16 A L J 800; 24 M L T 330; 28 C L J 409; 23 C W N 50; 5 P L W 276; 20 Bom L R 1022; (1919) M W N 91; 9 L W 518; 45 I A 73 (P. C.) ... 306
Imambandi Begam v. Kamleswari Pershad, 14 C 109 (P. C.); 13 I A 160; 10 Ind Jur 468; 4 Sar P C J 732; 7 Ind Dec (N. S.) 72 ... 789

Page.

I—concld.

Imbichunni Nayar v. Lalji Ram Doss Sait, 24 M 560 ... 779
Imdad Ali Shah v. Sayed Ali, 40 Ind Cas 65; 26 P R 1917 ... 451
Imperatrix v. Pandharinath, 6 B 34 at p 37; 3 Ind Dec (N. S.) 479 ... 327
Imperial Gas Light and Cake Co. v. Broadbent, (1859) 7 H L C 600; 115 R R 295; 29 L J Ch 377; 5 Jur (N. S.) 1319; 11 E R 239 ... 833
Imray v. Magnay, (1843) 11 M & W 267; 2 Dowl (N. S.) 531; 12 L J Ex 188; 7 Jur 240, 63 R R 592; 152 E R 803 ... 952
Indian Companies Act, 1882, *In the matter of*, 18 C 31; 9 Ind Dec (N. S.) 21 ... 601
Inland Revenue Commissioners v. Blott, (1920) 2 K B 257 at p 267; 89 L J K B 677 ... 483
Inland Revenue Commissioners v. Southendon Sea Estates Co, Ltd., (1915) A C 428; 84 L J K B 154; 112 L T 89; 59 S J 24; 31 T L R 30 ... 484
Institute of Patent Agents v. Lockwood, (1894) A C 347; 63 L J P C 74; 6 R 219; 71 L T 205 ... 341
International Contract Company, *In re*, (1871) 6 Ch App 525 ... 599
Inugunti Prakasa Rajaningaru v. Yeranki Peda Venkat Rao, 21 Ind Cas 319; 38 M 160; 25 M L J 350; (1913) M W N 800 ... 463
Ishar Das v. Emperor, 10 P R 1918 Cr.; 8 P W R 1908 Cr.; 7 Cr L J 290; 112 P L R 1908 ... 919
Ishar Das v. Emperor, 18 P W R 1908 Cr.; 8 Cr L J 75 ... 224
Ishar Das v. Harkishan Das, 35 Ind Cas 577; 148 P W R 1916; 7 P L R 1917 ... 670
Ishri v. Bhola Singh; 52 Ind Cas 152; 67 P W R 1919 ... 506
Ishvar Timappa Hegde v. Devar Venkappa Shanbog, 27 B 146; 5 Bom L R 19 ... 949
Ismal v. Ramjit Sambhaji, 23 B 682; 1 Bom L R 177; 12 Ind Dec (N. S.) 456 ... 355
Isuri Prasad Singh v. Umrao Singh, 22 A 234; A W N (1900) 46; 9 Ind Dec (N. S.) 1187 ... 157

J

Jackson v. Thompson, (1861) 1 B & S 745; 31 L J Q B 11; 8 Jur (N. S.) 134; 6 L T (N. S.) 104, 10 W R 42; 124 R R 734; 121 E R 891 ... 819
Jadu Nath Poddar v. Rup Lal Poddar, 33 C 967; 10 C W N 650; 4 C L J 22 ... 286
Jafar Husain v. Emperor, 26 Ind Cas 648; 11 A L J 736; 16 Cr L J 36 ... 378
Jag Mohan Singh v. Sita Ram Singh, 39 Ind Cas 186; 20 O C 72 ... 276
Jagadindra Nath Roy v. Hemanta Kumari Debi, 32 C 129 at p 140; 31 I A 203; 8 C W N 809; 6 Bom L R 765, 1 A L J 585; 8 Sar P C J 698 ... 127
Jagadindra Nath Roy v. Secretary of State, 30 C 291 (P. C.); 30 I A 44; 7 C W N 197; 5 Bom L R 1 ... 299
Jagan Nath v. Champa, 28 A 307; 3 A L J 87; A W N 1906) 13 ... 125
Jagannath Vithal v. Apaji Vishnui, 5 B H C R (A. C. J.) 217 ... 481

J —contd.

Page.

Jagat Narain v. Sheo Das, 5 A 311; A W N (1883) 51; 3 Ind Dec (N. S) 344 ... 125
Jagat Tarini Dasi v. Naba Gopal Chaki, 34 C 305; 5 C L J 270 ... 569
Jaiprakash Lal, *In the matter of the petition of*, 6 A 26 (F. B.); A W N (1883) 203; 3 Ind Dec (N. S) 641 ... 414
Jairam Narayan v. Atmaram Narayan, 4 B 482; 2 Ind Dec (N. S.) 830 ... 15
Jalal-ud-din v. Emperor, 15 Ind Cas 979; 18 P W R 1912 Cr; 147 P L R 1912; 13 Cr L J 563 ... 224
Jamal v. Moolla Dawood, Sons & Co. 31 Ind Cas 949; 43 C 493; 20 C W N 105; 30 M L J 73; 14 A L J 89; 19 M L T 80; 3 L W 181; 23 C L J 137; (1916) 1 M W N 70; 18 Bom L R 315; 9 Bur L T 8; 43 I A 6 (P.C.) ... 879
Jamna Das v. Najm-un-nissa Bibi, 28 A 466; 3 A L J 228; A W N (1906) 88 ... 102
Jamna Devi v. Mul Raj, 49 P R 1907; 83 P L R 1908; 110 P W R 1907 ... 33
Jamshed Khodaram v. Burjorji Dhunjibhai, 32 Ind Cas 246; 40 B 289; 30 M L J 186; 3 L W 239; 19 M L T 84; 14 A L J 225; (1916) 1 M W N 229; 18 Bom L R 162; 23 C L J 358; 20 C W N 744; 43 I A 26 P. C.) ... 215
Jan Mahomed v. Queen-Empress, 10 C 584; 8 Ind Jur 569; 5 Shome L R 158; 5 Ind Dec (N. S) 391 ... 201
Jan Mahommed Abdulla Datu v. Datu Jaffar, 22 Ind Cas 195; 38 B 449 at pp 582, 583; 15 Bom L R 1044 ... 564
Janson v. Driefontein Consolidated Mines, (1902) A C 484; 71 L J K B 857; 87 L T 372; 51 W R 142; 7 Com Cas 268; 18 T L R 798 ... 157
Jarip Khan v. Durfa Bewa, 15 Ind Cas 476; 16 C L J 144; 17 C W N 59 ... 750
Jatuni Chowdhurani v. Amar Krishna Saha, 1 Ind Cas 164; 6 C L J 745; 13 C W N 850 ... 513
Jawahir v. Neki Ram, 28 Ind Cas 502; 37 A 189; 13 A L J 190 ... 2
Jayanti Subbiah v. Alamelu Mangamma, 27 M 45 at p 51 398, 585
Jeo Lal Singh v Gunga Pershad, 10 C 996 at p 1001; 5 Ind Dec (N. S.) 664 ... 49
Jethabhai v. Chapsey, 4 Ind Cas 108; 24 B 467 at p 483; 11 Bom L R 1014 ... 787
Jewadul Huq v. Ram Das Saha, 24 C 143; 1 C W N 166; 12 Ind Dec (N. S.) 761 ... 317
Jhargi v. Ramzan, 5 Ind Cas 808; 13 P R 1910; 20 P W R 1910; 60 P L R 1910 ... 72
Jhingai Singh v Ram Pratap, 1 Ind Cas 762; 31 A 150; 9 Cr L J 382; 6 A L J 113 ... 401
Jivani Bhai v. Javu Bhai, 2 M H C R 462 ... 625
Jiwan Singh v. Har Kaur, 22 Ind Cas 415; 41 P R 1914; 51 P L R 1914 34 P W R 1914 ... 505
Jogdamba Koer v. Secretary of State for India, 16 C 367 at p 370; 13 Ind Jur 385; 8 Ind Dec (N. S.) 242 ... 125
Jogendra Nath Singh v. Secretary of State for India, 17 Ind Cas 92; 17 C W N 835 at p 1838; 16 C L J 385 ... 295
Jogesh Chandra v. Benode Lal Roy, 5 Ind Cas 59; 14 C W N 122 ... 126
Jogesh Chandra v. Sarada Kumar, 49 Ind Cas 834; 23 C W N 223 ... 799

J —concld.

Page.

Jogesh Chunder Dutt v. Kali Churn Dutt, 3 C 30; 1 C L R 5; 1 Ind Dec (N. S.) 611 ... 105
Jogeshwar Narain v. Lala Moorlidar, 7 C L J 270 ... 542
Johnstone v. Milling, (1886) 16 Q B D 460 at p 467; 55 L J Q B 162; 54 L T 629; 34 W R 238; 50 J P 694 ... 78
Jones v Jones, (1908) 24 T L R 839; 52 Sol Jo 699 ... 819
Jordeson v. Sutton Southcoates and Drypool Gas Company, (1898) 2 Ch D 614; 67 L J Ch 666; 79 L T 478; 47 W R 222; 63 J P 137 ... 830
Joshi Powar v. Jiwraj Hazarimal, 13 C P L R 104 ... 478
Josiam Thiruvengaduchariar v. Sawmi Iyengar, 5 Ind Cas 937; 34 M 76; 7 M L T 195; (1910) M W N 542; 20 M L J 760 ... 929
Jotendromohan Tagore v. Ganendromohan Tagore, 18 W R 359 at p 374; 9 B L R 377; I A Sup Vol 47; 2 Suth P C J 692; 3 Sar P C J 82 ... 309
Jowala Singh v. Kala Singh, 22 P R 1898 ... 878
Joy Gobind Laha v. Monmotha Nath Banerji, 33 C 580 ... 891
Joy Narain Singh v. Badri Das; 13 Ind Cas 144; 16 C L J 156 at p 159 ... 869
Joykissen Mookerjee, *In re*, 24 W R 40 Cr ... 36
Juggeewundas Keeka Shah v. Ramdas Brijbookundas, 2 M I A 437; 6 W R P C 10; 1 Suth P C J 103; 1 Sar P C J 222; 18 E R 386 ... 600
Juggodumba Dassee v. Paddomoney Dassee, 15 B L R 318 ... 471
Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy, 6 B 528 at p 543; 5 Ind Dec (N. S.) 742 ... 926
Justices of the Peace for Calcutta v. Oriental Gas Company, 8 B L R 433 at p 452; 17 W R 364 ... 535
Jwala Dei v. Pirbhu, 14 A 35; A W N (1891); 192 7 Ind Dec (N. S.) 354 ... 937
Jyotish Chandra Mukerjee v. Ramanath Bhadra, 32 C 243 ... 894

K

Kaila Singh v. Tahal Singh, 143 P R 1888 ... 239
Kailash Mondul v. Baroda Sundari Dasi, 24 C 711; 1 C W N 565; 12 Ind Dec (N. S.) 1143 ... 753
Kaki Subbanadri v. Muthu Rangayya, 4 Ind Cas 1039; 32 M 532; 6 M L T 175 ... 351
Kali Charan Nath v. Sukhada Sundari Debi, 30 Ind Cas 824; 20 C W N 58; 22 C L J 272 ... 635
Kali Churn Dutt v. Jogesh Chunder Datt, 2 C L R 354 ... 105
Kali Kissen Tagore v. Annad Chunder Roy, 23 C 557; 12 Ind Dec N S) 370 ... 406
Kali Prasonna Sil v. Panchanan Nandi, 33 Ind Cas 670; 44 C 367; 20 C W N 1000; 23 C L J 489 ... 212
Kali Nath v. Gobinda Chandra, 5 C W N 293 ... 154
Kali Roy v. Pratap Narain, 5 C L J 92 ... 753

K—contd.

Page.

Kalikananda Mukerji v. Bipro Das Pal Chouduri, 26 Ind Cas 436; 19 C W N 18 at p 19; 21 C L J 265 ... 635
Kallangowda v. Bibishaya Shah Mahomed Khan, 58 Ind Cas 42; 22 Bom L R 936; 44 B 943 ... 780
Kalyanbhai Dilpchand v. Ghanasham Lal Jadunathji, 5 B 29; 3 Ind Dec (N. S.) 21 ... 636
Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal, 17 Ind Cas 65; 36 M 275; 12 M L T 439; 23 M L J 499; (1912) M W N 1154; 13 Cr L J 753 ... 379
Kamala v. Bhagirathi, 16 Ind Cas 939; 38 M 45; 24 M L J 518; 12 M L T 429; (1912) M W N 1166 ... 266
Kamala Sahai v Babu Nandan Mian, 2 Ind Cas 13; 11 C L J 39 ... 240
Kamalathammal v. Krishna Pillai, 8 Ind Cas 995; 20 M L J 781 at p 784; 9 M L T 73 ... 65
Kaman v. Umra, 47 Ind Cas 411; 76 P R 1918; 156 P W R 1918, 103 P L R 1918 ... 892
Kamini Moni Debi v. Khetra Mohan Ganguly, 13 Ind Cas 43; 17 C W N 45; 15 C L J 660 ... 174
Kamini Sundari Chowdhurani v. Abdul Halim Moulvi, 47 Ind Cas 420; 28 C L J 254 ... 761
Kanakammal v. Ananthamathi Ammal, 25 Ind Cas 901; 37 M 293 ... 266
Kanaran v. Kultooly, 21 M 110; 8 M L J 62, 7 Ind Dec (N. S.) 434 ... 340
Kandasami Asari v. Subramania Pillai, 13 M L J 370 ... 975
Kannepalli Suryanarayana v. Pucha Venkataramana, 29 M 382 at pp 388, 389 (P. C.); 10 C W N 921; 4 C L J 171; 16 M L J 276; 1 M L T 260; 8 Bom L R 700; 3 A L J 702; 33 I A 145 ... 612
Karan Singh v. Kanhai Lal, 8 Ind Cas 279; 6 N L R 123 ... 241
Kari Singh v. Emperor, 18 Ind Cas 660; 40 C 433; 17 C W N 297; 14 Cr L J 100 ... 144
Kari Singh v. J. Finch (Emperor), 18 Ind Cas 349; 40 C 441*n*; 17 C W N 449; 14 Cr L J 61 ... 144
Karim Bux v. Emperor, 57 Ind Cas 101; 24 C W N 624; 21 Cr L J 581 ... 138
Karsondas v. Bai Gungabai, 30 B 329; 7 Bom L R 965 ... 557
Kashiram v. Pandu, 27 B 1; 4 Bom L R 688 ... 608
Kasmi v. Ayishamma, 15 M 60; 1 M L J 754; 5 Ind Dec (N. S.) 391 ... 347
Kathari Narasimha Raju v. Bhupati Raju, 31 Ind Cas 52; 29 M L J 721; 18 M L T 571; 2 L W 964; (1915) M W N 819 ... 352
Kattika Bapanamma v. Kattika Kristnamma, 30 M. 231; 17 M L J 30 ... 241
Kausalia v. Gulab Kumar, 21 A. 297; A W N (1899) 72; 9 Ind Dec (N. S.) 898 ... 591
Kawasji v. Sirinbai, 23 B 279; 12 Ind Dec (N. S.) 185 ... 191
Kedar Nath Raut v. Kali Charn Ram, 25 C 703; 2 C W N 353; 13 Ind Dec (N. S.) 460 ... 432
Kedarnath v. Zumberlal, 37 Ind Cas 503; 12 N L R 171 705, 710
Kehr Singh v. Mahman Singh, 25 P R 1908; 51 P W R 1908; 128 P L R 1908 ... 745

K—contd.

Page.

Kesar v. Sundar Singh, 1 Ind Cas 888; 27 P R 1909; 46 P L R 1909; 33 P W R 1909 ... 776
Kewal Kishen Singh v. Sookhari, 24 C 173; 1 C W N 243; 12 Ind Dec (N. S.) 781 ... 385
Khadersa Hajee Bappu v. Puthen Veethil Ayissa Ummah, 6 Ind Cas 50; 34 M 511; 8 M L T 4; 20 M L J 288; (1910) M W N 447 ... 347
Khaire Khan v. Ghulam Ghaus, 10 Ind Cas 387; 32 P R 1911; 238 P L R 1911; 46 P W R 1911 ... 504
Khardah Company Limited v. Durga Charan Chandra, 58 Ind Cas 636; 46 C 640 ... 517
Khazan Chand v. Gobind Singh, 160 P R 1888 ... 173
Khetra Mohan Poddar v. Aswini Kumar Saha, 45 Ind Cas 667; 22 C W N 488 ... 708
Khetsidas Radhakishan v. Harba Marathe, 47 Ind Cas 956; 16 N L R 178 ... 478
Khiarajmal v Daim, 32 C 296; 9 C W N 201 (P. C.); 2 A L J 71; 7 Bom L R 1; 1 C L J 584; 32 I A 23; 8 Sar P C J 734 663, 842
Khobhari v. Jhaman, 34 Ind Cas 220; 23 C L J 482 ... 61
Khoda Bux v. Bakeya Mundari, 32 C 941; 9 C W N 1006; 2 Cr L J 764 ... 922
Khosh Mahomed Sirkar v. Nazir Mahomed, 33 C 352; 9 C W N 1065; 2 C L J 259; 2 Cr L J 637 ... 404
Khub Ram v. Surat, 39 Ind Cas 753; 20 P R 1917; 26 P L R 1917; 22 P W R 1917 ... 771
Khunni Lal v. Raghunandan Prasad, 20 Ind Cas 497; 35 A 450; 11 A L J 659 ... 246
Khusalbhai v. Kabhai, 6 B 26; 3 Ind Dec (N S.) 474 ... 791
Kidar Singh v. Gunesh, 42 Ind Cas 411; 4 O L J 532 ... 799
Kin Kin Gyi v. Maung Kan Gy, U B R (1902-03) Budd Law Div 1 ... 1007
King-Emperor v. Nga Thaung, 1 Cr L J 1047; U B R (1904-06) I, Cr Pro 25 ... 42
——— v. Parbhushankar, 25 B 680; 3 Bom L R 278 ... 197
——— v. Sada, 26 B 150; 3 Bom L R 586 ... 42
——— v. Takasi Nukayya, 24 M 660; 1 Weir 673 ... 45
Kisan Nandram v. Adandram Pachaji, 10 B H C R 433 ... 634
Kishen Chunder Ghose v. Ashoorun, Marsh 647 ... 663
Kishen Narain v. Pala Mal, 47 Ind Cas 937; 88 P R 1918; 167 P W R 1918; 102 P L R 1918 ... 72
Kishen Prashad v. Har Narain Singh, 9 Ind Cas 739; 33 A 272; 15 C W N 321; 8 A L J 256; 9 M L T 343; 13 C L J 345; 21 M L J 378; 13 Bom L R 359; (1911) 2 M W N 395; 38 I A 45 (P. C.) ... 760
Kishori Gir v. Ram Narayan Gir, 8 C W N 77; 1 Cr L J 46 ... 377
Kishori Lal v. Rakhal Das, 31 C 155 ... 462
Kodi Sankara Bhatta v. Moidin, 49 Ind Cas 147; 35 M L J 120; 8 L W 100 ... 276

K—contd.

Page.

Koneti Naicker v. Jatu Gopala Aiyar, 21 Ind Cas 417; 25 M L J 425; 33 M 482; 14 M L T 414 ... 599
Konsilla v. Ishri Singh, 6 Ind Cas 188; 32 A 499; 7 A L J 420 ... 790
Koobur Khansama v. Jan Khansama, 8 W R 467 ... 888
Kottarathil Puthiyapurayil Pokker v. Balathil Parkum Chandrankandi Kunhamad, 51 Ind Cas 714; 36 M L J 231 at p 237; 25 M L T 47, (1919) M W N 39; 9 L W 138; 42 M 143 948
Kottilinga Settu Royer v. Sahasranama Aiyar, 9 Ind Cas 643; 34 M 520; (1911) 1 M W N 257; 9 M L T 367; 21 M L J 662 ... 99
Koylash Chandra Shaha v. Christophoridi, 15 C 171; 7 Ind Dec (N. S.) 698 ... 779
Koylash Chunder Ghose v. Sonatun Chung, 7 C 132 at p 135; 8 C L R 281; 4 Shome L R 144; 5 Ind Jur 642; 3 Ind Dec (N. S.) 635 ... 147
Krishna Behari Roy v. Bunwari Lall Roy, 2 I A 283; 1 C 144 (P. C.); 25 W R 1; 3 Sar P C J 559; 3 Suth P C J 213; 1 Ind Dec (N. S.) 93 ... 880
Krishna Behari Sen v. Corporation of Calcutta, 31 C 993; 8 C W N 745 ... 919
Krishna Charan Barman v. Sanat Kumar Das, 34 Ind Cas 609; 25 C L J 24; 44 C 162; 21 C W N 740 ... 278
Krishna Dhone Dutt v. Troilokia Nath, 12 C 539; 6 Ind Dec (N S.) 366 ... 406
Krishna Kamini v. Abdul Jubbar, 30 C 155 at p 198; 6 C W N 737 ... 405
Krishna Nath Chakravarti v. Muhammad Wafiz, 31 Ind Cas 789; 21 C W N 93; 23 C L J 563 ... 317
Krishna Patter v. Sinnaponnu, 25 Ind Cas 759; 16 M L T 551 ... 398
Krishna Prosad Roy v. Bipin Behary Roy, 31 C 228 ... 776
Krishnaaiyar v. Krishnasamy Ayyar, 26 M 366 779
Krishnaji v. Bomanji, 2 Ind Cas 459; 11 Bom L R 380 ... 167
Krishnaji v. Munwar Ali, 6 Ind Cas 821; 6 N L R 72 ... 474
Krishnaji v. Nilkanth, 36 Ind Cas 516; 12 N L R 150 ... 475
Krishnamal v. Krishnaiyangar, 15 Ind Cas 652; 23 M L J 50; (1912) M W N 473; 13 Cr L J 508 ... 157
Kristo Nath Koondoo v. T. F. Brown, 14 C 176; 7 Ind Dec (N. S.) 117 ... 273
Kudutamma v. Narasimha Charyulu, 4 Ind Cas 1094; 17 M L J 528; 5 M L T 40 ... 683
Kulsum Fatma v. Ali Akbar, 38 Ind Cas 730; 39 A 401 at p 408; 15 A L J 452 ... 61
Kumeda Charan Ghose v. Emperor, 15 Ind Cas 656; 15 C L J 515; 13 Cr L J 512 ... 923
Kundan Mal v. Sardar Allah Dad Khan, 5 Ind Cas 821; 19 P R 1910; 36 P W R 1910; 167 P L R 1910 ... 73
Kunj Bihari v. Keshavlal Hiralal, 28 B 567; 6 Bom L R 475 ... 810
Kunja Lal v. Kailash Chander, 7 Ind Cas 740; 14 C W N 1068 at p 1073 ... 666
Kunji Lal v. Durga Prasad, 6 Ind Cas 127; 32 A 484; 7 A L J 425 ... 756

K—concld.

Page.

Kunji Lal v. Emperor, 21 Ind Cas 681; 12 A L J 151; 14 Cr L J 633 ... 851
Kunwar Sen v. Darbari Lal, 34 Ind Cas 171; 38 A 411 ... 479
Kura Mal v. Ram Nath, 28 A 414; A W N (1906) 67; 3 A L J 218 ... 938

L

Labhu v. Emperor, 52 Ind Cas 797; 25 P R 1919 Cr.; 20 Cr L J 717 ... 919
Labhu Ram v. Puran Chand, 53 Ind Cas 421; 130 P R 1919; 59 P L R 1920 ... 579
Lachho Bibi v. Gopi Narain, 23 A 472; A W N (1901) 145 ... 537
Lakhan Chunder Sen v. Madhusudan Sen, 35 C 209; 7 C L J 59; 3 M L T 90; 12 C W N 326 ... 102
Lakhi Kant Das v. Balabhadra Prosad Das, 25 Ind Cas 546; 19 C L J 400 at p 401 ... 837
Lakhrani Kuar v. Dhanraj Singh, 32 Ind Cas 634; 14 A L J 102 ... 632
Lakshman Dada Naik v. Ramchandra Dada Naik, 5 B 48 (P. C.); 7 I A 181; 4 Sar P C J 173; 3 Suth P C J 778; 3 Shome L R 217; 4 Ind Jur 472; 7 C L R 320; 3 Ind Dec (N. S.) 34 ... 682
Lakshmi v. Subramanya, 12 M 490; 4 Ind Dec (N. S.) 691 ... 682
Lakshmi Doss v. Roop Laul, 30 M 169 (F. B.); 17 M L J 19; 2 M L T 4 ... 948
Lakshmi Venkayyamma v. Venkatanarasimha, 34 Ind Cas 921; 43 I A 138; 20 C W N 1054; 14 A L J 797; 31 M L J 58; (1916) 2 M W N 23; 20 M L T 137; 4 L W 58; 18 Bom L R 651; 39 M 509; 24 C L J 279 (P. C.) ... 767
Lalit Mohan Ghose v. Gopal Chauk Coal Company Limited, 12 Ind Cas 723; 16 C W N 55; 14 C L J 411; 39 C 284 ... 789
Lalla Kanhoo Lal v. Manki Bibi, 6 C W N 601 ... 479
Lalljee Mahomed v. Dadabhai Jivanji Guzdar, 34 Ind Cas 807; 43 C 833 at p 849; 23 C L J 190 ... 820
Lalta Prasad v. Emperor, 5 Ind Cas 355; 13 O C 1; 11 Cr L J 114 ... 224
Larocque v. Beauchemin, (1897) A C 358; 66 L J P C 59; 76 L T 473; 45 W R 689; 4 Manson 263 ... 494
Lart, *In re*, Wilkinson v. Bladeo, (1896) 2 Ch D 788; 65 L J Ch 846; 75 L T 175; 45 W R 27 ... 309
Lashkari Mal v. Ishar Singh, 94 P R 1902; 134 P L R 1902 ... 745
Latifar Rahaman v. Forbes, 5 Ind Cas 783; 14 C W N 372 ... 596
Lea v. Facey, (1887) 19 Q B D 352; 56 L J Q B 536; 58 L T 32; 35 W R 721; 51 J P 756 ... 574
Lee v. Neuchatel Asphalte Co., (1889) 41 Ch D 1; 58 L J Ch 408; 61 L T 11; 37 W R 321; 1 Meg 140 ... 493
Lekh Ram v. Ramji Das, 57 Ind Cas 215; 1 L 234 ... 667
Leuien v. Reg., (1867) 1 P C 536; 36 L J P C 62; 16 W R 159 ... 641
Levene v. Brougham, (1908) 24 T L R 801 ... 395

L—concld.

Page.

Limba v. Rama, 33 B 548; 7 Ind Dec (N. s.) 363 ... 811
Llewellin, *In re;* Llewellin v. Williams, (1888) 37 Ch D 317; 57 L J Ch 316; 58 L T 152; 36 W R 347 ... 644
Lloyd v. Bibee Sogra, 25 W R 313 ... 976
Lolit Mohan Sarkar v. Queen-Empress, 22 C 313; 11 Ind Dec (N. s.) 210 ... 201
London and Brighton and South Railway Company v. Truman, (1886) 11 App Cas 45; 55 L J Ch 354; 54 L T 250; 34 W R 657; 50 J P 388 ... 825
London County Council v. Bermondsey Bioscope Co., (1911) 1 K B 445; 80 L J K B 141 at p 144; 103 L T 760; 75 J P 52; 9 L G R 79; 27 T L R 141 ... 341
London Freehold and Leasehold Property Company v. Baron Suffield, (1897) 2 Ch 608; 66 L J Ch 790; 77 L T 445; 46 W R 102 ... 172
Lotlikar v. Wagle, 6 B 596; 3 Ind Dec (N. s.) 853 ... 471
Lovick v. Crowder, (1828) 8 B & C 132; 2 M & Ry 84; 6 L J (o. s) K B 263; 108 E R 992 ... 952
Lowes v. Kermode, (1818) 8 Taunt 146 at p 147; 2 Moore 30; 129 E R 339 ... 57
Lyon v. Fishmongers' Company, (1876) 1 App Cas 662; 46 L J Ch 68; 35 L T 569; 25 W R 165 ... 365

M

Ma E Ko v. Ma Pwa Hmi, 54 Ind Cas 501; 3 U B R (1919) 179 ... 451
Ma Lok v. Maung San Ya Tha, U B R (1897-1901) II, 443 ... 961
Ma Nhin Bwin v. U Shwe Gone, 23 Ind Cas 433; 8 L B R 1; 7 Bur L T 105; 16 Bom L R 377; 27 M L J 41; 18 C W N 1121; 16 M L T 142; 20 C L J 264; 41 C 887; 1 L W 914; (1914) M W N 449; 41 I A 121 (P. C.) ... 1006
Ma Pan Nyun v. Ma Hla Sein, 30 Ind Cas 665, 8 L B R 180; 8 Bur L T 149 ... 1001
MacAllister v. Bishop of Rochester, (1880) 5 C P D 194; 49 L J C P 114; 42 L T 22 ... 214
Macgregor v. Topham, (1850) 3 H L C 132 at p 155; 10 E R 51 ... 821
Machi Raju Venkataratnam v. Vadrevu Ranganayakamma, 48 Ind Cas 270; 41 M 985; 24 M L T 197; (1918) M W N 599; 8 L W 292; 35 M L J 335 (F. B.) ... 953
Madan Lal v. Bhagwan Das, 21 A 235 (F. B.); A W N (1899) 41; 9 Ind Dec (N. s.) 859 ... 290
Madan Mohan Chattopadhya v. Akshoy Kumar Baruri, 5 Ind Cas 23; 14 C W N 15 ... 320
Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo, 46 Ind Cas 481; 41 M 859 at p 856; 35 M L J 138; 5 P L W 179; 8 L W 167; 16 A L J 725; (1918) M W N 621; 24 M L T 231; 28 C L J 403; 20 Bom L R 1041; 23 C W N 177; 45 I A 156 (P. C.) ... 612
Madho Ram v. Nihal Singh, 30 Ind Cas 494; 38 A 21; 13 A L J 985 ... 178
Madhu Sudan Sinha (Biswanath) v. Kali Charan, 46 Ind Cas 246; 27 C L J 119 ... 587

M—contd.

Page.

Madhusudan Sen v. Rakhal Chandra Das, 30 Ind Cas 697; 43 C 248; 19 C W N 1070; 22 C L J 552 ... 126
Magniram v. Mehdi Hossein Khan, 31 C 95; 8 C W N 30 ... 69
Mahableshwar Krishnappa v. Ramchandra Mangesh, 21 Ind Cas 350; 38 B 94; 15 Bom L R 882 591, 759
Mahadaji v. Joti, 17 B 425; 9 Ind Dec (N. s.) 2 ... 766
Mahadei v. Beni Pershad, 55 Ind Cas 194; 18 A L J 171; 21 Cr L J 242; 42 A 214 ... 402
Mahadeo Kumar v. Bisu, 25 A 537; A W N (1903) 102 ... 401
Mahamaya Debi v. Haridas Haldar, 27 Ind Cas 400; 42 C 455 at p 472; 19 C W N 208; 20 C L J 183 603, 628
Mahamaya Prasad Singh v. Abdul Hamid, 21 Ind Cas 615; 18 C W N 266 at p 268 ... 186
Mahant Kirpalban v. Ram Dei 7 Ind Cas 260; 8 A L J 647; 11 Cr L J 445 ... 858
Maharaj Bahadur Singh v. Raja Ranjit Singh Bahadur, 11 C W N 835; 6 Cr L J 36 ... 404
Maharaj Tewari v. Har Charan Rai, 26 A 144; A W N (1903) 212; 1 Cr L J 3 9 ... 401
Maharaja Jotindra Mohun Tagore v. Shumbhu Chunder Bhuttacharjee, 4 C W N 43 ... 753
Maharaja Surajakanta Acharaja Bahadur v. Maharaja Jagadindra Nath Roy Bahadur, 11 C W N 198 at p 201; 5 Cr L J 32 ... 645
Maharaja of Vizianagaram v. Sri Rajah Setrucherla, 13 M L J 83; 26 M 686 ... 152
Maharaja of Burdwan v. Apurba Krishna Roy, 10 Ind Cas 527; 15 C W N 872; 14 C L J 50 ... 569
Maharaja of Jeypore v. Rukmini Pattamahadevi, 50 Ind Cas 631; 42 M 589; 36 M L J 543; 17 A L J 552; 29 C L J 528; 21 Bom L R 655; (1919) M W N 271; 23 C W N 889; 26 M L T 16; 10 L W 381; 46 I A 109 (P. C.) ... 279
Maharajah Ishuree Persad Narain Sing v. Lal Chutterput Sing, 3 M I A 100 at p 130; 6 W R P C 27; 1 Sar P C J 245; 18 E R 435 ... 150
Maharajsha v. Abheram, 11 C P L R 5 420, 463
Maharanee of Lahore, *In the matter of*, (1848) Taylor 428; 2 Ind Dec (o. s.) 256 ... 150
Maharanee Ram Bunsee Koonwaree v. Maharanee Soobh Koonwaree, 7 W R 321 ... 937
Maharanee Shibesssauree Debia v. Mothooranath Acharjo, 13 M I A 270 at p 278; 13 W R P C 18; 2 Suth P C J 307; 2 Sar P C J 528; 20 E R 552 127, 242, 471
Maharani Beni Pershad Koeri v. Raj Kumar Chowbey, 6 C W N 589 ... 753
Mahmud Bakhsh v. Hassan Bakhsh, 11 Ind Cas 708; 7 P R 1912; 239 P L R 1911; 135 P W R 1911 ... 887
Mahomed Buksh Khan, v. Hosseini Bibi, 15 C 684 (P. C.); 15 I A 81; 12 Ind Jur 291; 5 Sar P C J 175; 7 Ind Dec (N. s.) 1040 ... 355
Mahomed Musa v. Aghore Kumar Ganguli, 28 Ind Cas 930; 42 C 801; 17 Bom L R 420; 21 C L J 231; 28 M L J 548; 19 C W N 250; 13 A L J 229; 17 M L T 143; 2 L W 258; (1915) M W N 621; 42 I A 1 (P. C.) ... 241

M—contd. Page.

Mahomed Riasat Ali v. Hasin Banu, 21 C 157 at p 163 (P. C.); 20 I A 155; 17 Ind Jur 484; 6 Sar P C J 374; Rafipue & Jackson's P C No. 133; 10 Ind Dec (N. S.) 737 ... 780
Mahomed Syedol Ariffin v. Yeoh Ooi Gark, (1916) 2 A C 575; 43 I A 256; 115 L T 564; 32 T L R 673; 86 L J P C 15; 39 Ind Cas 401; 21 C W N 257; (1917) N W N 162; 19 Bom L R 157 (P. C.) ... 148
Mahomed Wahib v. Mahomed Ameer, 32 C 527; 1 C L J 167 100, 457
Mahtab Rai v. Kaman Lal, 51 P R 1899 ... 681
Maiku v. Emperor, 50 Ind Cas 989; 17 A L J 453; 1 U P L R (A) 19; 20 Cr L J 38; 41 A 483 ... 548
Malik Rahmat v. Shiva Prasad, 13 A 533; A W N (1891) 172; 7 Ind Dec (N. S.) 327 ... 907
Mallikarjana v. Durga, 13 M 406; 17 I A 134; 5 Sar P C J 547, 4 Ind Dec (N. S,) 995 ... 980
Mamraj v. Birjlal, 12 Ind Cas 587; 34 A 106; 8 A L J 1241 ... 710
Manak v. Narayan, 59 Ind Cas 437; 22 Bom L R 1114 (Foot-note.) ... 441
Manally Chenna Kesavaraya v Mangadu Vaidelinga, 1 M 343; 2 Ind Jur 249; 1 Ind Dec (N. S) 229 ... 467
Manchharam Kalliandas v. Baksho Saheb, 6 B H C R 231 ... 634
Manhari Chowdhury v. Emperor, 43 Ind Cas 614; 22 C W N 199; 19 Cr L J 198; 27 C L J 434; 45 C 727 ... 208
Manilal v. Bai Tara, 17 B 398; 9 Ind Dec (N. S) 259 ... 584
Maniram v. Ganesh, 4 Ind Cas 233; 5 N L R 146 ... 286
Maniram Seth v. Seth Rupchand, 33 C 1047; 4 C L J 94; 8 Bom L R 501; 10 C W N 874; 1 M L T 199; 3 A L J 525; 16 M L J 30 ½; 2 N L R 130; 33 I A 155 (P. C.) ... 899
Manjaya v. Sesha Shetti, 11 M 477; 1 Weir 586; 4 Ind Dec (N. S.) 332 ... 144
Manjunath v. Kaverbai, 4 Bom L R 140 ... 587
Manjuri Bibi v. Akel Mahmud, 19 Ind Cas 793; 17 C W N 889; 17 C L J 316 ... 792
Manohar Lal v. Gauri Rautain, 22 Ind Cas 16; 12 A L J 36 ... 596
Manorama Chowdhurani v. Soshi Mohan Das Mazumdar, 28 Ind Cas 886; 19 C W N 366; 42 C 480 ... 666
Mansa v. Surta, 4 Ind Cas 853; 99 P R 1909; 170 P W R 1909; 16 P L R 1910 ... 84
Mansell v. Valley Printing Company, (1903) 1 Ch D 537 affirmed in 2 Ch D 441; 77 L J Ch 742; 99 L T 464; 24 T L R 802 ... 229
Marian Beeviammal v. Kadir Meera Sahib Taragan, 29 Ind Cas 275 ... 347
Marquess of Winchester's case, (1599) 6 Coke 23; 77 E R 287 ... 818
Marritt v. Hampton, (1797) 2 Sm L C (6th Ed.) 375 (11th Edition, 421); 7 T R 269; 2 Esp 546; 4 R R 439; 101 E R 969 ... 109
Marsh v. Tyrell, (1828) 2 Hagg Ecc 84 at p 122; 162 E R 793 ... 817
Marudayi v. Doraisami 30 M 348; 17 M L J 275 ... 565

M—contd. Page.

Maruthamalai v. Palani Gounden, 16 Ind Cas 182; 37 M 535 ... 842
Marya Pillai v. Sivabagyathachi, 12 Ind Cas 128; 36 M 113; (1911) 2 M W N 168; 21 M L J 850; 10 M L T 494 ... 266
Mata Din v. Sheikh Ahmad Ali, 13 Ind Cas 976; 15 C L J 270; 16 C W N 338; 11 M L T 145; (1912) M W N 183; 9 A L J 215; 14 Bom L R 192; 15 O C 49; 34 A 213; 23 M L J 6; 39 I A 49 (P. C.) ... 590
Matthewe v. Cork Country Council, (1910) 2 Ir R 521; 11 Ir L R 794 ... 498
Maulvi Zahurul Islam v. Jiwan Lal, 11 C P L R 137 ... 173
Maung Aung Byi v. Maung Yan Byo, U B R (1892-1896) II, 434 ... 961
Maung Hmon v. Ma Meik, U B R (1901-06) Budd Law Div 1 ... 1007
Maung Ke v. Maung Po Ni, U B R (1897-1901) II, 211 ... 961
Maung Naw v. Ma Shwe Hmat, 30 Ind Cas 772; 8 L B R 227; 8 Bur L T 191 ... 961
Maung Nut v. Ma Mi, U B R (1897-1901) II, 209 ... 961
Maung Nyun v. Maung Kywe, U B R (1902-1903) II, Civ Pro 1 ... 961
Maung Pe v. Ma Lon Ma Gale, 11 Ind Cas 497; 6 L B R 48; 15 C W N 766; 8 A L J 739; 14 C L J 5; 13 Bom L R 464; 21 M L J 749; 38 C 629; (1911) 2 M W N 397; 4 Bur L T 53; 10 M L T 479; 38 I A 140 (P. C.) ... 1006
Maung Pye v. Ma Me, U B R (1902-03) Budd Law Div 6 ... 1007
Maung Sein Kyi v. Ma E, 34 Ind Cas 159; 9 Bur L T 179; 8 L B R 399 ... 556
Maung Shwe Goh v. Maung Inn, 28 Ind Cas 938; 44 C 542; 21 M L T 18; 15 A L J 82; (1917) M W N 117; 32 M L J 6 25 C L J 103; 19 Bom L R 179; 21 C W N 500; 5 L W 532; 10 Bur L T 69; 44 I A 15 (P. C.) ... 797
Maung Tha Aung v. Maung San Ke, U B R (1897-1901) II, 207 ... 961
Maung Tha Zin v. Ma In, U B R (1892-1896) II, 327 ... 961
Maung Tun Tha v. Ma Thit, 38 Ind Cas 809; 44 C 379; 19 Bom L R 294; 15 A L J 96; 32 M L J 71; 21 M L T 97; 21 C W N 527; 26 C L J 169; 9 L B R 56; 10 Bur L T 138; 44 I A 42 (P. C.) ... 780
Maung Yin Maung v. Ma So, U B R (1897-01) II, 34 ... 1007
Maya Das v. Queen-Empress, 14 P R 1893 Cr ... 158
Mayor of Lyans v. East India Co., 1 M I A 175; 1 Moo P C 175; 3 State Tr (N. S.) 647; 1 Sar P C J 107; 18 E R 66; 112 E R 782 ... 151
Maxwell v. British Thompson Houston Co., (1904) 2 K B 342; 73 L J K B 644 ... 19
McCheane v. Gyles, (1902) 1 Ch D 287; 71 L J Ch 183; 86 L T 1; 50 W R 376 ... 14
McDermott v. Judges of British Guiana, (1863) 5 Moo P C (N. S.) 466 at p 497; 2 P C 341 38 L J P C 1; 20 L T 47; 17 W R 352; 16 E R 590 ... 150

M—contd.

	Page.
McKellar v. Wallace, 5 M I A 372; 8 Moo P C 378; 1 Equity Rep 309; 1 Sar P C J 453; 18 E R 986; 14 E R 144; 97 R R 62 ...	21
Meda Vengamma v. Mitta Chelamiah, 15 Ind Cas 17; 36 M 484; 23 M L J 168; 12 M L T 293 ...	996
Megh Lal Pandey v Raj Kumar Thakur, 34 C 858; 11 C W N 527; 5 C L J 208 ...	789
Mehari Bibi v. Yakub Ali, 11 C W N 156 ..	177
Meher Ali v. Kalai Khalashi, 29 Ind Cas 461; 19 C W N 1129; 27 C L J 579 ...	749
Mersey Docks v. Lucas, (1882) 8 A C 891; 53 L J Q B 4; 49 L T 781; 32 W R 34; 48 J P 212 ...	491
Merwanji Nowroji v. Ashabai, 8 B 1; 4 Ind Dec (N. S.) 375 ...	634
Metropolitan Asylum District v. Hill, (1881) 6 App Cas 193; 50 L J Q B 353; 44 L T 653; 29 W R 617; 45 J P 664 ...	826
Metropolitan Railway Warehousing Company, *In re*, (1868) 17 L T 108; 36 L J Ch 827; 15 W R 1121 ..	543
Mewa Ram Singh v. Ganga Ram, 52 Ind Cas 229; 17 A L J 910 ...	94
Mi Kin Lat v Ba Sa, U B R (1904-06 Budd Law Div 3 ...	1007
Mi Ma Gyi v. Nga Shwe Zin, U B R (1904-1906) II, Land and Revenue Regulation 1 ...	961
Mi Min Dwe v. Ma Ma Kin Kyimyin, U B R (1904-1906) II, Land and Revenue Regulation 5 ...	961
Mi Myin v. Nga Twe, U B R (1904-06) Budd Law Div 9 ...	1007
Mi Saw Bwin v. Nga San Nyun, 28 Ind Cas 801 U B R (1914) II, 32 ...	1006
Miajan v. Minnat Ali, 24 C 521; 12 Ind Dec (N. S.) 1015 ...	337
Middlesbrough Assembly Rooms Company, *In re*, (1880) 14 Ch D 104; 49 L J Ch 413; 42 L T 609; 28 W R 868 ...	543
Midland Railway Company v. Withington Local Board, (1883) 11 Q B D 788; 52 L J Q B 689; 49 L T 489; 47 J P 789 ...	574
Midnapore Zemindari Company Limited v. Gobinda Mahto, 8 C L J 31 ...	842
Midnapur Zemindary Co Ltd. v. Uma Charan Mandal, 52 Ind Cas 497, 37 M L J 199; 17 A L J 100; (1919) M W N 817; 26 M L T 489; 24 C W N 201; 22 Bom L R 7; 11 L W 371; 2 U P L R (P. C.) 5 (P. C.) ...	886
Minakshi v. Ramanada, 11 M 49 at p 55 (F. B); 11 Ind Jur 442; 4 Ind Dec (N. S.) 35	269, 585, 624
Mira Mohideen Rowther v. Nallaperumal Pillai, 12 Ind Cas 58; 26 M 131; 10 M L T 254; (1911) 2 M W N 221; 21 M L J 1000 ...	744
Mirabivi v. Vellayanna, 8 M 464; 4 Ind Jur 267; 3 Ind Dec (N S.) 317 ...	622
Miran Shah v. Emperor, 15 Ind Cas 491; 244 P L R 1912; 5 P R 1913 Cr; 31 P W R 1912 Cr; 13 Cr L J 494 ...	158
Mitchell v. Murree Brewery Co., 5 P R 1870 ...	425
Modhusudun Shaha v. Brae, 16 C 300; 8 Ind Dec (N. S.) 197 ...	753
Mohammad Abdullah Khan v. Bank Instalment Company Limited in Liquidation, 2 Ind Cas 379; 31 A 495; 6 A L J 611 ...	709

M—contd.

	Page.
Mohammad Farrukh v. Kadir Ali Khan, 10 C P L R 98 ...	456
Mohandas Thakurdas v. Tikamdas Hotchand, 37 Ind Cas 250; 10 S L R 123 ...	978
Mohesh Chandra Saha v. Emperor, 35 C 457; 12 C W N 416; 7 Cr L J 220; 7 C L J 488 ...	371
Mohima Chunder v. Mohesh Chunder, 16 C 473; 16 I A 23; 5 Sar P C J 321; 8 Ind Dec (N. S.) 312 ...	892
Mohini Mohun Das v. Bungsi Buddan Saha Das, 17 C 580 (P. C.); 5 Sar P C J 493; 8 Ind Dec (N. S.) 926 ...	284
Mohomed Ali v. Emperor, 20 Ind Cas 977; 41 C 463; 18 C W N 1; 14 Cr L J 497 ...	138
Mohori Bibee v. Dharmodas Ghose, 30 C 539; 5 Bom L R 421; 30 I A 114; 8 Sar P C J 374; 7 C W N 441 (P. C.) ...	245
Mokbul Hossain v. Ameer Sheikh, 25 C 131; 13 Ind Dec (N. S.) 89 ...	469
Monappa v. Surappa, 11 M 234; 4 Ind Dec (N. S.) 163 ...	720
Moniram Bewah v. Mirjan Sardar, 54 Ind Cas 169, 24 C W N 97; 31 C L J 183, 21 Cr L J 25; 44 C 438 ...	411
Moonshi Gulam Arab v. Curreembux Shaikhjee, 5 C 294; 4 C L R 477; 2 Ind Dec (N. S.) 793 ...	634
Moses v. Macpherlan, (1760) 2 Burr 1005; 1 W Bl 219; 97 E R 676	100, 457
Mouat, *In re*, Kingstan Cotton Mill Co. v. Mouat (1899) 1 Ch 831; 68 L J Ch 390; 80 L T 406; 47 W R 506 ...	952
Mughal v. Jalal, 69 P R 1898 ...	713
Mugnee Ram Chowdhury v. Gonesh Dutt Singh, 5 W R 134 ...	152
Muhammad Abdul Gaffur v. Hamida Beevi Ammal, 52 Ind Cas 505; 25 M L T 242; 36 M L J 456; (1919) M W N 484, 42 M 661 ...	708
Muhammad Ali v. Baldeo Pande, 34 Ind Cas 183; 14 A L J 55; 38 A 148 ...	94
Muhammad Amin v. Hasan, 31 B 143 at p 157; 9 Bom L R 65 ...	737
Muhammad Baksh v. Emperor, 16 P R 1904 Cr 1 Cr L J 1091 ...	849
Muhammad Baqar Ali Khan v. Hazari Lal, 52 Ind Cas 108; 6 O L J 297 at pp 306, 307 ...	572
Muhammad Husain v. Khushalo, 9 A 131 (F. B.); A W N (1886) 322; 5 Ind Dec (N. S.) 519 ...	939
Muhammad Khumarali v. Ranga Rao, 24 M 654 ...	943
Muhammad Masih Ullah Khan v. Jarao Bai, 27 Ind Cas 771; 37 A 226; 13 A L J 307 ...	178
Muhammad Mohidin Sait v. Municipal Commissioners for the City of Madras, 25 M 118 ...	830
Muhammad Mushtaq Ali Khan v. Bankey Lal, 55 Ind Cas 991; 18 A L J 440; 42 A 420 ...	94
Muhammad Nawaz Khan v. Bobo Sahib, 44 P R 1903; 75 P L R 1903 ...	745
Muhammad Newaz Khan v. Alam Khan, 18 C 414 at p 419 (P. C.); 18 I A 73; 15 Ind Jur 284; 6 Sar P C J 26, 70 P R 1891; 9 Ind Dec (N. S.) 276	59, 756

M—concld. Page.

Muhammad Yar v. Ghulam 49 P R 1884 ... 892
Mukundram v. Dayaram, 23 Ind Cas 893; 10 N L R 44 ... 122
Multani Chand v. Lalu Mal, 180 P R 1889 ... 125
Mungal Pershad Dichit v. Grija Kant Lahiri, 8 I A 123; 8 C 51 (P. C.); 11 C L R 113; 4 Sar P C J 249; 4 Ind Dec (N S) 32 748, 880
Municipal Board of Cawnpore v. Lallu, 20 A 200; A W N (1898) 25; 9 Ind Dec (N s.) 49... 875
Munna Lal v. Sarat Chunder, 27 Ind Cas 6 3; 42 C 776; 17 M L T 140; 21 C L J 118; 2 L W 282; 19 C W N 561; 17 Bom L R 408; 28 M L J 470; 42 I A 88 (P. C.) ... 178
Munshi Singh v. Emperor, 55 Ind Cas 733; 18 A L J 324; 21 Cr L J 365 ... 134
Munster v. Lamb, (1883) 11 Q B D 588 at p 603; 52 L J Q B 726; 49 L T 252; 32 W R 248; 47 J P 805 ... 152
Muppidi Papaya v. Ramana, 7 M 85; 7 Ind Jur 595; 2 Ind Dec (N. s) 644 ... 65
Murlidhar v. Mulchand, 52 Ind Cas 953 ... 708
Murlidhar Shukal v. Narsingh Das, 10 Ind Cas 359; 17 C W N 113; 15 C L J 453 ... 880
Muthar Sahib Maraikar v. Kadir Sahib Maraikar 28 M 544; 15 M L J 384 ... 944
Muthaya Manigaran v. Lakhu Reddiar, 14 Ind Cas 255; 37 M 412; 11 M L T 301; (1912) M W N 436; 22 M L J 413 ... 879
Muthia Naik v. Emperor, 43 Ind Cas 592; 41 M 323; 19 Cr L J 176 ... 189
Muthialu Chetti v. Bapun Saib, 2 M 140; 5 Ind Jur 23; 2 Weir 68; 1 Ind Dec (N s.) 369 ... 15
Muthu Karakki Chetty v. Mahamad Ammal, 54 Ind Cas 66; 43 M 184; 26 M L T 459; 38 M L J 1; 11 L W 487; (1920) M W N 42 ... 472
Muthukaruppan v. Muthu Samban, 25 Ind Cas 772; 38 M 1158; 27 M L J 497; 16 M L T 344; (1915) M W N 768; 1 L W 754 ... 351
Muthukumara Chetty v. Anthony Udayan, 24 Ind Cas 120; 38 M 867; 29 M L J 617; 15 M L T 361 591, 949
Muthunaiyan v. Sinna Samavaiyan, 28 M 526; 15 M L J 419 ... 307
Muthuraman Chetty v. Krishna Pillai, 29 M 72 ... 603
Muthuswami v. Emperor, 14 Ind Cas 757; 37 M 110; 11 M L T 431; 13 Cr L J 293 ... 144
Muttuvela Pillai v. Vythilinga Pillai, 5 M H C R 185 ... 633

N

Nabibhai Vazirbhai v. Dayabhai Amulakh, 36 Ind Cas 369; 40 B 504; 18 Bom L R 481 ... 747
Nadu Goundan v. Nadu Goundan, 1 Weir 589 ... 156
Nafar Chandra Pal v. Ram Lal Pal, 22 C 742 at p 750; 11 Ind Dec (N. s.) 493 ... 644
Nga Chit Nyo v. Mi Myo Tu, 8 Ind Cas 477; U B R (1910) I. 30 ... 1006
Nga Pan U. v. Mi Kyu, S J L B 30 ... 1001
Nga Saw Ke v. Emperor, 27 Ind Cas 145; U B R (1914) II, 19; 16 Cr L J 97 ... 42
Naganada Davay v. Bappu Chettiar, 27 M 424 at p 425; 14 M L J 69 ... 568

N—contd. Page.

Nagarji Trikamji, *In re*, 19 B 340; 10 Ind Dec (N. s.) 230 ... 144
Nagesh v. Gururao, 17 B 203; 9 Ind Dec (N. s.) 198 ... 252
Najm-ud-din Ahmad v. Albert Puech, 29 A 584; 4 A L J 450; A W N (1907) 184 ... 812
Namberumal Chetty v. Kotayya, 21 Ind Cas 773; 14 M L T 498 ... 670
Nana Kumar Roy v. Golam Chunder Dey, 18 C 422 (F. B.); 9 Ind Dec (N. s) 282 ... 167
Nanak Gir v. Kishen Kaur, 53 Ind Cas 815; 161 P R 1919 ... 125
Nand Ram v. Bhopal Singh, 16 Ind Cas 1; 34 A 592; 10 A L J 130 ... 676
Nanda v. Hira, 41 Ind Cas 230; 47 P R 1917; 117 P W R 1917 ... 240
Nanda Lal Pathak v. Chanurpat Das, 18 Ind Cas 142; 17 C L J 462; 17 C W N 779 ... 963
Nanhey Mal v. Chait Ram, 43 Ind Cas 364; 41 A 40; 16 A L J 899 ... 606
Nanhi v. Gauri Shankar, 28 A 187; 2 A L J 654; A W N (1905) 242 ... 125
Nanjaya Mudali v. Shanmuga Mudali, 22 Ind Cas 355; 38 M 684; 26 M L J 576; 15 M L T 186; (1914) M W N 353 ... 311
Narain Mullick v. Badi Roy, 6 C W N 94; 29 C 227 ... 101
Naraina Naika v. Vasudeva Bhatta, 23 M 389; 15 M L J 208 ... 770
Naraina Pai v. Appu, 28 Ind Cas 456 ... 262
Narasammal v. Balaramacharlu, 1 M H C R 420 ... 621
Narasinga Row v. Muthaya Pillai, 26 M 362; 12 M L J 389 ... 975
Narayan Bisnoi v. Yaswant Singh, 1 N L R 147 at p 149 ... 464
Narayan Govind Manik v. Sono Sadashiv, 24 B 345; 1 Bom L R 846; 12 Ind Dec (N. s.) 764 ... 636
Narayanaswamy Mudali v. Gangadhara Mudali, 48 Ind Cas 89; 37 M L J 353 ... 899
Narsingh Narain v Sheikh Jahi Mistry, 13 Ind Cas 414; 15 C L J 3 ... 844
Narsingha Singh v. Achhaibar Singh, 22 Ind Cas 539; 11 A L J 1004; 36 A 36 ... 93
Narso Ramji v. Nagava Ishvarappa, 45 Ind Cas 492; 20 Bom L R 358; 42 B 359 ... 115
Nash Durand Rebecca v. Durand, 14 W R 416 ... 933
Nasiruddin v. Lal Bibi, 89 P R 1888 ... 347
Nataraja Mudaliar v. Municipal Council of Mayavaram, 12 Ind Cas 311; 36 M 120; 10 M L T 219; (1911) 2 M W N 233; 21 M L J 878 ... 251
Natesan, *In re*, 38 Ind Cas 847; 40 M 125; 31 M L J 634 ... 246
Nathersa Rowther v. Mahamed Rowther, 28 Ind Cas 890 ... 386
Nathji Muleshvar v. Lalbhai Ravidat, 14 B 97; 7 Ind Dec (N s.) 522 ... 154
National Provident Institution v. Brown, (1920) 3 K B 35; 89 L J K B 866 ... 485
Naulakhi Kuar v. Jai Kishen Singh, 46 Ind Cas 905; 40 A 575; 16 A L J 564 ... 232
Naylor v. Balderen, 1 Ch Rep 69 ... 951

Page.

N—concld.

Neelachalam v. Kamarazu, 14 M L J 438 ... 65
Neki v. Chajju Ram, 48 Ind Cas 137; 111 P W R 1918 ... 837
Nelson v. Stocker, (1859) 4 De G & J 458; 28 L J Ch 760; 5 Jur (N. S.) 75'; 7 W R 603; 124 R R 339: 45 E R 178 ... 395
Nepal Chandra Ghose v. Mohendra Nath Roy Chowdhury, 31 C 707 ... 306
New Maxico Co, 14 R 98 ... 494
Newbridge Sanitary Steam Laundry, *In re*, (1917) 1 Ir R 67 at p 87 525, 544
Niamat Khan v. Empress, 17 P R 1883 Cr ... 37
Nield v. London and North Western Railway Company, (1875) 10 Ex 4; 44 L J Ex 15; 23 W R 60 ... 392
Nikunja Behari Sen v Harendra Chandra Sinha, 20 Ind Cas 1008; 41 C 514; 18 C W N 424; 14 Cr L J 528 ... 155
Nilmadhab Bose v. Ananta Ram, 2 C W N 755 ... 317
Nimmala Mahankali v. Kallakuri Subbarao, 41 Ind Cas 268; 32 M L J 455 ... 116
Nirvanaya v. Nirvanaya, 9 B 365; 5 Ind Dec (N S.) 243 ... 999
Nistarini Dabya v Brahmomoyi Dabya, 18 C 45; 9 Ind Dec (N S.) 31 ... 437
Nitayi Behari Saha Paramanik v. Hari Govinda Saha, 26 C 677; 13 Ind Dec (N. S.) 1033 ... 49
Nizam Uddin Shah v. Bohra Bhim Sen, 43 Ind Cas 870; 40 A 203; 16 A L J 85 ... 177
Nobin Chandra Barua v. Chandra Madhab Barua, 36 Ind Cas 1; 44 C 1; 20 M L T 430 21 C W N 97; 14 A L J 1199; 18 Bom L R 1022; 31 M L J 886; 24 C L J 509; (1916) 2 M W N 565; 5 L W 452 (P. C.) ... 664
Norendra Nath Sarcar v. Kamalbasini Dasi, 23 C 563 (P. C); 23 I A 18; 6 Sar P C J 667; 6 M L J 71; 12 Ind Dec (N. S.) 374 151, 793
Nowrung Singh v. Bhagat Singh, 4 P R 870 ... 726
Nrityamoni Dassi v. Lakhan Chunder Sen, 33 Ind Cas 42; 43 C 660; 30 M L J 529. (1916) 1 M W N 332; 3 L W 471; 18 Bom L R 418; 24 C L J 1; 20 M L T 10; 20 C W N 522 (P. C.) ... 105
Nund Lall Bose v. Meer Aboo Mahomed, 5 C 597; 5 C L R 45; 2 Ind Dec (N. S.) 988 ... 457
Nundo Pershad Thakur v. Gopal Thakur, 10 C 1008; 5 Ind Dec (N. S) 672 ... 244
Nusserwanji Pestanji Wadia v. Eleconora Wadia 20 Ind Cas 492; 15 Bom L R 593 at p 602; 38 B 125 ... 935
Nuttall v. Bracewell, (1866) 2 Ex 1; 12 Jur (N. S) 989; 15 L T (N. S) 313; 36 L J Ex 1; 143 R R 867; 4 H & C 714 ... 930

O

Oakes v. Turquand, (1867) 2 H L 325; 36 L J Ch 949; 16 L T 808; 15 W R 1201 ... 951
Ochhavalal v. Gopal, 32 B 78; 9 Bom L R 1332 ... 279
O'Connell v. Reg., (1844) 5 St Tr (N. S.) 1 (877); 11 Cl & Fin 155 at p 372; 9 Jur 25; 1 Cox C C 418; 7 Ir L R 261; 8 E R 1061 at p 1163; 65 R R 59 ... 156

Page.

O—concld.

Official Receiver of Trichinopoly v. Samasundaram Chettiar, 34 Ind Cas 602; 30 M L J 415 ... 507
Ogston v. Aberdeen District Tramways Company, (1897) App Cas 111; 66 L J P C 1; 75 L T 633; 91 J P 436 ... 831
Oriental Steam Navigation Co, v. Secretary of State for India, 5 B H C R App 1; Bourke A O C 166 ... 453
Orr v. Sundra Pandia, 17 M 255; 6 Ind Dec (N. S.) 176 ... 955

P

Padarath Singh v. Raja Ram, 4 A 235; A W N (1882) 29; 6 Ind Jur 542; 2 Ind Dec (N. S.) 863 ... 939
Padmanabha Panjikannaya v. Emperor, 5 Ind Cas 145; 33 M 264; 7 M L T 79; 11 Cr L J 49; 20 M L J 84 ... 916
Padmaraju Pantulu v Vencataramana Aiyar, 1 Ind Cas 799; 19 M L J 217; 6 M L T 15; 9 Cr L J 385 ... 156
Palaniandi Chetti v. Appavu Chettiar, 34 Ind Cas 778; 30 M L J 565; 19 M L T 390 ... 948
Palaniandy Gounden v. Emperor, 1 Ind Cas 54; 32 M 218; 5 M L T 218, 9 Cr L J 146 ... 371
Palaniappa Chettiar v. Shanmugam Chettiar, 49 Ind Cas 23; 41 M 815; 8 L W 317; 35 M L J 90; 24 M L T 51. ... 289
Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi, 39 Ind Cas 722; 40 M 709; 21 C W N 729; 15 A L J 485; 1 P L W 697; 33 M L J 1; 19 Bom L R 567; 22 M L T 1; (1917) M W N 507; 26 C L J 153; 6 L W 222; 44 I A 147 (P. C.) ... 242
Pancnoo Kopali v. Jajneswar Majhi; 58 Ind Cas 844; 32 C L J 9 ... 443
Pandara Sannathi v. Karutha Ravuthan, 9 Ind Cas 150; 21 M L J 129, 9 M L T 327 ... 287
Pandiri Bangaram v Karumoory Subbarau, 8 Ind Cas 382; 34 M 159 at p 161; 8 M L T 285 ... 276
Pandit Ram Kant v. Pandit Rajdeo, 60 P R 1897 681, 685
Pandu Lakshman Masurekar v. Anpurna, 21 B 793; 11 Ind Dec (N. S.) 534 ... 763
Pandurang Govind, *In re*, 24 B 527; 2 Bom L R 84; 12 Ind Dec (N. S) 882 ... 401
Pandurang Hari Vaidya v. Vinayak, 16 B 652; 8 Ind Dec (N. S.) 913 ... 822
Panton v. Williams, (1843) 2 Curt 530; 163 E R 498; Reversed, (1843) 2 Notes of Cases XXI ... 816
Papireddi v. Narasareddi, 16 M 464; 5 Ind Dec (N. S) 1039 ... 291
Paramen Chetty v. Sundararaja Naick, 26 M 499 ... 939
Parbatty Debya v. Mathura Nath Banerjee, 15 Ind Cas 453; 40 C 29; 16 C W N 877; 16 C L J 9 ... 209
Parmeshur Dat v. Debi Sahae, 6 O C 101 ... 572

P—contd.

Page.

Partapo v. Asa Ram, 19 Ind Cas 211; 96 P R 1913; 208 P L R 1913; 221 P W R 1913 ... 505
Parvatibayamma v. Ramakrishna Rau, 18 M 145; 5 M L J 44; 6 Ind Dec (N. s) 450 ... 610
Patcha v. Mohidin, 15 M 57; 1 M L J 757n, 5 Ind Dec (N. s) 389 ... 347
Pattikadan Ummaru v. Emperor, 26 M 243; 2 Weir 388 & 463 ... 196
Pen Allt Silver Lead Mining Co, *In re* Fothergill's *case*, (1873) 8 Ch 270; 42 L J Ch 481; 27 L T 124; 21 W R 301 ... 494
Perayya v. Venkata, 11 M 403; 4 Ind Dec (N. s) 281 ... 339
Peria Gounden v. Kuppa Gounden, 52 Ind Cas 782; 10 L W 235; 37 M L J 234; 26 M L T 140; (1919) M W N 577; 42 M 880 219, 975
Perianan Chetty v. Nagappa Mudaliar, 30 M 32; 16 M L J 543; 2 M L T 23 ... 387
Perisami Mudaliar v. Seetharama Chettiar, 27 M 243 (F. B.); 14 M L J 84 ... 643
Perma Roy v. Kishen Roy, 25 C 90; 13 Ind Dec (N. s.) 61 ... 963
Petherpermal Chetty v. Muniandy Servai, 35 C 551; 10 Bom L R 590; 12 C W N 562; 5 A L J 290; 7 C L J 528; 14 Bur L R 108; 35 I A 98; 18 M L J 277; 4 M L T 12; 4 L B R 266 (P. C.) 286, 1004
Phillips v. Davis, "Times" 13th Dec 1907 ... 819
Phul Chand v. Ganga Ghulam, 21 A 450; A W N (1899) 167; 9 Ind Dec (N. s.) 994 ... 606
Phul Kumari v. Ghanshyam Misra, 35 C 202; 7 C L J 36; 12 C W N 169; 10 Bom L R 1; 5 A L J 10; 17 M L J 618; 2 M L T 506; 14 Bur L R 41; 35 I A 22 (P. C.) ... 949
Phundi Ram v. Emperor, 10 Ind Cas 682; 7 P W R 1911 Cr; 12 Cr L J 193 ... 158
Piran v. Abdul Karim, 19 C 203; 9 Ind Dec (N. s) 581 ... 717
Pirthi Pal v. Jowahir Singh, 14 C 493 at p 494 (P. C.); 14 I A 37; 1 Ind Jur 232; 4 Sar P C J 758; Rafique and Jacksons' P C No 97; 7 Ind Dec (N s.) 527 ... 429
Pollard v. Mothial, 4 M 234; 1 Weir 695; 1 Ind Dec (N. s.) 999 ... 918
Ponnusami Mudali v. Mandi Sundara Mudali, 27 M 255 at p 257; 14 M L J 356 59, 756
Poolai Udayan v. Karuppa Servai 34 Ind Cas 921; (1916) 2 M W N 136 ... 353
Poona City Municipality v. Ramji, 21 B 250; 11 Ind Dec (N. s.) 169 ... 267
Poonoo Bibee v. Fyez Buksh, 15 B L R App 5; 23 W R 66 ... 805
Potamaraju Venkatarayudu v. Emperor, 28 M 90 (F. B.); 1 Weir 538 (*a*) ... 201
Potaraju Venkata Reddy v. Emperor, 14 Ind Cas 659; 36 M 2 6; (19 2) M W N 476; 13 Cr L J 575; 11 M L T 416; 23 M L J 39 ... 156
Prafulla Nath Tagore v. Hodding, 42 Ind Cas 604; 21 C W N 1059; 26 C L J 39; 18 Cr L J 988 ... 644
Pragdas v. Girdhardas, 26 B 76 at p 78; 3 Bom L R 431 ... 54
Pramatha Nath v. P. C. Lahiri, 54 Ind Cas 63; 46 C 681; 21 Cr L J 15 ... 37

P—concld.

Page.

Pramatha Nath Gangooly v. Khetra Nath Banerjee, 32 C 270; 9 C W N 247 ... 569
Prannath Roy Chowdry v. Rookea Begam, 7 M I A 327; 4 W R P C 37; 1 Suth P C J 367; 1 Sar P C J 692; 19 E R 331 ... 105
Pratab Chandra Dutt v. Abhimanini Surini, 48 Ind Cas 752 ... 901
Pretty v. Solly, (1859) 26 Beav 606 at p 610; 33 L T (o. s) 72; 122 R R 263; 53 E R 1032 ... 62
Price v. Manning, (1889) 42 Ch D 372; 58 L J Ch 649; 61 L T 537; 37 W R 785 ... 819
Price's Patent Candle Co, Ltd. v. London County Council, (1908) 2 Ch 526; 78 L J Ch 1; 99 L T 571; 72 J P 429; 24 T L R 823 ... 837
Proceedings 22nd December 1866, 3 M H C R (App.) xi at p xvii ... 149
Produce Brokers Co, Ltd, v. Olympia Oil and Cake Co, Ltd., (1916) 1 A C 314; 85 L J K B 260; 114 L T 94; 21 Com Cas 110; 60 S J 74; 32 T L R 115 ... 439
Profulla Kumar Ghose v. Harendra Nath Chatterjee, 38 Ind Cas 767; 44 C 970; 21 C W N 252; 25 C L J 445; 18 Cr L J 377 ... 144
Prosunno Kumar Sanyal v. Kali Das Sanyal, 19 C 683; 19 I A 166; 6 Sar P C J 209; 9 Ind Dec (N. s) 898 ... 895
Prosunno Kumari Debya v. Golab Chand Baboo, 2 I A 145; 14 B L R 450 (P. C.); 3 Bar P C J 449; 23 W R 253; 3 Suth P C J 102 ... 127
Pulteney v. Warren, (1891) 6 Ves 73 at p 92; 31 E R 944; 5 R R 226 ... 105
Punjab National Bank, Limited v. Mercantile Bank of India, Limited, 8 Ind Cas 98 ... 224
Purappavanalingam Chetti v. Nullasivan Chetti, 1 M H C R 415 ... 467
Puttangowda Mallangowada Patil v. Nilkanth Kalo Deshpande, 20 Ind Cas 974; 15 Bom L R 773; 37 B 675 ... 533
Puttappa v. Timmaji, 14 B 176; 7 Ind Dec (N s) 576 ... 763

Q

Queen v. Ahmed Ally, 11 W R 25 Cr ... 256
——— v Basti Khan, 1 W R Cr 17 ... 558
——— v. Gopal Dass, 3 M 271 (F. B.); 2 Weir 782; 1 Ind Dec N. s.) 744 ... 329
——— v. Joseph Meriam, 10 W R Cr 10; 1 B L R A Cr J 5; 1 Ind Dec (N s) 271 ... 927
——— v. Kaly Kishore Roy, 25 W R 68 Cr ... 36
——— v. Naiada, 1 A 43; 1 Ind Dec (N. s.) 29 ... 927
——— v. Pursoram, 2 W R (Cr.) 36; 3 W R (Cr.) 45 ... 145
——— v. Rujhoo, (1864) W R Cr 30 ... 927
——— v. Shaik Ali, 5 M H C R 473; 1 Weir 377 ... 142
Queen-Empress v Babaji, 17 B 127; 9 Ind Dec (N. s.) 83 ... 144
——— ——— v. Balkrishna Vithal, 17 B 573; 9 Ind Dec (N. s.) 374 ... 144
——— ——— v. Chiragh Ali, A W N (1898) 198 ... 913

Q—concld. Page.

Queen-Empress v Dalip, 18 A 246; A W N (1896) 48; 8 Ind Dec (N. S) 871 ... 321
——— ——— v Fakirappa, 15 B 49 at p 496; 8 Ind Dec (N S.) 333 ... 147
——— ——— v. Fischer, 14 M 342 at p 351 (F. B.); 1 M. L J. 458; 1 Weir 802; 5 Ind Dec (N. S.) 239 ... 37
——— ——— v. Ganu Sonba, 12 B 440; 16 Ind Dec (N S.) 778 ... 329
——— ——— v. Girdhari Lal, 8 A 653; A W N (1886) 264; 5 Ind Dec (N S) 393 ... 201
——— ——— v. Gobind Chandra Das, 20 C 520; 10 Ind Dec (N. S,) 352 ... 404
——— ——— v. Govinda Pillai, 16 M 235; 1 Weir 587; 5 Ind Dec (N. S.) 871 ... 156
——— ——— v. Haradhan, 19 C 380; 9 Ind Dec N. S.) 628 ... 201
——— ——— v. Indarjit, 11 A 267; A W N (1889) 85; 6 Ind Dec (N. S.) 595 ... 918
——— ——— v. Kattayan, 20 M 235 at p 238; 1 Weir 697; 2 Weir 40; 7 Ind Dec (N. S.) 167 ... 918
——— ——— v. Lajja Ram, A W N (1888) 96 ... 852
——— ——— v. Latifkhan, 20 B 394 at p 397; 10 Ind Dec (N. S.) 825 ... 37
——— ——— v. McCarthy, 9 A 420; A W N (1887) 33; 5 Ind Dec (N. S.) 715 ... 204
——— ——— v. Muhammad Saeed Khan, 21 A 113; A W N (1898) 197; 9 Ind Dec (N. S.) 781 ... 201
——— ——— v. Nana, 14 B 260 at p 263 (F. B ; 7 Ind Dec (N. S.) 632 ... 327
——— ——— v. Ram Lal, 15 A 136; A W N (1893) 50; 7 Ind Dec (N. S.) 805 ... 559
——— ——— v. Sheo Dayal, 7 A 459; A W N (1885) 85; 4 Ind Dec (N. S) 720 ... 201
——— ——— v. Sheodin, 10 A 115; A W N (1888) 25; 6 Ind Dec (N S.) 77 ... 35
——— ——— v. Soshi Bhushan, 15 A 210; A W N (1893) 96; 7 Ind Dec (N. S.) 853 ... 201
——— ——— v. Vithal Narayan, 13 B 565 note ... 201

R

Radha Bai v. Kamod Singh, 30 A 3[illegible]; 4 A L J 696; A W N (1907) 276 .. 750
Radha Kishan v. Janki, A W N (1907) 155 ... 165
Radha Pershad Singh v. Budhu Dashad, 22 C 938; 11 Ind Dec (N. S) 6 2 ... 469
Radha Shyam Basak v. Secretary of State for India, 34 Ind Cas 30; 44 C 16; 23 C L J 547 878
Radhabai v. Anantrav, 9 B 39. (F. B.', 5 Ind Dec (N S.) 133 ... 475
Ragavendra Rau v. Jayaram Rau, 20 M 283 7 M L J 134; 7 Ind Dec (N. S) 201 ... 269
Raghavendra v. Kashinathbhat, 19 B 717; 10 Ind Dec (N. S.) 480 ... 155
Ragho Atmaram v. Purshotam Jairam, 4 N L R 26 ... 286
Raghoba Arelay v. Ragho, 14 C P L R 129 ... 368
Raghu Bhumij v. Emperor, 58 Ind Cas 4[illegible]; 5 P L J 430; 1 P L T 241; 21 Cr L J 705 132, 372
Raghu Mal v. Bandhu, 11C P R 1908; 196 P W R 1908 ... 708

R—contd. Page.

Raghubar v. Rukmin, 42 Ind Cas 794; 20 O C 265 ... 677
Raghumoni Audhikary v. Nilmoni Singh Deo, 2 C 393; 1 Ind Dec (N. S.) 541 ... 457
Raghunandan Prasad v. Sheo Prasad, 20 Ind Cas 490; 35 A 308; 11 A L J 349 ... 246
Raghunath v. Lakshuman, 2 Bom L R 93 at p 95 ... 280
Raghunath v. Sarva, 1 Ind Cas 804; 7 N L R 169 ... 315
Raghunath Kuari v. Munnan Misr, 20 A 191; A W N (1898) 13; 9 Ind Dec (N. S.) 484 ... 125
Raghunath Saran Singh v. Sri Ram, 28 A 764; 3 A L J 579; A W N (.906) 235; 1 M L T 242 ... 174
Ragoonathdas Gopaldas v. Morarji Jutha, 16 B 568; 8 Ind Dec (N. S) 857 ... 600
Rahim Bakhsh v Muhammad Hasan, 11 A 1; A W N (1888) 266; 13 Ind Jur 152; 6 Ind Dec (N. S.) 429 ... 355
Raj Krishna Dey v. Bepin Behary Dey, 17 Ind Cas 162; 40 C 245; 16 C L J 194; 17 C W N 591 ... 778
Raj Mal v. Sandhi, 1 Ind Cas 728; 41 P R 1909; 67 P W R 1909; 40 P L R 1909 ... 240
Raj Mohan De v. Mati Lal Saha Paddar, 33 Ind Cas 331; 22 C L J 546 ... 273
Raja v. Krishnabhat, 3 B 232; 2 Ind Dec (N. S.) 156 ... 273
Raja Modhu Sudan Singh v. Rooke, 24 I A 164; 25 C 1 P. C.) 1 C W N 433; 7 M L J 127; 7 Sar P C J 194; 13 Ind Dec (N. S.) 1 ... 480
Raja of Pittapur v. Surya Row, 12 I A. 116; 8 M 520 (P. C.) 9 Ind Jur 274; 4 Sar P C J 638; 3 Ind Dec (N. S.) 356 ... 518
Raja of Vizianagram v. Setrucherla Somasekhararaz, 26 M 686 F. B.) ... 262
Raja Rajeswara Dorai v. Arunachellam Chettiar 19 Ind Cas 596; 38 M 321; (1913) M W N 453; 13 M L T 469; 24 M L J 592 ... 955
Raja Setrucherla Ramabhadra v. Raja Setrucherla Virbhadra Suryanarayana, 22 M 470; 1 Bom L R 388; 3 C W N 533; 26 I A 67; 7 Sar P C J 50; 8 Ind Dec (N. S.) 33 ... 358
Rajah Bhaskara Sethupathi and Irulappa Nadan v. Narayanasamy Gurukkal, 12 M L J 360 ... 234
Rajah Pudmanunda Singh v Ghanashyam Misser, 1 C L J 134; 32 C 336; 9 C W N 610 ... 761
Rajah Venkata Narasimha Appa Rao Bahadur v. Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur, 31 M 321; 4 M L T 5; 18 M L J 409 ... 772
Rajagopalan v. Kasivasi Somasundara Tambiran, 30 M 316; 17 M L J 140 ... 102
Rajani Kumar Dass v. Gaur Kishore Shaha, 35 C 1051; 7 C L J 586; 12 C W N 761 ... 955
Rajendro Chunder Roy Chowdhury, *In the matter of the petition of*, 11 C 737; 10 Ind Jur 22[illegible]; 5 Ind Dec (N. S.) 1250 ... 414
Rajindra Bahadur Singh v. Rani Raghubans Kunwar, 48 Ind Cas 213; 45 I A 134; 21 O C 106; 24 M L T 282; 5 O L J 401; 8 L W 570; 40 A 470; (1918) M W N 831; 28 C L J 456; 23 C W N 101; 20 Bom L R 1075 (P. C.) ... 185

R—contd.

Page.

Rajrup Singh v. Ramgolam Roy, 16 C 1 at p 5; 13 Ind Jur 139; 8 Ind Dec (N. s.) 1 ... 637
Rakhal Das Majumdar v. Jogendra Narain Majumdar, 3 Ind Cas 391; 10 C L J 467 ... 52
Ralia Ram v. Mulk Raj, 54 Ind Cas 512; 1 L 295; 2 U P L R (L.) 29; 17 P L R 1920; 24 P W R 1920 ... 523
Ram Asra v. Gurditta, 42 P R 1891 ... 244
Ram Awatar v. Tulsi Prosad Singh, 11 Ind Cas 713; 16 C W N 137; 14 C L J 507 ... 789
Ram Bhaj v. Devia, 123 P R 1881 ... 73
Ram Bharose v. Kallu Mal, 22 A 135, A W N (1900) 12; 9 Ind Dec (N. s.) 1120 ... 501
Ram Chand v. Dewan Chand, 13 Ind Cas 571; 65 P R 1912; 99 P L R 1912; 109 P W R 1912 ... 253
Ram Charan Bhagat v. Sheobaratrai, 16 A 418; A W N (1894) 142; 8 Ind Dec (N. s.) 272 ... 793
Ram Jus Rae v. Ram Narain, 2 N W P 382 ... 633
Ram Kirpal v. Rup Kuari, 11 I A 37; 6 A 269; 4 Sar P C J 489; 3 Ind Dec (N. s) 718 756, 880
Ram Kumari, *In the matter of*, 18 C 264; 9 Ind Dec (N. s) 176 ... 33
Ram Lal v. Emperor, 55 Ind Cas 285; 1 P L T 73; 21 Cr L J 269 ... 42
Ram Lal Sukul v. Bhela Gazi, 6 Ind Cas 370; 37 C 709; 14 C W N 814 ... 337
Ram Mohan Pal v. Sheikh Kachu, 32 C 386; 9 C W N 249; 1 C L J 1 ... 337
Ram Narain Gunga Bissen v. Liladhur Towjee, 33 C 1237 at p 1240; 10 C W N 8 4 ... 76
Ram Pershad Koeri v. Jawahir Roy, 12 C W N 899; 7 C L J 72 ... 443
Ram Prakash v. Anand Das, 33 Ind Cas 583; 43 C 707; 43 I A 73; 20 C W N 802; 14 A L J 621; (1916) 1 M W N 406; 31 M L J 1; 18 Bom L R 490; 3 L W 556; 24 C. L J 116; 20 M L T 267 (P. C.) ... 288
Ram Prasad v. Bhikari Das, 26 A 464; A W N (1904) 108 ... 291
Ram Sarup v. Kishan Lal, 29 A 327; 4 A L J 306; A W N (1907) 76 ... 1004
Ram Sewak Lal v. Maneshwar Singh, 6 Ind Cas 352; 37 C 604; 11 Cr L J 325; 12 C L J 15; 14 C W N 839 ... 145
Ram Singh v. Chet Ram, 51 Ind Cas 119; 41 A 529; 1 U P L R (A) 52; 17 A L J 706 ... 798
Ram Singh v Nihal Singh, 136 P R 1889 ... 7 6
Rama Iyen v. Venkatachellam Patter, 30 M 75; 16 M L J 554 ... 946
Rama Kanta Das Mahapatra v. Shamanand Das Mahapatra, 1 Ind Cas 754; 36 C 590; 6 A L J 364; 13 C W N 581; 9 C L J 497; 11 Bom L R 530; 19 M L J 239; 36 I A 49; 6 M L T 84 (P. C) ... 980
Rama Nand v. Emperor, 40 Ind Cas 1008; 26 P R 1917 Cr.; 18 Cr L J 688; 31 P W R 1917 Cr ... 919
Ramachandra Padayachi v. Kondayya Chetti, 24 M 555 ... 687
Ramakistnayya v. Kassim, 13 M 172; 4 Ind Dec (N. s.) 832 ... 606

R—contd.

Page.

Ramalakshmi Ammal v. Perumal Sethurayar, 14 M I A 570 at p 585; 12 B L R 396; 17 W R 552; 3 Sar P C J 108; 2 Suth P C J 603; 20 E R 898 ... 622
Ramalinga Pillai v. Sadasiva Pillai, 9 M I A 506 at pp. 510, 515; 1 W R P C 25; 1 Suth P C J 538; 2 Sar P C J 51; 19 E R 830 ... 587
Raman v. Wazira, 79 P R 1886 ... 73
Ramanath Kalapahar v. King Emperor, 2 C L J 524; 3 Cr L J 160 ... 922
Ramanathan Chetti v. Murugappa Chetti, 29 M 283; 10 C W N 825 (P. C.); 33 I A 139; 1 M L T 327, 3 A L J 707; 4 C L J 189; 16 M L J 265; 8 Bom L R 498 ... 468
Ramanathan Chetty v. Maruthappa Kone, 25 Ind Cas 643; 27 M L J 494; 16 M L T 502 ... 685
Ramanathan Chetty v. Murugappa Chetty, 27 M 192; 13 M L J 341 ... 467
Ramasami v. Appavu, 12 M 9; 18 Ind Jur 16; 4 Ind Dec (N. s.) 356 ... 737
Ramasami Reddi v. Sokkappa Reddi, 48 Ind Cas 732; 35 M L J 194 ... 161
Rambrichh Ram v. Tarak Tewari, 33 Ind Cas 805; 14 A L J 589 672, 842
Rambux Chittangeo v. Modoosoodhun Paul, B L R Supp Vol 675 (F. B.); 7 W R 377; 2 Ind Jur (N. s.) 155 ... 152
Ramchandra Krishna Joshi v. Gopal Dhondo Joshi, 32 B 619; 10 Bom L R 948 ... 269
Ramchandra Martand Waiker v. Vinayak Venkatesh Kothikar, 25 Ind Cas 290; 42 C 384, 18 C W N 1154; 27 M L J 333; 1 L W 831; 10 N L R 112; 16 M L T 447; (1914) M W N 835; 16 Bom L R 863, 12 A L J 1281; 20 C L J 573; 41 I A 290 (P. C.) 266-612
Ramgopal v. Shamskhaton, 20 C 93 at p 99; 19 I A 228; 6 Sar P C J 247; 17 Ind Jur 38; 10 Ind Dec (N. s.) 63 (P. C.) ... 886
Ramkishore Kedarnath v. Jainarayan Ramrachpal, 10 Ind Cas 958; 40 I A 213 at p 221; (1913) M W N 661; 14 M L T 163; 17 C W N 1189, 18 C L J 237; 15 Bom L R 867; 11 A L J 865; 25 M L J 512; 40 C 966; 10 N L R 1 (P. C) 564, 679
Ramlal Mookerjee v. Secretary of State for India, 7 C 304 at p 316 (P. C.); 8 I A 46; 10 C L R 349; 4 Sar P C J 225; 5 Ind Jur 327; 3 Ind Dec (N. s.) 744 ... 309
Rampartab Samrathrai v. Foolibai, 20 B 767; 10 Ind Dec (N. s) 1082 ... 13
Ramu Aiyar v. Palaniappa Chetty, 1 Ind Cas 17; 35 M 35; (1910) M W N 589; 8 M L T 381; 21 M L J 756 ... 953
Ramun Nayar v. Subramanya Aiyar, 17 M 87; 6 Ind Dec (N. s.) 60 ... 156
Ramzan Ali v. Basharat Ali, 105 P R 1901 ... 892
Ranee Surno Moyee v. Shooshee Mokhee Burmonia, 12 M I A 244 at p. 258; 11 W R P C 5; 2 B L R P C 10; 20 E R 331; 2 Suth P C J 173; 2 Sar P C J 424 8, 101, 315, 472
Rang Lal Singh v. Ravaneshwar Pershad Singh, 12 Ind Cas 171; 39 C 26; (1911) 2 M W N 108; 10 M L T 161; 13 Bom L R 823; 14 C L J 334; 8 A L J 1173; 16 C W N 1; 38 I A 200 (P. C.) ... 167

R—contd. Page.

Rangammal v. Echammal, 22 M 305; 9 M L J 14; 8 Ind Dec (N. S.) 217 ... 398
Ranganasary v. Shappani Asary, 5 M H C R 375 ... 633
Rangasami Gounden v. Nachiappa Goundan, 50 Ind Cas 498; 46 I A 72; 36 M L J 493; 17 A L J 536; 29 C L J 539; 21 Bom L R 610; 23 C W N 777; (1919) M W N 262; 42 M 523; 26 M L T 5; 10 L W 105; 1 U P L R (P. C.) 66 449, 611
Rangayya Appa Rao v. Bobba Sriramulu, 27 M 143; 8 C W N 162; 14 M L J 1; 6 Bom L R 241; 3 I A 17; 8 Sar P C J 617 102, 315, 472
Ranglal v. Chunnilal, 60 Ind Cas 316; 16 N L R 204 ... 241
Rangnath Sakharam v. Gobind Narasiva, 28 B 639; 6 Bom L R 592 ... 955
Rao Ram Rao v. Narasimha Nayanini Varu, 28 Ind Cas 392; 28 M L J 363; 2 L W 286 ... 610
Raoji Baburao v. Bansilal Narayan Marwari, 53 Ind Cas 135; 43 B 735; 21 Bom L R 835 ... 451
Rash Mohini Dasi v. Umesh Chunder, 25 C 824 (P. C.); 25 I A 109, 2 C W N 321; 7 Sar P C J 294; 13 Ind Dec N S) 537 ... 818
Rashed Kazi v. Pachoo Sardar, 42 Ind Cas 534 ... 750
Rashid-un-nissa v Muhammad Ismail Khan, 3 Ind Cas 864; 31 A 572; 13 C W N 1182; 10 C L J 318; 6 A L J 822; 11 Bom L R 1225; 6 M L T 279; 19 M L J 631; 36 I A 168 (P. C.) ... 842
Rati Ram v. Nadar, 49 Ind Cas 990; 41 A 435; 17 A L J 649 ... 760
Ratnachallam v. Venkatrama Aiyar, 29 M 48 ... 52
Raziuddin v. Karim Bhaksh, 12 A 169; A W N (1890) 36; 6 Ind Dec (N. S.) 856 ... 173
Read v. Brown, (1889) 22 Q B D 128 at p 132; 58 L J Q B 120; 60 L T 250; 37 W R 131 ... 540
Reese River Silver Mining Co., v. Atwell, (1869) 7 Eq 347; 20 L T 163; 17 W R 601 ... 952
Reg. v. A. H. Morton, (1873) 28 L T 452; 42 L J M C 58; 2 C C 22; 21 W R 629; 12 Cox C C 456 ... 599
—— v. Bertand, (1867) 1 P C 520 at p 535; 4 Moo P C (N. S.) 460; 36 L J P C 51; 16 L T 752; 16 W R 9; 10 Cox C C 618; 16 E R 391 ... 820
—— v. Chand Nur, 11 B H C R 240 ... 916
—— v. Dorabji Balabhai, 11 B H C R 117 at p 119 ... 791
—— v. Tawell, (1845) 2 C & K 309 *note* 1 Woodall's Celebrated Trials 162; See Will's Circumstantial Evidence, 5th Ed (1912) pp 313, 317 ... 863
—— v. Tolson, (1889) 23 Q B D 168 at p 172; 58 L J M C 97; 60 L T 899; 37 W R 716; 16 Cox C C 629; 54 J P 94 ... 37
—— v. Whitehurch, (1881) 7 Q B D 534; 50 L J M C 99; 45 L 879; 29 W R 922; 45 J P 617 ... 46
Remmett v. Lawrence, (1850) 15 Q B 1004; 20 L J Q B 25; 14 Jur 1067; 117 E R 738 ... 953

R—concld. Page.

Rex v. Ball, (1911) A C 47; 80 L J K B 691; 103 L T 738; 75 J P 180; 22 Cox C C 366; 55 S J 139; 27 T L R 162 ... 928
—— v. Pease, (1832) 4 B & Ad 30; 1 N & M 690; 2 L J (N. S.) M C 26; 38 R R 207; 110 E R 366 ... 826
Rhymney Iron Company v. Fowler, (1896) 2 Q B 79 at p 80; 65 L J Q B 524; 44 W R 651 ... 484
Richard Spooner v. Juddow, 4 M I A 353; 6 Moo P C 257; Perry O C 392; 1 Sar P C J 363; 4 Ind Dec (O. S.) 358; 18 E R 734; 13 E R 682 ... 575
Robert Fischer v. Secretary of State for India, 22 M 270 (P. C.); 3 C W N 161; 26 I A 16; 7 Sar P C J 459; 8 Ind Dec (N. S.) 192 ... 246
Robinson v. Canadian Pacific Railway Co., (1892) A C 481; 61 L J P C 79; 67 L T 505 ... 151
Rodger v. Comptoir d' Escompte de Paris, (1871) 7 Moo P C (N. S.) 314; 40 L J P C 1; 3 P C 465; 24 L T 111; 19 W R 449; 17 E R 120 ... 783
Rodriguee v. Speyer Brothers, (1919) A C 59 at p 90; 88 L J K B 147; 119 L T 409; 62 S J 765; 34 T L R 628 ... 153
Romesh Chandra Mandal v. Bhuyan Bhaskar Mahapatra, 39 Ind Cas 225; 1 P L W 316 ... 294
Roop Chand Jankidas v. National Bank of India, 48 Ind Cas 975; 22 C W N 1042; 46 C 342 ... 968
Ruddar Singh v. Dhanpal Singh, 26 A 156 at p 160; A W N (1903) 221 ... 637
Rukhanbai v. Adamji, 1 Ind Cas 622; 33 B 69; 10 Bom L R 366 ... 54
Rupchand v. Minhomal, 27 Ind Cas 366; 8 S L R 164 ... 268
Russell v. Town and County Bank, (1888) 13 A C 418; 58 L J P C 8; 59 L T 481; 53 J P 244 ... 492

S

Sabapatthi Pillai v. Thandavaroya Odayar, 54 Ind Cas 515; 43 M 309; 37 M L J 620; 11 L W 108; 43 M 309 ... 312
Sabhapat Singh v. Abdul Gaffur, 24 C 107; 12 Ind Dec (N. S.) 786 ... 246
Sachindra Narain Saha v. Hironmoyee Dassi, 59 Ind Cas 435; 24 C W N 538 ... 666
Sadashiv v. Narayan Vithal, 11 Ind Cas 987; 35 B 452; 13 Bom L R 661 ... 367
Sadasuk Janki Das v. Maharaja Sir Kishen Pershad, 50 Ind Cas 216, 46 I A 33; 20 C L J 340; 17 A L J 405; 25 M L T 253; 36 M L J 429; 21 Bom L R 605; 1 U P L R (P. C.) 37; (1919) M W N 310; 23 C W N 937; 10 L W 143; 46 C 663; 12 Bur L T 160 (P. C.) ... 599
Safaruddi v. Fazal Huq, 30 Ind Cas 414; 21 C L J 592 ... 209
Sahu Ram Chandra v. Bhup Singh, 39 Ind Cas 280; 44 I A 126; 21 C. W N 698; 1 P L W 557; 15 A L J 437; 19 Bom L R 498; 26 C L J 1; 33 M L J 14; (1917) M W N 439; 22 M L T 22; 6 L W 213; 39 A 437 (P. C.) 571, 798
Saide Khan v. Amir-un-nissa, 45 Ind Cas 996; 94 P R 1918; 109 P W R 1918 ... 505
Saiyad Noor v. Ramji, 12 C P L R 158 ... 420

Page.

S—contd.

Sajuddi Mandal v. F. L. Cork, 46 Ind Cas 41; 22 C W N 499; 27 C L J 465; 19 Cr L J 681 ... 404
Sakrabhai Nathubhai v. Maganlal Mulchand, 26 B 206; 3 Bom L R 738 ... 165
Salig Ram v. Chaha Mal, 11 Ind Cas 712; 34 A 49; 8 A L J 1160 ... 360
Salmon, *In re*; Priest v. Uppleby, (1889) 42 Ch D 351; 61 L T 146; 38 W R 150 ... 583
Samibai v. Premji, 20 B 304; 10 Ind Dec (N. s.) 762 ... 60
Saminathan Chetty v. Palaniappa Chetty, 26 Ind Cas 228; 41 I A 14; 18 C W N 617; 17 New Law Reports 56; (1914) A C 618; 110 L T 913; 83 L J P C 131 (P. C.) 73, 363, 519
Samuel, *In re*, Testamentary Suit No. 3 of 1920 (Unreported) ... 344
Sanchiram De Behari v. Hara Priya Thakurani, 45 Ind Cas 611 ... 894
Sandes v. Jomir Shaikh, 9 W R 399 ... 634
Sandyal v. Bhaba Sundari Debi, 7 Ind Cas 803; 15 C W N 995; 14 C L J 31 ... 144
Sanjeeviyah v. Nanjiyah, 4 M H C R 453 ... 633
Sant Singh v. Qaim, 118 P R 1908 ... 557
Sarabdawan Singh v. Bijai Singh, 24 Ind Cas 705; 36 A 551; 12 A L J 927 ... 340
Sarabji Coovarji v. Kala Raghunath, 12 Ind Cas 911; 36 B 156; 13 Bom L R 1193 ... 459
Sarah Xavier v. Samuel Francis Xavier, (1892) P J 153 ... 933
Saral Chand Mitter v. Mohun Bibi, 25 C 371 at p 395; 2 C W N 18 and 201; 13 Ind Dec (N. s.) 247 ... 394
Sarat Chandra Datta v. Jadab Chandra Gosami, 37 Ind Cas 956; 44 C 214; 21 C W N 206; 27 C L J 198 ... 789
Sarat Chandra Naskar v. Hari Pada Mistri 4 C L J 338 ... 172
Sarat Chandra Singha v. Nritya Gopal, 8 Ind Cas 47; 13 C L J 284 ... 789
Sarat Chunder Roy Chowdhry v. Chundra Kanta Roy, 25 C 805; 13 Ind Dec (N. s.) 524 ... 173
Sardar Diwan Singh v. Subhan, 72 P R 1878 ... 257
Sardhari Lal v. Ambika Pershad, 15 C 521 at p 523; 15 I A 123 at p 127; 5 Sar P C J 172; 12 Ind Jur 210; 7 Ind Dec (N. s.) 931 (P. C.) ... 954
Sarferaz Khan v. Emperor, 19 Ind Cas 314; 11 A L J 331; 14 Cr L J 218 ... 42
Sarju Parshad v. Gi dhari Lal, 1 Ind Cas 393; 1 P R 1909; 8 P W R 1909; 21 P L R 1909 ... 173
Sartaj Kuari v. Deoraj Kuari, 10 A 272; 15 I A 51; 5 Sar P C J 159; 12 Ind Jur 213; 6 Ind Dec 182 (P. C.) ... 992
Sathi v. Ramandi Pandaram, 53 Ind Cas 399; 42 M 647; 9 L W 600; 37 M L J 93; 26 M L T 61; (1919) M W N 487 ... 564
Satya Sri Ghoshal v. Kartik Chandra Das, 13 Ind Cas 59; 15 C L J 227; 16 C W N 418 ... 242
Sawan Singh v. Mothu, 23 Ind Cas 817; 85 P R 1914; 162 P L R 1914; 120 P W R 1914 ... 715
Saxton v. Saxton, (1879) 13 Ch D 359; 49 L J Ch 128; 41 L T 649; 28 W R 294 ... 515

Page.

S—contd.

Sayad Nasrudin v. Vankatesh Prabhu, 5 B 382; 3 Ind Dec (N. s.) 251 ... 634
Sayamalal Dutt v. Saudamani Dasi, 5 B L R 362; 2 Ind Jur (N. s) 24; Bourke 189 ... 800
Schwabacher, *In re*; Stern v. Schwabacher, (1907) 1 Ch D 719; 76 L J Ch 399; 96 L T 564 ... 583
Seager v Hukma Kessa, 24 B 458; 2 Bom L R 403; 12 Ind Dec (N. s.) 837 ... 968
Seaman v. Netherclift, (1876) 2 C P D 53; 46 L J C P 128; 35 L T 784; 25 W R 159 ... 157
Secretary of State for India v. Ashtamurthi, 13 M 89; 4 Ind Dec (N. s.) 772 ... 307
——— ——— v. Chelekani Rama Rao, 35 Ind Cas 902; 39 M 617; at pp 631, 633; 31 M L J 324; 14 A L J 1114; 20 M L T 435; 4 L W 486; 18 Bom L R 1007; 25 C L J 69; 43 I A 192; 20 C W N 13.I; (1916) 2 M W N 224 (P. C.) ... 475
——— ——— v. Fahamidanissa Begum, 17 C 590 (P. C.); 17 I A 40; 5 Sar P C J 391; 8 Ind Dec (N. s.) 933 ... 303
——— ——— v. Gajanan Krishna, 10 Ind Cas 639; 35 B 362; 13 Bom L R 273 ... 123
——— ——— v. Jawahir Lal, 29 Ind Cas 144 37 A 33; 13 A L J 460 ... 453
——— ——— v. J. Moment, 18 Ind Cas 22; 40 I A 48; 13 M L T 53; 17 C W N 169; (1913) M W N 45; 15 Bom L R 27; 11 A L J 49; 17 C L J 94; 6 Bur L T 1; 24 M L J 459; 40 C 391; 7 L B R 10 (P. C.) 452, 962
——— ——— v. Venkatesalu Naidu, 30 M 113; 1 M L T 435 ... 246
Secretary to the Commissioner, Salt, Abkri and Separate Revenue Madras v. Ramanathan Chetty, 53 Ind Cas 976; 43 M 75; (1919) M W N 826; 10 L W 570; 37 M L T 663; 26 M L T 447 ... 488
Seetaram Brahman v. Rambhaoo Patwari, 10 C P L R 78 ... 475
Sefton v. Hopwood, (1858) 1 F & F 578 at p 579 ... 817
Selmes v. Judge, (1871) 6 Q B 724; 40 L J Q B 287; 24 L T 905; 19 W R 1110 ... 574
Seshappier v. Subramania Chettiar, 23 Ind Cas 174; 38 M 783; 15 M L T 221; (1914) M W N 319 ... 967
Sethuramaswamiar v. Moruswamiar, 43 Ind Cas 806; 41 M 296, 7 L W 22; 4 P L W 91; 34 M L J 130; 16 A L J 113; 27 C L J 231; 22 C W N 457; 20 Bom L R 514; 45 I A 1 (P. C.) ... 468
Shaikh Kamaruddin Ahmad v. Jawahir Lal, 32 I A 102; 1 C L J 381; 2 A L J 397; 9 C W N 601; 15 M L J 258; 27 A 334 (P. C.); 7 Bom L R 433; 8 Sar P C J 310 ... 636
Sham Chandra Dafadar v. Gadadhar Mandal, 9 Ind Cas 377; 13 C L J 277 ... 590
Sham Lal v. Banna, 4 A 286; A W N (1882) 42; 6 Ind Jur 594; 2 Ind Dec (N. s.) 905 ... 298
Sham Sundar Lal v. Achhan Kunwar, 21 A 71 at pp 79, 81 (P. C.); 2 C W N 729; 25 I A 183; 7 Sar P C J 417; 9 Ind Dec (N. s) 755 165, 611
Shama Bibi v. Baranagore Municipality, 6 Ind Cas 675; 12 C L J 410 ... 575

Page.

S—contd.

Shama Charan Chakravarti v. Katu Mundal, 24 C 344; 1 C W N 129; 12 Ind Dec (N. S.) 837 ... 414
Shama Charan Kundu v. Khettromoni Dasi, 27 C 521 (P. C.); 27 I A 10; 2 Bom L R 568; 4 C W R 501; 7 Sar P C J 638; 14 Ind Dec (N. S.) 343 537, 819
Shama Purshad Roy Chowdhury v. Hurro Purshad Roy Chowdhery, 10 M I A 203 at pp 211, 212; 3 W R P C 11; 2 Suth P C J 103; 19 E R 948 ... 105
Shambhu Nath v. Ralli, 52 Ind Cas 591; 25 P W R 1913 ... 125
Shankar Bharati Swami v. Venkapa Naik, 9 B 422; 5 Ind Dec (N. S.) 280 ... 287
Shankar Murlidhar v. Mohan Lal Jaduram, 11 B 704; 6 Ind Dec (N. S.) 463 ... 967
Shavaksha v. Tyab Haji Ayub, 37 Ind Cas 140; 40 B 386; 18 Bom L R 559 ... 54
Shaw v. Holland, (1900) 2 Ch 305 at p 313; 69 L J Ch 621; 82 L T 782; 7 Manson 409; 48 W R 681 ... 884
Shears v. Rogers, (1832) 3 B & Ad 362; 1 L J K B 89; 110 E R 137 ... 952
Sheikh Golam Hossein v. *Musammat* Alla Rukhee Beebee, 3 N W P 62 ... 633
Shelfer v. City of London Electric Lighting Company, (1895) 1 Ch D 287; 64 L J Ch 216; 12 R 112; 72 L T 34; 43 W R 238 ... 833
Sheo Babu v. Udit Narain, 24 Ind Cas 490; 12 A L J 757 ... 803
Sheo Narain Singh v. Darbari Mahton, 2 C W N 207 ... 291
Sheo Pershad Singh v. Leelah Singh, 20 W R 160 12 B L R 188 ... 976
Sheobabu v. Udit Narain, 24 Ind Cas 490, 12 A L J 757 ... 785
Sheobaksh Singh v. Thakur Dayal Singh, 50 Ind Cas 729; 4 P L J 164 ... 795
Sher Muhammad v. Emperor, 25 P R 1901 Cr .. 557
Sheru v. Jawahir Singh, 13 Ind Cas 662; 58 P R 1912; 240 P W R 1912 ... 887
Shib Shankar Lal v. Soni Ram, 3 Ind Cas 725; 32 A 33; 6 A L J 931; 6 M L T 348 ... 792
Shibcharan v. Ratiram, 7 A 20; A W N (1884) 212; 4 Ind Dec (N. S.) 250 ... 669
Shibo Prosad Pandah, *In the matter of the petition of*, 4 C 124; 3 C L R 122; 1 Shome L R Cr 72; 2 Ind Dec (N. S.) 80 ... 153
Shield's Estate, *In re*, (1901) 1 Ir Rep 172; 35 Ir L T R 3; 5 Ir L R 668 ... 476
Shioshankarpuri v. Emperor, 27 Ind Cas 845; 10 N L R 177; 16 Cr L J 161 ... 855
Shivo Gowda v. Fernandez, 8 Ind Cas 141; 34 M 513; 8 M L T 412; (1911) 1 M W N 1; 21 M L J 391 ... 670
Shivlal Bhagvan v. Shambhuprasad, 29 B 435; 7 Bom L R 585 ... 120
Shivlingrao v. Rango, 8 Bom L R 777 ... 59
Shivrao Narayan v. Pundlik Bhaire, 26 B 437; 4 Bom L R 90 ... 152
Shoroshibala Debi v. Anandamayee Debi, 12 C W N 6 ... 666
Shri Nana Maharaj, *In re*, 16 B 729; 7 Ind Dec (N. S.) 965 ... 858
Shudhangshu Bhusan Roy Chowdhury v. Bejoy Kali Roy Chowdhury, 3 C L J 376 ... 575

Page.

S—contd.

Shunmugaroya Mudaliar v. Manika Mudaliar, 3 Ind Cas 799; 32 M 400; 36 I A 185; 10 C L J 276; 11 Bom L R 1206; 6 M L T 304; 19 M L J 640 (P. C.) ... 819
Shyam Lal v. Parshottam Dass, 58 Ind Cas 585; 42 A 277; 18 A L J 241; 2 U P L R (A) 104 ... 786
Shyam Sundar Lal v. Bajpai Jainarayan, 30 C 1060; 7 C W N 914 ... 779
Sidhu Sahu v. Gopi Charan Das, 18 Ind Cas 969; 17 C L J 233 ... 590
Sidlingappa v. Hirasa, 31 B 405; 9 Bom L R 542 286, 1004
Simson v. McMaster, 13 M 344; 4 Ind Dec (N. S.) 952 ... 190
Sirimati Mallika Dassi v. Mokham Lal Chowdhry, 9 C W N 928; 2 C L J 389 ... 317
Sirinivasa Aiyangar v. Radhakrishna Pillai, 22 Ind Cas 54; 38 M 667; 14 M L T 547; (1914) M W N 81; 26 M L J 47 ... 339
Sita Ram v. Madho Lal, 24 A 44 (F. B.); A W N (1901) 194 ... 633
Sivanananja Perumal v. Muttu Ramalinga Sethurayar, 3 M H C R 75 at p 77 ... 622
Smith v. Hopper, (1847) 9 Q B 1005; 16 L J Q B 93; 11 Jur 302; 115 E R 1560 ... 575
Sonaji v. Radhika, 2 Berar L J 114 ... 603
Sonba Teli v. Labanoo, 15 C P L R 188 ... 512
Soni Ram v. Kanhaiya Lal, 19 Ind Cas 291; 35 A 227; 13 M L T 437; 17 C W N 605; 11 A L J 389; (1913) M W N 470; 17 C L J 488; 15 Bom L R 489; 25 M L J 131; 40 I A 74 (P. C.) 792
Sonilal Sheobankar v. Delawar, 39 Ind Cas 267; 2 U B R (1916) 151; 11 Bur L T 42 ... 961
Soobah Pirthee Lal Jha v. Soobah Doorgah Lal Jha, 7 W R 73 ... 910
Soonder Lal v. N B Baillie, 24 W R 287 ... 575
Soopromonian Setty v. Heligers, 5 C 71; 4 Ind Jur 517; 4 C L R 377; 2 Ind Dec (N. S.) 657 ... 599
Soper v. Arnold, (1889) 14 App Cas 429 at p 435; 59 L J Ch 214; 61 L T 702; 38 W R 449 ... 215
Spanish Prospecting Co., *In re*, (1911) 1 Ch D 92; 80 L J Ch 210; 103 L T 609; 18 Manson 191; 55 S J 63; 27 T L R 76 ... 482
Spargo's *case*, Harmony and Montague Tin and Copper Mining Company, *In re*, (1873) 8 Ch 407; 42 L J Ch 486; 28 L T 153; 21 W R 306 ... 494
Sreemutty Rajcoomaree Dossee v. Nobo Coomar Mullick, 1 Boulnois 137; 3 Ind Dec (o. s.) 82 ... 619
Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma, 22 M 398 at p 427; 21 A 460; 1 Bom L R 226; 3 C W N 427; 9 M L J 67; 26 I A 113; 7 Sar P C J 330; 8 Ind Dec (N. S.) 286; 9 Ind Dec (N. S.) 1001 ... 627
Sri Chand v. Murari Lal, 16 Ind Cas 183; 10 A L J 252; 34 A 628 ... 70
Sri Raja Venkata Narasinha Appa Rao v. Sri Raja Sobbanadri Appa Rao, 10 C W N 161; 8 Bom L R 1; 29 M 52; 3 A L J 55; 3 C L J 1; 1 M L T 3; 16 M L J 1; 33 I A 46; 8 Sar P C J 897 (P. C.) ... 469
Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishore Patta Deo, 1 M 69; 3 I A 154; 11 Mad Jur 188; 25 W R 291; 3 Sar P C J 583; 3 Suth P C J 263; 1 Ind Dec (N. S.) 45 (P. C.) ... 615

S—contd. Page.

Srikant v. Emperor, 2 A L J 444; 2 Cr L J 353... 224
Srimath Daivasigamini Pandarasanidhi v. Noor Mahomed Routhan, 31 M 47; 17 M L J 553; 3 M L T 95 ... 289
Stead v. Salt, (1825) 3 Bing 101; 130 E R 452; 10 Moore 389; 3 L J (o. s.) C P 175; 28 R R 602 ... 501
Stiles v. Galinski, (1904) 1 K B 615 at p 621; 73 L J K B 485; 90 L T 437; 52 W R 462; 68 J P 183; 2 L G R 341; 20 T L R 219 ... 341
Stone & Hastie, *In re*, (1903) 2 K B 463; 89 L T 353; 72 L J K B 846; 52 W R 130; 63 J P 44; 19 T L R 654 ... 79
Storey v. Bloxam, (1796) 2 Esq 504 ... 57
Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora, 13 M I A 333; 13 W R P C 21; 20 E R 576; 2 Suth P C J 302; 2 Sar P C J 546 ... 981
Strickland v. Symons, (1884) 26 Ch D 245; 53 L J Ch 582; 51 L T 406; 32 W R 883 ... 289
Subba Pillai v. Ramasami Ayyar, 27 M 512 ... 174
Subrahmania Ayyar v. Emperor, 25 M 61 at p 97; 11 M L J 233; 3 Bom L R 540; 28 I A 257; 5 C W N 866; 2 Weir 271; 8 Sar P C J 160 ... 852
Subrahmanyam v. Venkamma, 26 M 627 at p 635; 13 M L J 239 ... 610
Subramania Ayyar v. Muthia Chettiar, 43 Ind Cas 651; 41 M 612; 6 L W 750; 33 M L J 705 947
Subramania Mudaliar v. Ranganathan Chettiar, 18 Ind Cas 506; 24 M L J 301; 13 M L T 213; (1913) M W N 202 ... 692
Subramanian Chettiar v. Arunachalam Chettiar, 25 M 603 at p 611 (P. C.); 29 I A 138; 12 M L J 479; 6 C W N 865; 4 Bom L R 839; 8 Sar P C J 316 ... 789
Suburban Hotel Co., *In re*, (1867) 2 Ch App 737; 26 L J Ch 710; 17 L T 22; 15 W R 1096 ... 525
Sukh Dei v. Kedar Nath, 23 A 405 at p 413; 5 C W N 895; 28 I A 186; 3 Bom L R 704; 8 Sar P C J 109 ... 537
Sukh Lal v. Tara Chand, 33 C 68; 2 C L J 241; 9 C W N 1046; 2 Cr L J 618 ... 406
Sukharam Manchand v. Keval Padamsi, 56 Ind Cas 429; 44 B 392; 22 Bom L R 313 ... 943
Sukheswar Phulan v. Emperor, 11 Ind Cas 593; 38 C 789; 15 C W N 1001; 15 C L J 186; 12 Cr L J 409 ... 415
Sullivan v. Norton, 10 M 28 (F. B.); 3 Ind Dec (N. s.) 770 ... 156
Sultanat Jahan Begam v. Sundar Lal, 58 Ind Cas 90; 42 A 409; 18 A L J 431 ... 681
Sunderbai v. Collecter of Belgaum, 52 Ind Cas 897 at p 898; 21 Bom L R 1148; (1919) M W N 254; 43 B 376; 23 C W N 753; 46 I A 15 (P. C.) ... 778
Sungara Narayan Pillay v. Sandira Pillai, 6 M H C R 13 ... 633
Sunkuru Suryanarayana v. Sunkuru Ramadoss, 43 Ind Cas 526; 41 M 604 at p 605; 22 M L T 501; 34 M L J 87 at p 92; 7 L W 72; (1918) M W N 208 ... 610
Suraj Bansi Koer v. Sheo Pershad Singh, 5 C 148 (P. C.); 6 I A 88; 4 Sar P C J 8; 3 Suth P C J 589; 4 C L R 226; 2 Shome L R 242; 2 Ind Dec (N. s.) 705 390, 571, 682

S—concld. Page.

Suraj Bhan v. Punjab Cotton Press Co, Ltd. 18 Ind Cas 130; 45 P L R 1913; 40 P W R 1913 361
Surajmani v. Rabi Nath Ojha, 30 A 84; 5 A L J 67; 12 C W N 231; 18 M L J 7; 10 Bom L R 59; 7 C L J 131; 3 M L T 144; 35 I A 17 P. C.) ... 232
Surendra Nath Banerjee v. Chief Justice of Bengal, 10 C 109; 10 I A 171; 4 Sar P C J 474; 5 Ind Dec (N. s.) 76 ... 150
Surendra Nath Nag v. Gopal Chunder Ghosh, 8 Ind Cas 794; 12 C L J 464 ... 418
Suresh Chandra Sanyal v. Emperor, 14 Ind Cas 753; 16 C W N 812; 39 C 606; 13 Cr L J 289 ... 224
Suresh Chunder Wum Chowdhry v. Jogut Chunder Deb, 14 C 204 (F. B.); 7 Ind Dec (N. s.) 135 ... 936
Surjiram Marwari v. Barhamdeo Persad, 1 C L J 337 ... 472
Surjiram Marwari v. Brahamdeo Persad, 2 C L J 202 at p 214 ... 269
Suryanarayana Pandarathar v. Gurunada Pillai, 21 M 257; 8 M L J 25; 7 Ind Dec (N. s.) 538 ... 657
Susil Kumar Banerjee v. Apsari Debi, 27 Ind Cas 276; 20 C L J 501; 19 C W N 826 ... 818
Sussex Peerage *case*, (1844) 11 Cl & F 85; 8 Jur 793; 8 E R 1034; 65 R R 11 ... 986
Sutcliffe v. Booth, (1863) 32 L J Q B 136; 9 Jur (N. s.) 1037; 139 R R 744 ... 930
Swallow v. Binns, (1855) 1 K & J 417; 1 Jur (N. s.) 843; 108 R R 154; 69 E R 522 ... 807
Swaminatha Aiyar v. Srinivasa Aiyar, 38 Ind Cas 172; 32 M L J 259; (1917) M W N 278; 21 M L T 31; 5 L W 323 ... 287
Swaminatha Mudali v. Saravana Mudali, 40 Ind Cas 581; 33 M L J 370 ... 276
Swifte v. Attorney-General for Ireland, (1912) A C 276; 81 L J P C 158; 106 L T 3; 28 T L R 199 ... 986
Syed Abdul Haq Sardar Diler Jaung Bahadur v. Ghulam Jilani, 20 B 677; 10 Ind Dec (N. s.) 1021 ... 340
Syeda Khatun v. Lal Singh, 25 Ind Cas 324; 36 A 238; 12 A L J 344; 15 Cr L J 572 ... 401
Sykes, *In the goods of*, (1873) 3 P & D 26; 42 L J P 17; 28 L T 142; 21 W R 416 ... 822

T

Taba v. Shib Charan, 162 P R 1883 ... 237
Taibatannessa Chowdhurani v. Pravabati Dasi, 4 Ind Cas 750; 10 C L J 640 ... 871
Tara Kumari v. Chaturbhuj Narayan Singh, 30 Ind Cas 833; 42 C 1179 (P. C.); 29 M L J 371; 19 C W N 1119; 18 M L T 228; 2 L W 843; 13 A L J 1034; 17 Bom L R 1012; 22 C L J 498; (1915) M W N 717; 42 I A 192 ... 991
Tarachand v. Sukhlal, 12 B 559; 6 Ind Dec (N. s.) 856 ... 11
Tarap Ali v. Kalipada Bandopadhya, 34 Ind Cas 97; 23 C L J 635 ... 258
Tarsi Ram v. Man Singh, 8 A 492; A W N (1886) 156; 5 Ind Dec (N. s.) 224 ... 186
Tarubai v. Venkatrao, 27 B 43; 4 Bom L R 721 ... 475
Tarvil v. Tipper, (1627) 1 at p 222; 2 Roll Rep 493 ... 952

Page.

T—concld.

Tayaramma v. Sitaramasami Naidu, 23 M 613; 10 M L J 214 ... 1004
Taylor, *Ex parte;* Goldsmid, *In re,* (1887) 18 Q B D 295; 56 L J Q B 195; 35 W R 148 ... 579
Thakur Prasad v. Fakir Ullah, 17 A 106 (P. C.); 5 M L J 3; 32 I A 44; 6 Sar P C J 526; 8 Ind Dec (N. S.) 393 ... 576
Thanawala v. Shahzada Basudeo Singh, 1 Ind Cas 825; 12 O C 17 ... 360
Thasi Muthukannu v. Shunmugavelu Pillai, 28 M 413; 15 M L J 286 ... 1004
Thathu Naik v. Kondu Reddi, 1 Ind Cas 221; 32 M 242; 5 M L T 248 ... 948
Til Kanchan Gir v. Emperor, 8 Ind Cas 220; 11 Cr L J 594 ... 158
Tincowry Dey v. Fakir Chand Dey, 30 C 218; 7 C W N 180 ... 55
Tirupati Razu v. Vissam Raju, 20 M 155; 7 Ind Dec (N. S.) 109 ... 532
Titali Venkata Seetharamaya v. Vedula Venkataramaya, 15 Ind Cas 334; 37 M 418 ... 417
Todd, *Ex parte;* Ashcroft, *In re,* (1887) 19 Q B D 186 at p 195; 56 L J Q B 431; 57 L T 835; 35 W R 676; 4 Morrell 20 ... 250
Tonge, *In the goods of,* (1866) 66 L T 60 ... 823
Trafalgar Co. Limited v. Francis, (1892) B 758 18
Trimbak Ramchandra Pandit v. Sheikh Ghulam Zilani Waikar, 5 Ind Cas 965; 34 B 329; 12 Bom L R 208 ... 475
Trimbak Ravji v. Nana, 10 B 504; 5 Ind Dec (N. S.) 725 ... 167
Troilokhya Nath Mandal v. Abinas Chandra Roy, 24 Ind Cas 18; 21 C L J 459 ... 126
Troilokya Nath Roy v. Sarat Chandra Banerjee, 32 C 123; 8 C W N 901 ... 789
Tukaram v. Babaji, 21 B 122; 11 Ind Dec (N. S.) 84 ... 400
Tulshibhai Naranbhai v. Ranchhod Gobar, 26 B 442; 4 Bom L R 99 ... 475
Turner v. Jagmohan Singh, 27 A 531 at p 537; 2 A L J 297; A W N (1905) 77 ... 267
Tarof Sahib v. Esuf Sahib, 30 M 322; 17 M L J 395; 2 M L T 270 ... 352
Tyrrell v. Painton, (1894) P D 151; 6 R 540; 70 L T 453; 42 W R 343 537, 820

U

Udit Narain Misr v. Muhammad Minnatulla, 25 A 611; A W N (1903) 117 ... 101
Umaid Bahadur v. Udei Chand, 6 C 119 (F. B.); 6 C L R 500; 5 Ind Jur 585; 3 Shome L R 146; 3 Ind Dec (N S.) 78 ... 690
Umed Babar v. Khushalbhai, 2 Ind Cas 426; 11 Bom L R 396 ... 564
United Kingdom Mutual Steamship Assurance Association v. Nevil, (1887) 19 Q B D 110 at p 115; 56 L J Q B 522; 35 W R 746; 6 Asp M C 226 ... 599
Unni v. Kunchi Amma, 14 M 26; 5 Ind Dec (N. S.) 19 ... 590
Upendra Kishore Rai Chowdhury v. Ram Tara Debya Chaudhurani, 4 Ind Cas 542; 13 C W N 696 ... 182

Page.

U—concld.

Upendra Lal Gupta v. Ataula, 36 Ind Cas 404; 21 C W N 108 ... 278
Upendra Lal Misra v. Moti Thakur, 41 Ind Cas 61; 2 P L W 35; 2 P L J 617; (1918) Pat 166 ... 876
Upendra Nath Bagchi v. F. A. Savi, 1 Ind Cas 147; 36 C 375; 13 C W N 340; 9 C L J 259; 9 Cr L J 165 ... 155
Urlam case, Kandukuri Balasurya Prosadha Row v. Secretary of State, 41 Ind Cas 98; 40 M 886; 33 M L J 141; 22 M L T 76; 15 A L J 697; 21 C W N 1089; (1917) M W N 536; 19 Bom L R 751; 6 L W 340; 2 P L W 260; 26 C L J 290; 44 I A 166 (P. C.) ... 100

V

Vaidyanatha Aiyar v. Aiyasamy Aiyar, 1 Ind Cas 408; 32 M 191 at p 194; 5 M L T 49; 19 M L J 94 ... 858
Vairananda Nadar v. Miyakan Rowther, 21 M 109; 7 Ind Dec (N. S.) 433 ... 352
Vaithinatha Iyer v. Kuppu Thevan, 17 Ind Cas 572; (1912) M W N 1121; 13 Cr L J 828 ... 377
Vanichand v. Lakhmichand, 53 Ind Cas 395; 21 Bom L R 955 at p 957; 44 B 272 ... 445
Varada Pillai v. Jeevarathnammal, 53 Ind Cas 901; 46 I A 285; (1919) M W N 724; 10 L W 679; 24 C W N 346; 38 M L J 313; 18 A L J 274; 43 M 244; 2 U P L R (P. C.) 64; 22 Bom L R 444 (P. C.) ... 353
Vardon Seth San v. Luckpathy Royjee Lallah, 9 M I A 303 at p 321; Marsh 461; 1 Suth P C J 480; 1 Sar P C J 857; 19 E R 756 ... 152
Vardopulo v. Vardopulo, (1909) 25 T L R 518; 53 S J 469 ... 218
Vasudev Sadashiv Modak v. Collector of Ratnagiri, 4 I A 119; 2 B 99; 3 Suth P C J 390; 3 Sar P C J 701; 1 Ind Jur 387; 1 Ind Dec (N. S.) 494 ... 453
Vayidinada v. Appu, 9 M 44 (F. B.); 3 Ind Dec (N. S.) 427 585, 620
Veerabasavaraju Pantulu v. Balasurya Prasada Rao, 48 Ind Cas 706; 41 M 998; 25 M L T 1; 17 A L J 34; 36 M L J 40; 23 C W N 251; 29 C L J 184; 9 L W 243; 21 Bom L R 238; 1 U P L R (P. C.) 18; 45 I A 265 (P. C.) ... 610
Velchand v. Liston, 25 Ind Cas 371; 16 Bom L R 517; 38 B 638 ... 717
Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi, 1 M 174; 4 I A 1; 1 Ind Jur 63; 26 W R 21; 3 Sar P C J 669; 3 Suth P C J 353; 1 Ind Dec (N. S.) 116 (P. C.) ... 617
Vellayappa Chettiar v. Unnamalai Achi, 42 Ind Cas 573; 6 L W 687; (1917) M W N 858 ... 476
Velu Pillai v. Ghose Muhammad, 17 M 293; 4 M L J 140, 6 Ind Dec (N. S.) 203 ... 670
Vema Rangiah Chetty v. Vajravelu Mudaliar, 40 Ind Cas 655; 6 L W 80 ... 533
Venkata Lakshmi Narasayya v. Meenakshi Ammal, 52 Ind Cas 992; 10 L W 221; (1919) M W N 707 ... 276
Venkata Surya Mahipati v. Court of Wards, 9 M L J Sup 1; 1 Bom L R 277; 22 M 383; 3 C W N 415; 7 Sar P C J 481; 26 I A 83 (P. C.); 8 Ind Dec (N. S.) 276 ... 995

V—concld.

Page.

Venkata Viraragavayyangar v. Krishnasami Ayyangar, 6 M 344; 7 Ind Jur 358; 2 Ind Dec (N. S.) 520 ... 513
Venkatachalapathi Ayyar v. Robert Fischer, 30 M. 444; 17 M L J 294 ... 118
Venkatachallam Reddi v. Rungiah Reddi, 12 Ind Cas 372; 36 M 353; 10 M L T 248; 21 M L J 990; (1911) 2 M W N 249 ... 56
Venkatakrishnamma v. Annapurnamma, 23 M 486; 10 M L J 73; 8 Ind Dec (N. S) 741 ... 610
Venkatarama Chetty, *In re*, 51 Ind Cas 512; 7 L W 610 ... 533
Venkatasami v. Kristayya, 16 M 341; 3 M L J 169; 5 Ind Dec (N. S.) 945 ... 417
Venkatasubbaramiah v. Nambura Ramiah Sethi, 24 Ind Cas 622 ... 568
Venkayya v. Surama, 12 M 235; 4 Ind Dec (N. S.) 514 ... 65
Veyindramuthu Pillai v Maya Nadan, 54 Ind Cas 209; 43 M 107; (1919) M W N 541; 96 M L T 391; 38 M L J 32 (F. B.) ... 895
Villuri Adinarayana v. Polimera Ramudu, 17 Ind Cas 648; 37 M 304; 12 M L T 637; 24 M L J 17 ... 931
Vinayak v. Govind, 25 B 129 at pp 133, 134; 2 Bom L R 820 ... 611
Vinjanampati Peda Venkanna v. Vadlamannati Sreenivasa Deekshatulu, 43 Ind Cas 225; 41 M 136 at p 143; 22 M L T 334; 33 M L J 519; 6 L W 649; (19 8) M W N 55 ... 688
Viraragava v. Ramalinga, 6 M 148 at pp 161, 166; 3 Ind Dec (N. S.) 500 ... 611
Visalatchi Ammal v. Annasamy Sastry, 5 M H C R 150 at P 157 ... 570
Vishnu Keshav Joshi v. Satvaji, (1897) P J 87 ... 217
Vishwanath v. Sitaram, 26 Ind Cas 768; 10 N L R 159 ... 463
Vithoba v. Bapu, 15 B 110 at p 133; 8 Ind Dec (N. S.) 75 ... 612
Vithu v. Dhondi, 15 B 407; 8 Ind Dec (N. S.) 277 ... 279
Vitla Button v. Yamenamma, 8 M H C R 6 ... 682
Vitta Tayaramma v. Chatakondu Sivayya, 48 Ind Cas 50; 41 M 1078; 35 M L J 317; 24 M L T 183; (1918) M W N 625; 8 L W 480 ... 92
Vivian v. Moat, (1881) 16 Ch D 730; 50 L J Ch 331; 44 L T 210; 29 W. R. 504 ... 279
Vusa Chandrakantam v. Vusa Subhavayudu, 25 Ind Cas 685; 1 L W 827 at p 830; 16 M L T 347; (1914) M W N 745 ... 65
Vyankatesh Chimaji v. Sakharam Daji, 21 B 465; 11 Ind Dec (N. S.) 312 ... 59
Vyankatesh Mahadev v. Ramchandra Krishna, 27 Ind Cas 46; 38 B 687; 16 Bom L R 653 ... 55
Vyapuri Goundan v. Chidambara Mudaliar, 18 Ind Cas 607; 37 M 314; 24 M L J 26 ... 161
Vydianatha Iyer v. Subramanian Pattar, 10 Ind Cas 552; 36 M 104; 21 M L J 546; 10 M L T 69; (1911) 2 M W N 93 ... 52
Vyse v. Brown, (1884) 13 Q B D 199; Cab & E 223; 33 W R 168; 48 J P 151 ... 949

W

Page.

Waghela Rajsanji v. Sheikh Masludin, 11 B 551 at p 561; 14 I A 89 at p 96; 11 Ind Jur 315; 5 Sar P C J 16; 6 Ind Dec (N. S.) 364 ... 152, 563
Wahed Molla v. Shaik Basaraddi, 11 C W N 507; 5 Cr L J 291 ... 377
Walian v. Banke Behari Pershad Singh, 30 C 1021 at p 1031; 30 I A 182; 7 C W N 774; 5 Bom L R 822; 8 Sar P C J 512 ... 653, 672
Walji Mathuradas v. Ebji Umersey, 29 B 235; 6 Bom L R 182 ... 811
Walter Rebells v. Maria Rebells, 2 C W N 100 ... 666
Waolfun Bibi v. Jesarat Sheikh, 27 C 262; 14 Ind Dec (N. S.) 173 ... 144
Waterhouse v. Keen, (1825) 4 B & C 200; 6 D & R 257; 107 E R 1034; 40 R R 858 ... 574
Watts, *In re*; Smith v. Watts, (1882) 22 Ch D 5; 52 L J Ch 209; 48 L T 167; 31 W R 262 ... 583
Wazeer Mahton v. Chuni Singh, 7 C 727; 9 C L R 377; 3 Ind Dec (N. S.) 1016 ... 59
Wiley v. Smith, (1894) 1 Ir R 153; 1 Ir L R 73 ... 19
Williams v. Buchanan, (1891) 7 T L R 226 ... 583
Williams v. Jones, (1845) 67 R R 767; 13 M & W 628; 14 L J Ex 145; 2 Dowl & L 680; 153 C R 262 ... 633
Williams Brothers v. Ed. T. Aguis Limited, (1914) A C 510; 83 L J K B 715; 110 L T 865; 19 Com Cas 200; 58 S J 377; 30 T L R 381 ... 265
Williamson v. Barbour, (1878) 9 Ch D 529; 50 L J Ch 147; 37 L T 698 ... 21
Willmott v. London Celluloid Co., (1886) 31 Ch D 425 at p 434; 55 L J Ch 449 ... 978
Willmott v. London Celluloid Co., (1887) 34 Ch D 147 at p 150; 56 L J Ch 89; 55 L T 696; 35 W R 145 ... 978
Wingrove v. Wingrove, 14 W R 416 ... 934
Woomesh Chunder Biswas v. Rashmohini Dasi, 21 C 279; 10 Ind Dec (N. S.) 818 ... 818

Y

Yamnava Govind Appaji v. Laxuman Bhimrao, 16 Ind Cas 180; 38 B. 533; 14 Bom L R 543 ... 269, 587
Yashvant Narayan Kamat v. Vithal Divakar Parulekar, 21 B 267; 11 Ind Dec (N. S.) 181 ... 73
Yeditha Subbaya v. Emperor, 15 Ind Cas 85; 23 M L J 722; 13 Cr L J 453; (1912) M W N 725; 12 M L T 203 ... 917
Yenidje Tobacco Co. *In re*, (1916) 2 Ch 426 at p 432; 86 L J Ch 1; 115 L T 530; 60 S J 707; 32 T L R 709 ... 525, 543
Yinuganti China v. Katagiri Venkata, 21 Ind Cas 650; 14 M L T 502; (1913) M W N 1005 ... 599
Yule & Co. v Mahomed Hossain, 24 C 124; 1 C W N 71; 12 Ind Dec (N. S.) 748 ... 878

Z

Zamorin of Calicut v. Sitarama, 7 M 405; 2 Ind Dec (N. S.) 865 ... 307
Zipru Talhoo v. Hari Supdushat, 42 Ind Cas 73; 19 Bom L R 774; 42 B 10 ... 423

INDIAN CASES

1921.

VOLUME LIX.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

January 20, 1920.

Present:—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Syed AMATUL FATEMA BIBI,

SINCE DECEASED, NOW REPRESENTED BY *Syed* ABDUL HAFIZ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Dewan ABDUL ALIM SAHEB AND ANOTHER—DEFENDANTS—RESPONDENTS.

Privy Council—Finding of fact, interference with—Muhammadan Law—Waqf, *validity of—Substantial dedication.*

The Privy Council will not interfere with concurrent findings on issues of fact.

Where there is a substantial dedication of property to charitable and religious purposes. the dedication, in the absence of any legal objection, is not invalid according to Muhammadan Law.

Appeal preferred against the decree, dated the 25th June 1912, passed by the Calcutta High Court (Chitty and Teunon, JJ.), affirming the decree of the Subordinate Judge, Second Court of Mymensingh, dated the 31st March 1908.

Mr. *De Gruyther*, *K. C.*, and Mr. *Abdul Majid*, for the Appellants.

Mr. *Dunne*, *K. C.*, and Mr *J. K. Roy*, for the Respondents.

JUDGMENT.

VISCOUNT CAVE.—Their Lordships do not think it necessary to trouble Counsel for the respondents in this case.

This is an appeal against the judgment of the High Court of Bengal affirming a judgment of the Second Subordinate Judge of Mymensingh dismissing the plaintiff's suit.

The plaintiff claimed as heiress of Izzetanessa Bibi and sought to set aside a *waqfnama* executed by her, being a dedication to charitable and religious purposes of certain property, partly derived by Izzatanessa Bibi from her late son and partly being property of her own. The grounds on which the plaintiff sought to set aside the deed were: first, fraud and undue influence on the part of the defendants, who are respondents; secondly, that the dedicator did not understand the document; and thirdly, that the document was bad according to Muhammadan Law.

The issues of fraud and undue influence and failure to understand the documents were issues of fact, and the Subordinate Judge, placing the burden of proof on the right shoulders, determined those issues in favour of the defendants. His decision was affirmed by the High Court, full and sufficient reasons being given. There were, therefore, concurrent findings in favour of the respondents on the issues of fact, and it is impossible for the appellants to displace those findings.

With regard to the suggestion that the document was bad according to Muhammadan Law, it is sufficient to say that it has not been made out to their Lordships' satisfaction that there is any legal objection to the document. There was a substantial dedication of property to charitable and religious purposes, and no legal objection to the dedication has been established.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed, and that the appellants, the legal representatives of the plaintiff, should pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellants.—Messrs. *Truefitt and Francis.*

Solicitors for the Respondents.—Messrs. *W. W. Box & Co.*

RAM LAL-ISHAR DAS *v.* SALIG RAM.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 606 OF 1919.

October 18, 1920.

Present :—Mr. Justice Abdul Raoof.

THE FIRM KNOWN AS MESSRS. RAM LAL-ISHAR DAS THROUGH ISHARDAS, AND MANGAL MAL—DEFENDANTS —PETITIONERS

versus

SALIG RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Place of suing—Fraud, decree obtained by—Suit to set aside decree, whether can be brought in Court other than that which passed decree—Cause of action——Wrong report with regard to service of summons—Civil Procedure Code (Act V of 1908), ss. 104 (2), 115—Revision—Plaint, order directing return of—Appeal—Appellate Court's order—Appeal, second, whether lies.

A suit to set aside an *ex parte* decree on the ground of fraud may be brought in a Court other than that by which the decree sought to be set aside was passed. [p 3, col. 1.]

Plaintiff sued the defendant at Lahore for setting aside an *ex parte* decree passed against him by the Munsif of Ferozepore It appeared that notice of the suit in which the impugned decree was passed was issued to be served on the plaintiff in Lahore, but was not served and was returned with a report that he was evading service, whereupon the *ex parte* decree was passed. The Munsif of Lahore, holding that the cause of action arose at Ferozepore, returned the plaint for presentation to the proper Court. On appeal the District Judge held that the suit was cognizable by the Lahore Court and remanded it for decision on the merits. The defendant applied for revision to the High Court :

Held, (1) that the order passed by the District Judge, being one passed on appeal against an order returning the plaint, was not appealable and that, therefore, a petition for revision was competent ; [p. 2, col. 2.]

(2) that, inasmuch as a wrong report was made by the serving officer with regard to the plaintiff's alleged attempt at evasion of service, part of the cause of action arose at Lahore and the suit was maintainable at Lahore. [p 3, col 1.]

Jawahir v. *Neki Ram*, 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190, followed.

Petition, under section 44 of Act VI of 1918, for revision of the order of the District Judge, Lahore, dated the 23rd April 1919, reversing that of the Munsif, 1st Class, Lahore, dated the 23rd December 1918, and remanding the case for fresh decision.

Lala *Ram Chand Manchanda*, for the Petitioners.

Babu *M. N. Mukerjee*, for the Respondent.

JUDGMENT.—In my opinion this case is fully covered by the ruling *Jawahir* v. *Neki Ram* (1). The suit was one for setting aside an *ex parte* decree. The *ex parte* decree was passed by the Munsif of Ferozepore. It appears that notice of the suit was issued to be served on the plaintiff in Lahore of which, admittedly, he is a resident. The notice, however, was not served on the plaintiff, but it was returned with a report of the serving officer that, in spite of search, the plaintiff could not be got at because he tried to evade service on getting information that an effort was being made to serve him with a notice of the suit. On the return of the notice to the Court of Ferozepore, an *ex parte* decree was passed against the plaintiff, who was defendant in that case. Now, the plaintiff has instituted a suit in the Court of the Munsif of Lahore for a declaraton that the *ex parte* decree passed by the Ferozepore Court was obtained against him by fraud. The plaint was returned by the Court of the Munsif to the plaintiff to be presented to a proper Court, because he was of opinion that the cause of action of the plaintiff lay in Ferozepore where the *ex parte* decree had actually been passed. The plaintiff preferred an appeal from the order returning the plaint. The learned Judge of the Court below has taken a different view from that taken by the Court of first instance, and has held that part of the plaintiff's cause of action accrued in Lahore and that, therefore, the suit was cognizable by the Lahore Court. He, consequently, made an order sending back the case to the Court of Munsif for decision on the merits. Against this appellate order passed by the District Judge the present application for revision has been preferred to this Court.

A preliminary objection was taken to the hearing of this petition for revision on the ground that the order passed by the lower Appellate Court was appealable as an order for remand and no revision lay. This contention entirely ignores the provisions of section 104 (2), Civil Procedure Code. It cannot be denied that it was an order passed upon an appeal against an order returning the plaint which was appealable under Order XLIII, rule 1 (*a*). The order under revision being, therefore, an order passed in appeal no appeal lay to this Court. I overruled the objection and allowed the learned Vakil for the petitioner to argue the petition for revision on the merits. He has tried to distinguish

(1) 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190.

the present case from the cases reported in *Banke Behari Lal* v. *Pokhe Ram* (2) and *Jawahir* v. *Neki Ram* (1) upon the ground that the decisions in those cases were based, primarily, upon the ground that an attachment of the property of the plaintiff had been made at the place where the suits had been instituted, but a reference to the concluding part of the judgment in the case of *Jawahir* v. *Neki Ram*(1) at page 194* makes it quite clear that that was not the only ground upon which the learned Judges based their decision. Their Lordships observed:—

"It is part of the plaintiff's case that the defendant fraudulently prevented the institution of the suit from becoming known to him by causing the notice of the suit to be served on some other person and an incorrect return to be made to the Court. This is part and parcel of the fraud alleged, and, if the allegation is found to be true, part of the fraud was committed in the Agra District and there can be no doubt that the cause of action arose in part at least in the Agra District, even if the attachment of the plaintiff's property is not part of the cause of action."

These observations apply with equal force to the facts of the present case. The *ex parte* decree was passed against the plaintiff in consequence of the report made by the serving officer. If the plaintiff had been actually served he would have defended the suit, but, inasmuch as the serving officer made a report that the plaintiff was avoiding service, probably the service was considered sufficient and a decree *ex parte* was passed against him. Therefore, the report of the serving officer and the sending of the notice to be served in Lahore formed part of the alleged fraud which brought about the *ex parte* decree.

I accordingly dismiss this application with costs.

Application dismissed.

(2) 25 A. 48; A. W. N. (1902) 179.

*Page of 37 A.—*Ed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 925 OF 1918.

June 15, 1920.

Present :—Mr. Justice Teunon and Mr. Justice Newbould.

NILRATAN MITRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDUL GOFUR GAZI AND OTHERS—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899), s. 36, applicability of, to document executed previous to passing of Act—Decree, whether binding on persons not parties thereto—Appeal, second—Point not involving question of law, whether can be raised for first time.

The admission in evidence of a document cannot, by virtue of section 36 of the Stamp Act, be subsequently objected to on the ground that under the Stamp Act in force at the date of its execution—in this case Act XXXVI of 1860—the document was insufficiently stamped, as that section is as applicable to documents of the years when the Act of 1860 was in force as it is to insufficiently stamped documents under the Act in which it is contained. [p. 4, col. 1.]

A decree obtained in a suit to which the parties litigating a subsequent suit were not parties, is not conclusive and binding as against them. [p. 4, col 2.]

A point which does not involve a pure question of law and which was not taken in the lower Courts, cannot be taken in second appeal. [p. 4, col. 2.]

Appeal against the decree of the First Additional District Judge, 24-Parganahs, dated the 5th of February 1918, reversing that of the Munsif, 1st Court, at Baruipur, dated the 11th of February 1917.

Dr. *Dwarkanath Mitter* and Babu *Hiralal Chuckerbutty*, for the Appellants.

Babus *Biraj Mohan Majumdar* and *Ramendra Mohan Majumdar*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs for recovery of *khas* possession of certain land and for ejectment of the defendants therefrom. The case of the plaintiffs was that the holding or tenure, in question was not transferable and that the defendants, who were transferees from two tenants, Kheraj and Jeraddi, were trespassers. The case of the defendants was that their vendors had a *mourasi mokarari* interest in the land and this case they based upon a *patta* said to have been granted by the plaintiff No. 1 to the father of one of the vendors, namely, Kheraj, on 27th *Baisakh* 1269, corresponding with May 1862

With regard to this *patta* the plaintiff's contention was that it was not genuine. In the Court of first instance the decision was in favour of the plaintiffs. In the Court of first appeal it has been held that the *patta* of 1269 is genuine and that, by the express terms of this *patta*, the interest of the lessees is transferable.

In the appeal before us the plaintiffs who are the appellants contend that the decision of the learned District Judge is wrong and they assail it on three grounds. It is first pointed out that this *patta*, which bears a stamp of 4 annas, should, in accordance with the law then in force—Act XXXVI of 1860—have borne a stamp of Re. 1-8 0. It is then said that, by reason of the provisions of section 12 of that Act, the document is not admissible in evidence in civil proceedings, but, just as in the Act now in force, under section 13 of that Act there are provisions by which the Courts may receive in evidence such deeds or instruments on payment to the Court of the proper amount of the stamp duty. Section 36 of the present Stamp Act, II of 1899, appears to us to be as applicable to documents of the years when Act XXXVI of 1860, was in force as it is to insufficiently stamped documents under the present Act,

It is next said that the District Judge should have held that in May 1862 the plaintiff No. 1, Nilratan, was a minor and could not, therefore, possibly have executed this *patta* of 1862. In coming to the conclusion that the plaintiff was not a miror in May 1862 the learned District Judge, it has been contended, has not given sufficient weight to the decrees of the years 1862, 1865, 1866 and 1867. These decrees appear to be decrees on contest and they show that in the suits which led to those decrees the plaintiff Nilratan was represented to be a minor, and that in those suits his mother appeared on his behalf as his guardian. The learned District Judge has, however, considered these decrees and has also, at the same time, considered along with the decrees other evidence on the record with regard to the plaintiff's age. Unless, therefore, it could be said that the statements contained in those decrees were binding on the present defendants we cannot say that, with regard to the estimate of the value of those decrees, the learned District Judge has fallen into an error. The present defendants or their predecessors were no parties to the litigation, and it cannot, therefore, be said that the statements of the plaintiff's age in those decrees are conclusive and binding as against the defendants.

Lastly, it is said that Nilratan's younger brother, Bhuban, was a minor in May 1862 and that the learned District Judge should have held that, as against him at least, the *patta* could not be taken to have a permanent and transferable interest. This is a point which does not appear to have been taken in either of the Courts below and if it had been taken it would have been open to the defendants to show that there were circumstances in the case rendering this *patta* operatives as against Nilratan's brother, Bhuban, as well as against him. It is not a pure question of law, and the point not having been taken in either of the Courts below cannot be taken now.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 353 OF 1917.
June 9, 1920.
Present :—Mr. Justice Tudball and
Mr. Justice Kanhaiya Lal.
Musammat MAHMUD JAHAN BEGAM—
DEFENDANT—APPELLANT
versus
GOVIND RAM AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Jurisdiction of Civil and Revenue Courts - Partition—Parao, *whether can be partitioned by Civil Court.*

A Parao, or encamping ground, which bears a separate number in the revenue papers and is included in a *khewat khasra* is part and parcel of the *mahal* within the area of which it is included, notwithstanding the fact that revenue has not been fixed upon it As such, the *parao*, *i. e.*, the site and not the houses that may be standing on it, is divisible only by a partition suit in the Revenue Court, a Civil Court having no jurisdiction to partition or to divide it. [p. 6, col. 2.]

First appeal from the decree of the Additional Subordinate Judge, Meerut.

MAHMUD JAHAN BEGAM v. GOVIND RAM.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This is an appeal by one defendant out of a large number of parties to a partition suit instituted in the Civil Court. Govind Ram, Hari Ram and Anand Ram sued for partition of their shares in certain properties claiming a three-fifths share therein. The property consisted of house property and some Zamindari and other miscellaneous properties. Among the items of properties which they sought to divide were three items, namely, Khata Khewat No. 35, Khata Khewat No. 65 and Khata Khewat No. 66 in Qasba Meerut. While the suit was pending, Anand Ram died and was succeeded by his two daughters, *Musammat* Bhagwanti and *Musamma* Sita. A preliminary decree for partition was passed on the 17th of September 1913, under which the three plaintiffs were held entitled only to a one-fifth share and not to the three-fifths that they claimed While the suit was pending, *i.e*, on the 14th of February 1912, Hari Ram and Anand Ram sold to one Ram Saran Das a two-fifths share in Khata Khewats Nos. 35, 65 and 66 which they claimed in the suit. This, of course, was prior to the preliminary decree. On the 20th of February 1912 Govind Ram sold his one fifth share that he claimed in the same three properties to Ram Chandar Sahai. On the 15th of August 1912 Ram Saran transferred to Ram Chander Sahai the rights and interest that he had acquired from Hari Ram and Anand Ram on the 14th of February 1912. In this way, Ram Chandar Sahai purported to have acquired the whole three-fifths share claimed by Govind Ram, Hari Ram and Anand Ram in the three Khatas mentioned. On the 21st February 1914, *i.e.*, after the preliminary decree, Ram Chandar Sahai sold to Kalyan Singh all the interests that he had acquired in these three Khatas. He purported to sell a three fifths share therein. On the 26th of March 1917 Kalyan Singh transferred his rights and interests to the present appellant, *Musammat* Mahmud Jahan Begam. In his sale-deed he sets forth all the previous transfers made by Govind Ram, Hari Ram and Anand Ram of a three-fifths share; the fact that they have been held to be owners only of a one-fifth share was set out plainly and simply and also that he transferred his interests to the present appellant. Up to that time no final decree had been prepared. The preliminary decree came up to this Court on appeal, where it was upheld, and that, no doubt, explains the delay in the preparation of the final decree. The present appellant was made a party to the suit on the 10th of April 1917. On the 20th of April 1917 all the other persons who were parties to the suit filed a petition of compromise in the Court below in respect to what they considered as the non Zamindari property, setting forth certain lots and asking that those lots might be decreed to those persons to whom they had been allotted by the compromise. As for the Zamindari property it was held that it could only be divided by the Revenue Court under the terms of the Land Revenue Act. Mahmud Jahan Begam was no party to that compromise and if that compromise had dealt only with the property which was apart from the share acquired by her in Khata Khewats Nos. 35, 65 and 66, then she was not a necessary party to it. Her rights and interests were divisible by a partition in the Revenue Court. Mahmud Jahan Begam raised at least two objections with which we are concerned in this appeal. An examination of the plaint will show that there are attached to that plaint two or three lists of property. List A was a detail of immoveable non-Zamindari property, item No. 10 of which was a Parao, or an encamping ground, together with thatched shops, for the sale of chaff and fuel, situated in the City of Meerut bounded as below. In list B item No. 8 was 5 *bighas*, 12 *biswas pukhta* of land bearing a *jama* of Rs. 65 entered in the Khewat as Khata Khewat No. 65 situate in the resumed Lakhiraj Mahal in Qasba Meerut, District Meerut. Mahmud Jahan Begam's first plea was that this "Parao" is part and parcel of Khata Khewat No. 65; that the land thereof could not be divided by the Civil Court as it was part of a Mahal; that it was not, therefore, divisible under the compromise, and that she was entitled to a one-fifth share therein. The Court below held that the Parao, not being assessed to Government revenue, was divisible by the Civil Court and not by the Revenue Court, and secondly, that Mahmud Jahan Begam had acquired no share in the Parao under the sale-deeds which we have mentioned above.

The lower Court's finding on both these points have been contested before us. So far as the liability of the site of the Parao to be

divided by the Civil Court is concerned, we have to see whether or not it is a part and parcel of a Mahal as defined in the Land Revenue Act. The evidence of the Patwari, Ishwari Prasad, is to the effect that the Parao has a Khasra No. 952, and that it is included in the Khata Khewat No. 65. He says that this Parao has not been assessed to revenue and the rest of the Khata Khewat No. 65 is assessed to revenue. The lower Court has held that it is liable to be partitioned by the Civil Court because it is not assessed to Government revenue and because it is *abadi* land with which the Revenue Courts have no concern. It says that a Mahal is a revenue paying unit and since the Parao is not assessed to revenue it is not part of the Mahal, and, therefore, section 233 (*k*) of the Land Revenue Act is not a bar to the partitioning of *abadi* land by the Civil Court. With this decision of the learned Subordinate Judge we are unable to agree. The word Mahal, as defined in section 4 of the Land Revenue Act, is (*a*) any local area held under a separate engagement for the payment of land revenue: provided that if such area consists of a single village or portion of a village, a separate Record of Rights has been framed for such village or portion, a Mahal also includes (*b*) any revenue-free area for which a separate Record of Rights has been framed. With classes (*c*) and (*d*) of the definition we are not concerned. Ordinarily speaking, in a Mahal there are many plots of land which, speaking colloquially, are not assessed to revenue, *i.e.*, there is no income derived from them which is to be taken into consideration at the time of the assessment of revenue. Roadways, uncultivated plots, and even *abadi* sites of villages, are all within the boundaries of a Mahal although no income may be derivable from them. The total income of the Mahal is taken into consideration at the time of settlement and on that, as a basis, revenue is fixed upon the whole Mahal and the whole Mahal is held under one engagement for the payment of revenue. A Mahal may be, and frequently is, divided and sub-divided into many different Pattis and Khatas and the revenue is distributed over these sub-divisions. Each of these sub-divisions may contain land which is waste, like the present Parao land, and the income from which may or may not have been taken into consideration in the fixing of the revenue. But the fact remains that all areas within the Mahal are primarily responsible for the revenue of the Mahal. Equally so in the case of a Khata, which is but a sub division of a Mahal. In former days, under the rules fixed by the Board of Revenue, if a Zemindar planted trees upon cultivated land in his Mahal, when the grove was well-established, Government used to reduce the revenue of the area planted with trees. That was done as an inducement to Zemindars to plant groves; the area thus granted, though free in a way from Government revenue, yet was part and parcel of the Mahal and the whole Mahal remained responsible to Government for the revenue assessed upon it. In the present case the Patwari's evidence leaves by it beyond a shadow of doubt that this Parao actually bears Khasra No. 952, that is within Khata No. 65, and though it may be that revenue was not fixed upon it still it remained a part and parcel of the Khata and, therefore, responsible to Government for the total revenue fixed upon that Khata. There can be no doubt that if the revenue was not paid Government would be within its right if it attached and sold this Parao land for the purpose of recovering the revenue. This Parao, (*i.e.*, the site and not the houses that may be standing upon it) is, therefore, part and parcel of the Mahal and as such is divisible by a partition suit in the Revenue Court. In so far, therefore, as the decree by the lower Court purports to divide up the area of this Parao is concerned, it is bad and we must set it aside. It must be carefully noted that this does not affect the division of the house property standing upon it. House property is property which cannot be divided or partitioned by a Revenue Court. It is only the site of these houses, in so far as they are part and parcel of the Mahal, that a Revenue Court can divide. We would like to point out to the Court below that partition of sites of *abadi* land in similar circumstances is done every day by those Courts and the power of Revenue Courts to divide up the *abadi* land has never yet been questioned. There remains the question whether the appellant has any share whatsoever in this Parao. The lower Court has come to the conclusion that, because the Parao is mentioned in list A of the plaint and Khata Khewat No. 65 is mentioned in list B of the plaint, therefore, Hari Ram, Govind

Ram and Anand Ram were treating the Parao as a separate entity, and that when they purported to transfer their shares in Khata Khewat No. 65 they did not intend to transfer any share in the Parao. The area of Khata Khewat No. 65 is 5 *bighas*, 12 *biswas*. In the sale deed which these persons executed they distinctly stated that they sold the shares which they claimed, *i.e*, two fifths in the one sale-deed and one-fifth in the second sale-deed out of the total area of 5 *bighas*, 12 *biswas* of this Khata. They similarly mentioned the areas of the other two Khatas which they also sold. Now, this area 5 *bighas*, 12 *biswas*, being the area of the whole Khata, includes the area of the Parao. There is nothing in the sale deeds to show that the Parao was exempted in any way. Thus, in all the various transfers which bring us down to the deed in favour of the appellant, the same description has been used, the total area of each Khata has been given and the areas of the shares transferred have also been given. In Kalyan Singh's sale deed in favour of the appellant he merely purports to transfer the one-fifth share without specifying the area of the one fifth share. On the basis of these sale-deeds it is impossible to say that Mahmud Jahan Begam is not the owner of a one-fifth share in every portion of Khata Khewat No. 65 which includes the Parao. If Hari Ram, Govind Ram and Anand Ram wished to exempt this Parao from their sale-deed it was very simple, indeed, for them to have done so and, in fact, if they had done so they would have distinctly stated that the area of the shares which they were selling was the total area of the Khata *minus* the area of the Parao. But the very fact that they specified the full area goes to show that they did not wish to exempt any area of the Khata from the sale. So far as the Parao land of this Khata is concerned, the plaintiff ought to get her one-fifth share therein. We would like to point out here that the learned Subordinate Judge has been guilty of some exaggeration when he says that the Parao is an encamping ground in the heart of the City of Meerut, and that it is studded with shops thatched and *pucca*. The Parao, as a matter of fact, lies on the edge of the city and not within the heart of it. In one direction it is bounded by cultivated land. The map on the file shows that the portion on which the shops stand is very minute, as compared to the area of 1 *bigha*, 4 *biswas*; only 4 *biswas* of the Parao is covered with house property, the rest of it is waste land. The learned Subordinate Judge was also of opinion that the assessment of Municipal taxation upon the houses, (*i.e.*, the Municipal house-tax) is also a solid proof that the land is not part and parcel of the Mahal. When he has had more experience of revenue matters he will find that it is not an infrequent occurrence that there are many portions of a Mahal which not only pay Government revenue but also Municipal taxation. One would think that in the town of Meerut one would find innumerable instances of this. We, therefore, allow this appeal. We set aside the decree of the Court below, in so far as it operates on the land of the Parao. So far as it has divided the house and other properties standing upon the Parao, the decree will stand. We also declare that the land of this Parao is part and parcel of Khata Khewats Nos. 65 and 66, and that Mahmud Jahan Begam is entitled to a one-fifth share therein and that this property is divisible only by a partition under the Land Revenue Act.

Appeal decreed.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

November 20, 1919.

Present :—Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

HARDIT SINGH AND OTHERS—APPELLANTS

versus

GURMUKH SINGH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLV, r. 8 b)—Judicial Committee's Rules, r. 43—Appeal heard ex parte—Application for re-hearing—Procedure—Omission to notify respondents of admission of appeal, effect of.

The accidental omission to notify the respondents of the admission of an appeal to the Privy Council is not a sufficient ground for re-hearing, provided the respondents in fact knew of the admission,

TANHA SINGH *v.* BANDHU SINGH.

Appeal from a decree of the Punjab Chief Court, dated the 20th December 1913, reversing a decree of the Subordinate Judge, Ferozepur.

FACTS.—This appeal was heard *ex parte* by the Board, who, on January 29th, 1918, allowed it. The respondents now applied for re hearing on the ground that notice of the admission of the appeal had not been given to the respondents (other than Gurmukh Singh) as required by Order XLV, rule 8 (*b*) of the Code of Civil Procedure, 1908.

Mr. *Dunne*, *K. C.* and Mr. *Raikes*, for the Petitioners (Respondents).—The Chief Court admitted the appeal on February 13th, 1915, but did not notify the respondents other than Gurmukh Singh of the admission. Such notification was required by Order XLV, rule 8 (*b*). The Registrar of the Chief Court has certified that the respondents other than Gurmukh Singh were not served with notice, and that this was due to oversight in his office. Gurmukh Singh has sworn that he did not inform the other respondents of the admission of the appeal, and all the other respondents have filed affidavits that they did not know of the admission, or of the despatch of the printed record to England. Had they known, they would have instructed agents to defend the appeal. Under these circumstances they are entitled to a rehearing.

Ranee Surno Moyee v. *Shooshee Mokhee Burmonia* (1).

(Reference was made to rule 43 of the Rules of the Judicial Committee, 1908).

Mr. *Dube*, for the Opposite Party, submitted that the facts and circumstances of the case showed that all the respondents knew of the admission of the appeal. They all had knowledge of the application under Order XLV, rule 3, and of the Chief Court's order, dated October 14th, 1914, certifying that the case fulfilled the requirements of section 110 of the Code of Civil Procedure.

Further, they all had notice of an application made by appellants for stay of execution pending the appeal to the Board. There was sufficient evidence to show that they all knew of the despatch of the record to England. Under rule 43 of the Board's Rules it is not necessary that they should get notice of the admission of the appeal if they were, in fact, aware of it: it is clear that they were so aware.

Mr. *Dunne*, replied.

Their Lordships rejected the application with cos's.

Application rejected.

(1) 12 M. I. A. 241 at p 258; 11 W. R. P. C. 5; 2 B. L. R. P.C. 10; 20 E. R 331; 2 Suth. L. P. C. J. 173; 2 Sar. P.C. J. 424.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 450 OF 1916.

May 28, 1917.

Present :—Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Sharfuddin.

TANHA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BANDHU SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 35—Hissawari, admissibility of, in evidence.

A *hissawari* prepared in consequence of a demand made by the Collector of a district under section 30 of the Bengal Land Registration Act, is inadmissible in evidence under section 35 of the Evidence Act. It is not a public or other official book, register or record, but is merely the record of information supplied by some of the sharers in an estate and can only be admitted in evidence, if it is proved to have been made by the person or persons by whom it is signed.

Appeal from a decision of the Additional District Judge, Patna, dated the 16th February 1916.

Messrs. *Hasan Imam* and *Gangadhar Das*, for the Appellant.

Messrs. *Manuk*, *Gupta* and *Surendra Mohan Das*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—(*March* 15, 1917).—This appeal arises out of a suit brought by the plaintiffs for possession of about 18 *bighas* of land. Without going into fractions of a *bigha*, it may be said that the plaintiffs claim to be entitled to 6 *bighas* on the ground that 35 *bighas* more or less belong to one Chulhan Singh, a distant relative of his; that Chulhan Singh died and his heirs were

the plaintiff Tanha Singh and Lakhan Singh, the father of the defendants. According to law, Tanha Singh and Lakhan Singh were each entitled to half of the property of Chulhan, that is to say, to 18 *bighas* more or less, but Tanha Singh alleges that he defrayed two thirds of the cost of some litigation which took place between himself and Lakhan on the one side and a lady, who put herself forward as a daughter of Chulhan Singh, on the other and, therefore, he became by agreement with Lakhan Singh entitled to two-thirds of Chulhan's property instead of one-half. He has obtained one half, that is, 18 *bighas*, and he claims with his sons to be entitled to 24. On this account, therefore, they claim 6 *bighas*. The other 12 *bighas* in suit were admittedly the property of one Hanuman Singh on whose death they passed into the possession of his widow *Musammat* Degnu Kuer. The plaintiffs' case is that *Musammat* Degnu Kuer died in 1310 F., and that at that time the plaintiff Tanha Singh was solely entitled as reversionary heir of Hanuman Singh. The plaintiffs allege that Lakhan Singh died in 1309 F., that is one year before the death of *Musammat* Degnu. The defendants, the sons of Lakhan, with reference to the claim to the 6 *bighas*, deny that there was any such arrangement as was alleged by the plaintiffs. With regard to the claim to the 12 *bighas* they say that their father Lakhan Singh was alive when *Musammat* Degnu Kuer died and that the property which she had held devolved in equal shares upon the plaintiff Tanha Singh and Lakhan Singh. The Subordinate Judge decreed the claim in full. The defendants appealed. As the District Judge observes at the beginning of his judgment, the plaintiffs, in order to succeed, have to establish two propositions, namely, (1) that Lakhan predeceased *Musammat* Degnu Kuer, and (2) that the plaintiff Tanha Singh obtained two thirds of Chulhan's property against one-third taken by Lakhan Singh. With regard to the claim for the 6 *bighas* the District Judge describes the story told by the plaintiffs as a trumped up story and he gives solid reasons for arriving at the conclusion that the plaintiffs failed to make out the alleged arrangement with Lakhan. I can see no reason why we should not accept the District Judge's finding upon this part of the case.

The learned Judge, when dealing with the plaintiffs' claim for the 12 *bighas*, relied strongly upon a *hissawari* said to have been filed in the Collectorate in 1309 F. The Subordinate Judge rejected the *hissawari*. He refused to accept the statement of the Patwari to the effect that it had been signed by all the *maliks* and he seems to have accepted the statement of the plaintiff Ramdhan Singh that he did not sign the *hissawari*. The District Judge does not refer to the evidence adduced to prove the *hissawari*, but he says that the *hissawari* is a reliable piece of evidence and that it must carry great weight as it came into existence before the dispute between the parties broke out. He refers to the fact that the Subordinate Judge had rejected the *hissawari* because it had not been signed by the *maliks*, and goes on to say that he is not concerned with deciding whether the *hissawari* is binding upon the plaintiff or any other persons but what he is concerned with is, the existence of a particular person in a particular year and that this is, established by the *hissawari*. In this Court it is contended that the *hissawari* was not admissible in evidence, first, because it was not proved and, secondly, because if not proved, it was not admissible as a public document. Mr. Manuk, on behalf of the defendants respondents, contended that the document was admissible under section 35 of the Evidence Act. It appears to me that we should be putting a great strain on that section if we were to hold that the *hissawari* was admissible under it. It seems to have come into existence, in consequence of a demand made by the Collector under section 30 of the Land Registration Act, 1876. The *hissawari* does not appear to me to be a public or other official book, register or record. So far as it is admissible or useful in the present case, it is merely the record of information supplied by some of the sharers in an estate on the demand of the Collector. I would not admit this document under section 35. It appears to me that it would certainly be admissible if it were proved to have been made by the person or persons by whom it is said to have

been signed and I think that, before making use of the document, the District Judge should have examined the evidence to see whether the *hissawari* was proved. Mr. Hasan Imam maintains also that the District Judge has overlooked a number of receipts which were filed in the case. Mr. Manuk, on the other hand, says that he relies strongly on the receipts himself. The receipts may not be of much value in the case but I think that they should have deen discussed by the District Judge. Under the circumstances, I am of opinion that we ought not to accept the finding of the District Judge on the question whether Lakhan, the father of the defendants, predeceased *Musammat* Degnu Kuer. I would direct that the record be returned to the Court of the District Judge in order that a fresh finding may be recorded by him on the question whether Lakhan predeceased *Musammat* Degnu Kuer. No further evidence should be taken. On return of the findings 10 days will be allowed for objections.

SHARFUDDIN, J.—(*March* 15, 1917).—I agree.

JUDGMENT.—In our order of March 15th last we directed that the record in this case should be returned to the Court of the District Judge in order that a fresh finding might be recorded on the question whether Lakhan predeceased *Musammat* Degnu Kuer. The learned District Judge, on a consideration of the evidence, finds as a fact that *Mus mmat* Degnu Kuer predeceased Lakhan Singh. The plaintiffs, in order to succeed, had to prove that Lakhan predeceased Degnu Kuer and that the plaintiff Tanba Singh obtained two-thirds of Chulan's property against one-third taken by Lakhan Singh. The second question was disposed of by us in our previous order and the present finding of the District Judge is fatal to the claim of the plaintiff-appellant. No one appears to support the appeal to day. The appeal is dismissed with costs

Appeal dismissed.

BOMBAY HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT NO. 1170 OF 1916.

June 16, 1919.

Present:—Mr. Justice Marten.

MESSRS. WELD & CO., A FIRM—PLAINTIFFS

versus

SHER AHMED EKBAL AHMED—DEFENDANT, AND HAJI KARIM ELAHI SHETHI—THIRD PARTY.

Champerty, whether void in India—Transaction, when void—Compromise, fraudulent.

W. and Co. brought a suit to recover from the defendant losses on certain cotton contracts, based on an account the correctness of which was not disputed. In this suit the third party, *i. e.*, the party who undertook to indemnify the defendant against losses, appeared as a party, and put in an agreement of compromise between the plaintiff and defendant entered into after admission of the suit, and alleged that the effect of this agreement was that the defendant was to pay plaintiff half the sum for which the suit had been brought and as regards the balance he was to bring a third party notice against the third party: that the plaintiff and defendant were to share the balance equally, and that defendant obtained this concession by agreeing to give evidence against the third party, and that, consequently, the agreement was fraudulent, collusive and against public policy, and that no decree should be passed against the defendant:

Held, (1) that as the account had been proved and also that the transactions entered therein did take place between the plaintiff and defendant which resulted in a loss for which defendant was liable, the agreement furnished no sufficient ground for not passing a decree against the defendant; [p. 11, col. 2]

(2) that inasmuch as champerty is not void in India unless the transaction is not a *bona fide* one for the acquisition of an interest in the subject of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive, the agreement did not fall within the description of an illegitimate transaction, and was, therefore, not invalid. [p. 12, col. 1.]

JUDGMENT.—This is a claim for Rs. 55,783-9-4 on cotton contracts. There are also third party proceedings under an order of the 5th October 1917 which provides "that the third party be at liberty to appear at the trial of this action and take such part therein as he may be advised and be bound by the result of the trial and.....that the question of the liability of the third party to indemnify the defendant be tried at the trial of this action, but subsequent thereto."

I am now, in the first instance, trying the action, which involves the question of the

direct liability of the defendant to the plaintiffs. The defendant did not dispute his liability to the plaintiffs for the amount claimed. Counsel for the third party, as I understood him, said he could not dispute the account, Exhibit E to the plaint, as between the plaintiffs and the defendant, but he was not prepared to say he would not dispute it at all. I did not altogether follow the precise effect of this distinction, and I, therefore, thought it best to let the plaintiff prove his case, and then to allow any question to be asked in cross-examination which either Counsel should think proper, subject to the issues and the pleadings.

That, accordingly, has been done. The result is that, so far as the account itself is concerned, which is Exhibit E to plaint, and is shown in the ledger, Exhibit G, there is no dispute on the evidence that these transactions took place between the plaintiffs and the defendant and resulted in a loss of Rs. 55,783 for which the defendant was liable to the plaintiffs.

It is, however, admitted by the plaintiffs that Rs. 28,000 have, since the filing of the plaint, been paid by the defendant and that, accordingly, that sum must be taken into account in arriving at the decree to be passed in this suit.

The third party called no evidence, but he put in an agreement of compromise entered into between the plaintiffs and the defendant on the 2nd of February 1917. I should say the plaint was admitted on the 30th of October 1916. He (the third party) says that this document was fraudulent and collusive and against public policy and that, accordingly, I ought not to pass any decree against the defendant, more especially as the sum of Rs. 28,000 has been paid thereunder. He says the effect of this agreement was that the defendant was to pay Rs. 28,000 of the Rs. 55,783 and that, as regards the balance of the claim, he, the defendant, was to bring a third party notice against the third party and that, thereafter, the plaintiffs and defendant were to share the balance equally, and that the defendant got this concession in consideration of his agreeing to give evidence against the third party.

The defendant says the agreement speaks for itself, and that no other evidence of fraud is necessary. In the first place, I hold, that the account, Exhibit G, has been proved, and that these transactions did take place between the plaintiffs and the defendant, and that they resulted in a loss of Rs. 55,000, odd, for which the defendant was liable.

Next, after considering the compromise agreement of 2nd February 1917 and the arguments of the learned Counsel, I hold that this agreement furnishes no sufficient reason why I should decline to pass judgment for the plaintiffs in respect of those *bona fide* transactions which took place between them and the defendant, allowing, of course, for the Rs. 28,000 that has been paid. When it comes to the issue of indemnity between the third party and the defendant, other questions as to the effect of this compromise may arise. I, however, decline to hold that this agreement, by itself and on the very face of it, is a fraudulent agreement on the part of the plaintiffs.

Mr. Kemp has cited two cases, one of *Bulli Coal Mining Company* v. *Osborne* (1) and another in *Tarachand* v. *Sukhlal* (2). He has drawn my attention, particularly, to the passage on page 353 in the Privy Council case, where the Chief Judge of New South Wales said in his judgment:—"We are of opinion that the agreement in question is in no sense champertous, as it appears to us to be obvious that both the Messrs. Osborne and the Bellambi Coal Mining Company have 'an interest in the thing at variance,' in which case, as pointed out in 1st Hawkins, Pleas of the Crown, 456, the parties are justified in entering into an agreement respecting a matter in which they have legally or equitably a common interest".

Then, on page 359, Lord James, in delivering their Lordships' judgment said, "The leading Counsel for the appellants intimated that he felt he could not rely upon this defence of champerty, and virtually withdrew it. Their Lordships are, therefore, relieved from delivering any judgment upon the subject, beyond saying that they see no ground for differing from the judgment delivered on this head by the Full Court."

In that case, the common "interest in the thing at variance" was of a landlord and

(1) (1899) A. C. 351; 68 L. J. P. C. 49; 80 L. T. 430; 47 W. R. 545; 15 T. L. R. 257.

(2) 12 B. 559; 6 Ind. Dec. (N. S.) 856.

tenant in relation to coal which had been abstracted by another party. It may, therefore, be said that it was rather easier in that case than in this to say that the two parties had a common interest in the thing at variance. Here, I suppose, "the thing at variance" would be the incidence of the loss on the cotton contracts, but the plaintiffs could hardly have a common interest in making the third party bear the loss unless the defendant was financially weak.

The other case, in 12 Bombay, goes to show that champerty is not void in India unless the transaction was not a "*bona fide* one for the acquisition of an interest in the subject of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive."

Taking that test, I think this agreement does not fall within the description of an illegitimate transaction referred to in that decision.

But, even if the compromise agreement was invalid, I heard no adequate argument from Counsel for the third party why the plaintiffs could not recover from the defendant on their original claim. Further, in considering the effect of the compromise agreement, it would seem that the Rs. 55,783 claimed by the plaintiffs is not the total loss but the balance of a larger loss after allowing for margin and other moneys paid by the defendant as appears by the contracts Exhibit A and the ledger Exhibit E. It may be, therefore, that, even if the defendant retains Rs. 13,891 under the compromise agreement, *viz.*, half of the balance of Rs. 27,783 to be recovered from the third party, he will still be out of pocket, unless he recovers the above margin and other moneys as well. In that event, it could not be said that he obtained any benefit at the expense of his principal.

In the result, I pass a decree against the defendant for the amount of Exhibit G, but in that decree credit must be given for the Rs. 28,000 already paid and the precise amount must be mentioned to me.

Suit decreed.

Attorneys for the Plaintiffs:—Messrs. *Little & Co.*

Attorneys for the Defendants:—Messrs. *Payne & Co.*

BOMBAY HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT No. 1170 OF 1916.

June 19, 1919.

Present :—Mr. Justice Marten.

MESSRS. WELD & CO., A FIRM—PLAINTIFFS

versus

SHER AHMED EKBAL AHMAD—DEFENDANT

AND

Haji KARIM ELAHI—3RD PARTY.

Letters Patent (Bom.), cl. 12—Third party proceedings—Cause of action partly outside jurisdiction—Party outside jurisdiction—Leave to proceed, necessity for.

Inasmuch as third party proceedings come within the description "suits of every other description" in clause 12 of the Letters Patent of the High Court of Bombay, the leave of that Court must be obtained to proceed therein when part of the cause of action arises outside the jurisdiction of that Court and the third party resides outside the jurisdiction. Such leave cannot be inferred from the fact that leave was obtained to issue the third party notice, as that does not necessarily imply that the question was judicially considered. [p. 14, col. 1; p. 15, col. 1.]

JUDGMENT.—This preliminary objection raises a two-fold point of jurisdiction, *viz*, (1) whether, in this case, the whole cause of action arose out of the jurisdiction and, therefore, this Court has no power to hear the third party notice at all; and (2) if part of the cause of action arose within the jurisdiction, then, whether express leave was not necessary under clause 12 of the Letters Patent before the third party notice could be served.

I am now on the third party notice, and have, as between plaintiffs and defendant already given a decree in favour of the plaintiffs. The present issue, *viz.*, No. 1, is between the defendant and the third party.

On the first point, the substance of the suit relates to certain cotton contracts on which, as I have said, I have found the defendant is liable to the plaintiffs. As between the defendant and the third party the defendant's case depends on a right of indemnity and, substantially, it is based on an express agreement of the 21st May 1916, Exhibit No. 4. The effect of that agreement was that the third party was to take over the cotton contracts then outstanding between the plaintiffs and the

defendant, and that the defendant was to carry out certain instructions of the third party in relation thereto, and that the third party thenceforth was to be responsible pecuniarily on these contracts. The third party says that the true relation was not that of principal and agent but that of vendor and purchaser, or assignor and assignee. Even assuming in his favour, without deciding the point that that is the true view, still it is clear that the contract, Exhibit 4, contemplated the defendant carrying out its terms by performing certain acts in Bombay. In other words, if he came to sue the third party on this contract as he has now done, he would have to prove certain acts of his which either took place in Bombay, or which, by means of telegrams, resulted in acts in Bombay. What I refer to are the cotton transactions which the plaintiffs carried out in Bombay as the result of instructions given by the defendant. It seems to me that; on that ground alone, a part of the cause of action has arisen in Bombay, because, to sue on the contract, it would be necessary for the defendant to prove certain operations carried out in Bombay by his instructions.

Mr. Setalvad, for the defendants, has taken another point, and that also seems to me, as at present advised, to be well founded. He says, as far as the third party notice is concerned, a part of the cause of action is this very suit in Bombay, because the validity of a third party notice depends on two things, *viz.*, first a hostile suit in Court, and secondly, a right to indemnity. The hostile suit he relies on is this very suit filed in Bombay. It seems to me, therefore, that the third party's objection on the ground that the subject-matter of this third party notice arose wholly out of jurisdiction, unfounded.

Now, I come to the second point, which has given me rather more trouble, and that is, whether assuming that part of the cause of action arose out of the jurisdiction, then whether leave to serve this third party notice ought not to have been obtained under clause 12 of the Letters Patent. In considering that, one may compare three classes of proceedings, *viz.*, (1) an ordinary suit, where you add a defendant, (2) a suit where there is a counter-claim bringing in a new party, and (3) a third party notice. Now, as regards class No. 1, it seems clear that, under the Bombay High Court practice, you must obtain leave under clause 12 of the Letters Patent to sue the new defendant although you may have obtained leave, under clause 12 to bring the suit against the original defendant. Authority for that proposition will be found in *Rampartab Samrathrai* v. *Foolibai* (1). Similarly, as regards class 2, if you bring a counter-claim against the plaintiff and bring in as a defendant to that counter-claim a new party, there, again, you must get leave under clause 12 of the Letters Patent, because, as has very properly been admitted by Mr. Setalvad, under our Bombay Rules (rule 118) a counter-claim has the same effect as a cross-suit. Therefore if leave would be necessary for an original suit, so also is it for a cross-suit. I am assuming, of course, cases where part of the cause of action is outside the jurisdiction and where the defendants live out of the jurisdiction.

Now, I come to the question of the third party notice, class 3. This is, in some respects, a combination of class 1 and class 2 and for this reason. The usual order provides that the third party shall be at liberty to appear at the trial of the action and take such part therein as he may be advised, and that the third party notice is to be tried at the same time as the original suit but after it. Now, what is the effect of this order? The third party can appear at the trial and, subject to the Judge's directions, he can dispute the plaintiffs' claim. This he could not do if it was merely the case of a cross suit, because, in that event, he would have no *locus standi* on the hearing of the original suit. The third party, therefore, resembles to some degree an added defendant, although the plaintiff obtains no decree against him directly.

Then, when the third party notice is tried, it is in the nature of a cross-claim, namely, a claim brought by the defendant against the third party. Perhaps, to be quite accurate, a cross suit should involve a claim against the plaintiff as well, but the analogy is near enough for my purpose. Therefore, on principle, one would expect to find that it is as necessary to obtain leave

(1) 20 B. 767; 10 Ind. Dec. (N. S.) 1082.

for a third party notice as it would be if the third party was added as a defendant, or if a counter-claim was brought against him as a new party.

Counsel have been unable to find any Indian authority on the point and they tell me that the third party procedure was introduced into this Court by Sir Lawrence Jenkins and that other Indian High Courts have not yet adopted it. This may account for that lack of Indian authority.

As far as the English practice is concerned, it is quite clear from the decision of the Court of Appeal in *McCheane* v. *Gyles* (2) that under the English practice the leave of the Court is necessary to serve third party notice out of the jurisdiction. Mr. Setalvad says this decision depends on the wording of the English Supreme Court Rules, one of which requires third party notices to be served like writs (as in our rule 127), and another of which requires leave for service of writs out of the jurisdiction. The latter rule, he says, is not to be found in our practice, for clause 12 of the Letters Patent requires leave for certain suits and not for service of writs.

I do not, however, propose to discuss the differences—for there are differences—between the English rules as to pleadings and service out of the jurisdiction on the one hand and the Indian rules as to pleadings and leave under clause 12 on the other hand. Nor do I propose to rely on *Mc Cheane* v. *Gyles* (2) as governing our practice. It is only useful by analogy. But I may just notice that our Bombay rules have so faithfully copied the English third party rules as to retain in rule 127 a reference to a statement of claim a pleading unknown in our Courts. In fact, in England the writ precedes the statement of claim. In India, the plaint precedes the writ.

The real point here is, I think, whether these third party proceedings come within the description "suits of every description" in clause 12 of the Letters Patent. Now, as to that, our third party rules will be found in Chapter VIII, rules 127 to 133. It is to be observed that, under rule 128, if the third party does not appear on the third party notice, he is to be deemed to admit the validity of the decree obtained against the defendant, and his own liability to contribute or indemnify to the extent claimed in the third party notice. Then, under rule 129, "where a third party makes default in entering an appearance in the suit in case the suit is tried and results in favour of the plaintiff, the Judge who tries the suit may, at or after the trial, pass such decree as the nature of the case may require, for the defendant giving the notice against the third party."

Therefore, although we do not find in the third party rules, express words like those in rule 118 treating counter-claim as cross suits, and, although we have not got the same express provision in any of the Indian Statutes, as is contained in the English Judicature Act, 1873, section 24 (*iii*), which expressly provides for third parties, still we have under the Bombay High Court Rules a form of procedure which is in substance a "suit" against the third party within the Letters Patent. Before the third party notice has been served on him, he is a freeman and no Court can pass a decree against him. As a result of that third party notice he is in peril, and may, unless he takes certain steps, have a decree passed against him. It seems to me, therefore, that, substantially, the case falls within clause 12 of the Letters Patent, just as the case of an added defendant or of a counter-claim against a new party does, and that leave under clause 12 is necessary.

This brings me to the next question whether leave was, in point of fact, obtained. Leave in the ordinary way was not obtained, that is to say, there is not the usual express endorsement "Leave under clause 12 of the Letters Patent". But the Judge's order of the 9th August 1917 giving leave to issue the third party notice was in the following form:—"I do order that the defendant be and he is hereby authorised to issue a third party notice against the said Karim Elahi Seth notwithstanding the time to file his written statement having expired and to serve the same upon him by sending it by registered post to the address of the said Karim Elahi Seth at Mohulla Dhalan, Peshawar City".

Here you get an expras statement in the Judge's own order that the defendant is to be at liberty to serve this third party notice by sending it by registered post outside the jurisdiction.

(2) (1902) 1 Ch. D. 287; 71 L. J. Ch. 183; 86 L. T. 1; 50 W. R. 376.

It is, accordingly, argued that there was implied leave under clause 12. But, as I have already intimated, there are differences between clause 12 and the English rules as to service out of the jurisdiction, and to treat the two as the same may be misleading. Further, my attention has been drawn to the judgment of Mr Justice Candy in *Rampartab Samrathrai* v. *Foolibai* (1), where there had been an order made by Farran, J, to add a party as a defendant. That party was out of the jurisdiction. Subsequently, at the trial, the point that no leave had been obtained, was raised, and it was answered by saying that as the Judge gave leave to add this party, it must be inferred that he gave leave also under clause 12. Candy, J., overruled that answer and said, at page 774: "It cannot be inferred that leave was then allowed or granted. In *Jairam Narayan* v. *Atmaram Narayan* (3) Mr. Justice West was asked to draw a similar inference, because leave had been granted to the plaintiff to sue as a pauper: 'but such leave' (he said) 'does not by any means necessarily imply that this particular question was judicially considered."

I may add that the order of Mr. Justice Farran will be found in *Foolibai* v. *Rampartab Samrathrai* (4) and that the point as to jurisdiction does not appear to have been raised before him, but that on appeal it was evidently present to the mind of Sir Charles Sargent, having regard to what that learned Judge said on page 468.

No doubt, there is a distinction on the facts of the present case, because Mr. Justice Kajiji's order expressly mentions service out of the jurisdiction. In the view, however, which I take, it is unnecessary to decide this point. I will leave it open for future decision if necessary. I will only add that, in my opinion, Solicitors should be careful to get leave under clause 12 in express terms. If that had been done here, of course, the point would have been unarguable.

Assuming, then, for the purposes of this case (but without deciding the point) that the Judge's order of 9th August 1917 did not give the necessary leave under clause 12, it still remains to be seen what was done on that third party notice. The order, as I have said, was made on the 9th of August, and on the 7th of September the usual summons for directions was taken out. In answer to that summons the third party filed an affidavit of the 21st September 1917 and in paragraph 1 of that he said:—"I appear on this third party notice under protest and submit that this Honourable Court has no jurisdiction to try the question between the defendant and myself as raised by the defendant in his written statement and in his affidavit of 23rd July last" and he went on to say "I submit the whole of the cause of action between the defendant and myself arose in Peshawar". That point I have already dealt with. It is the first objection. This affidavit did not raise the second objection, namely, that if part of the cause of action arose in Bombay, leave under clause 12 of the Letters Patent had not been applied for. That affidavit was answered by the defendant and the third party put in a further affidavit of the 4th October 1917. Then, on the hearing of the summons, the Judge made his order of the 5th October 1917 in which he ordered the summons for directions to be made absolute; that the third party do file his written statement within four weeks, and make and file his affidavit of documents, and be at liberty to appear at the trial of this action and take such part therein as he may be advised and be bound by the result of the trial, and that the question of the liability of the third party to indemnify the defendant be tried at the trial of this action but subsequent thereto, and he ordered the costs to be costs in the cause. That was the usual form of order.

There is not a word said there about reserving the right of the third party to raise the point of jurisdiction at the trial. I must, I think, on the facts and on this order, assume that the learned Judge decided the point of jurisdiction against the third party. There has been no appeal from that order and it was made as long ago as October 1917. If I was now to decide that this Court has no jurisdiction to hear the third party notice, I should in effect be hearing an appeal, and reversing, on appeal, the decision of Mr. Justice Kajiji which, of course, I have no jurisdiction to do. Further, when it comes to the further point of embarrassment, which also was raised before Mr. Justice Kajiji, and to the argument that in the exercise of my discretion I should decline to hear this third party notice and leave

(3) 4 B. 482; 2 Ind. Dec. (N. S.) 830.
(4) 17 B 466 at p. 467; 9 Ind. Dec. (N. S.) 303.

the defendant to a fresh suit, I think there, again, I really cannot enter into questions of that sort, in view of the deliberate decision of the Chamber Judge made so long ago as October 1917. It will be noticed that in *Mc Cheane* v. *Gyles* (2) the third party moved to set aside the notice and order and when the motion was refused an appeal was pesented (see pages 289-290).

I, therefore, think that in substance this question of jurisdiction is *res judicata*. having regard to the order of the Chamber Judge of the 5th October 1917 and that, accordingly, the point of jurisdiction which has been raised at the trial failed.

I accordingly answer Issue No. 1, *viz.*, whether the Court has jurisdiction to try this suit between the defendant and the third party, in the affirmative, and direct the trial of the other issues on the third party notice to proceed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 1170 OF 1919.

June 20, 1919.

Present :—Mr. Justice Marten,

MESSRS. WELD & CO. A FIRM—PLAINTIFFS

versus

SHER AHMED EKBAL AHMED—DEFENDANT AND HAJI KARIM SHETHI—3RD PARTY.

Indemnity, contract of—Decree against defendant—Third party notice—Claim by defendant against third party—Claim to be confined to amount decreed.

Where in a suit under a contract or right of indemnity the real sum due by the defendant to the plaintiff for which the latter has obtained a decree is less than the real loss incurred by the defendant, the defendant cannot ask for a decree on a third party notice for this latter sum, nor can he be allowed to split up his claim partly for the amount decreed, and partly for the difference between that amount and the total loss, as a term of being allowed to proceed with the third party notice, that is to say, no other proceedings can be taken for the difference between the two amounts, and the case must proceed on the claim for indemnity as regards the first mentioned sum, *i. e*, the sum for which a decree has been passed. [p. 16, col. 2.]

JUDGMENT.—I have dealt with the claim in the suit and I am now on the third party notice. The claim in the suit has resulted in a decree for the plaintiffs Messrs. Weld & Co. against the defendant, for a sum of Rs. 55,000, odd. This sum the defendant claims by his third party notice from his uncle, the third party, under a contract or right of indemnity.

I should say, at the outset, that having regard to certain margin moneys, approximately Rs. 22,000, which were provided by the defendant and another sum of nearly Rs. 5,000 which represented profit made by the defendant on his own previous transactions with the plaintiffs, and which sum of Rs. 5,000 was left as further margin money, the real sum due by the defendant to the plaintiffs and the real loss incurred by the defendant is over Rs. 82,000. This fact is material on Issues Nos. 2, 10 and 11 as to the effect of a certain compromise agreement of 2nd February 1917 between the plaintiffs and the defendant.

It seemed to me, however, that on the pleadings the defendant could not ask for a decree on the third party notice for this sum of Rs. 82,000. At any rate, he has not asked that, but only wishes to deal with the Rs. 82,000 as an answer to Issues Nos. 2, 10 and 11. At the outset, I asked his Counsel what he was going to do as regards the balance of the claim, *viz.*, the difference between the Rs. 82,000 the total loss, and the Rs. 55,000, the claim on the third party notice. After consideration, Counsel for the defendant agreed to confine his claim to the Rs. 55,000 as a term of his being allowed to proceed with the third party notice. I mean by that that no other proceedings can be taken for the difference between the Rs. 82,000 and the Rs. 55,000. If the claim for the whole Rs. 82,000 had been proceeded with, I should probably have come to the conclusion that there must be one trial, and one trial only, for the whole Rs. 82,000, and that I could not allow it to be split up partly for the claim of Rs. 55,000 and partly (in other proceedings) for the balance of the Rs. 82,000. The case accordingly proceeds on a claim for indemnity as regards the Rs. 55,000 awarded by the decree in this suit against the defendant, the balance, if any of the total loss being

abandoned, but with leave to prove such total loss in connection with issues Nos 2, 10 and 11.

The explanation of these somewhat protracted proceedings is that the defendant and the third party are relatives, *viz.*, uncle and nephew, and that the third party, at any rate, is disposed to fight his relative to the last possible moment. Substantially, the defendant's story, which he has told me, supported, as it is, by a large body of documentary evidence, none of which is in any way displaced, is really not contradicted by the third party. In my opinion, the defendant's story as to the facts is the correct one.

The defendant says that, some time prior to 21st May 1916, he had certain transactions with the plaintiffs in which he and the third party were acting in partnership, the shares being four-fifths and one-fifth. The market went against them and the defendant wanted to close. The third party was averse to this and, consequently, the agreement of the 21st May 1916, Exhibit 4, was arrived at. The effect of that agreement was that the third party took over all outstanding transactions between the plaintiffs and the defendant, and for that purpose he, the defendant, was to act in effect as an intermediary between the plaintiffs and the third party for the purpose of giving orders in relation to future dealings with respect to these transactions. All matters were to be dealt with by the defendant, but it is quite clear from the agreement that the third party was to keep the defendant in funds.

Now, on that agreement, it is contended by the third party, that the relationship of principal and agent did not exist between the defendant and the third party but that their true relationship was of vendor and purchaser, or assignor and assignee. Even if one adopts that argument, it seems to me clear, on the face of the document, that, for certain purposes, *viz.*, the carrying out of the terms of this agreement, the defendant had to act as the agent of the third party. I won't refer to the clauses in detail but I am satisfied that to that extent, at any rate, the defendant was the agent of the third party. Even if that is incorrect, still, having regard to the fact that he was carrying out these terms in pursuance of this agreement and under the instructions of the third party, he would, I think, be entitled to be indemnified against the consequences. So I hold that the effect of this agreement was that the defendant, if and so far as he acted on the instructions of the third party, was entitled to be indemnified.

I do not propose to go into the details of the transactions which, on the instructions of the third party, took place with the plaintiffs. It is sufficient to say that an agreement was entered into with the plaintiffs Weld & Co., under which they were given certain Hundis—Hundis to the extent of a lac and a half and another ten thousand rupees, and that it was the duty of the third party to find money to meet these Hundis. He has not found a single pie. The plaintiffs naturally called for more margin, as the market was going against the defendant, but that margin was not provided by the third party. Eventually, the plaintiffs closed and the Rs. 55,000, odd, is the result of the loss sustained as at the closing date.

Personally, I do not think there has been any real answer in this Court to the defendant's claim and I think Counsel for the third party only acted quite properly in stating that he really had no evidence from a legal point of view, to meet the case put forward by the defendant. However, the third party was very anxious to go into the witness-box and, accordingly, I allowed him to do so and say anything he wanted. It was irregular in view of his Counsel's admissions, but I thought, under the circumstances I might overlook the irregularity. Having heard his grievances, I am quite satisfied that there is nothing whatever in them.

Now, turning to the formal issues that have been raised in the case, I have already dealt with issue No. 1. As regards issue No. 2, which I may take along with issues No. 10 and No. 11, this depends on a certain compromise agreement, Exhibit 1 (*a*), of the 2nd February 1917, which was entered into between the plaintiffs and the defendant with reference to the present suit. The effect of that agreement was that the defendant was to pay at once Rs. 28,000 and as regards the balance of the Rs. 55,000 so much as might be recovered from the third party was

to be divided in equal shares between the plaintiffs and the defendant, and the defendant was to assist the plaintiffs by his evidence and he was, if necessary, to submit to judgment in the suit and to bring a third party notice against the third party.

Now, if the result of this arrangement was that the defendant as agent would make the slightest profit out of the transaction then it might very well be that at any rate, against his own principal, the third party, this agreement could not stand. But when you look at it, it is clear that, in any event, the defendant was bound to be a loser for he had already provided the difference between the Rs. 82,0 0 the total loss and the Rs. 55,000, odd, claimed in this suit. This difference the agreement does not touch; and accordingly he could make no profit. This difference arises from the margin money of some Rs. 22,000 and his own personal profit on another transaction of nearly Rs. 5,000. That was his own money. It has all gone. He will never get that back now from the third party.

Under these circumstances, I do not see anything fraudulent or collusive or against public policy whatever in this document and accordingly I shall answer issue No. 2 in the negative, and issue No. 10 in the affirmative and issue No. 11 in the negative.

The remaining issues I answer as follows:—

3. Yes.

4. The effect of the agreement of 21st May 1916 was that, as between the third party and the defendant, the third party took over the transactions in question.

5. Yes, including the starting balance of Rs. 29,246.

6. Yes.

7. No.

8. Yes.

9. No.

In conclusion, I will add that the third party is a tea merchant, living in Peshawar. I do not suppose he has any real knowledge of cotton. In the future, I think he will be well advised to leave cotton speculations alone and to attend to his own business.

Attorneys for the Plaintiffs:—Messrs. *Little & Co.*

Attorneys for the Defendant:—Messrs. *Payne & Co.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 1170 OF 1916.

June 21, 1919.

Present:—Mr. Justice Marten.

MESSRS. WELD AND CO., A FIRM—PLAINTIFFS

versus

SHER AHMED EKBAL AHMED—DEFENDANT AND HAJI KARIM ELAHI—3RD PARTY.

Third party proceedings – Costs of successful defendant—Taxation, method of.

Where a decree is passed against a defendant in a suit and the defendant then succeeds in third party proceedings his costs of the suit should be taxed as against the third party as between solicitor and client and the costs of the third party proceedings as between party and party. [p. 20, col. 1.]

JUDGMENT.—The last point argued in this case is whether the costs of the defendant as against the third party ought, as to any, and, if so, what extent to be paid as between solicitor and client.

Mr. Setalvad at the outset disclaimed any intention to ask for costs between solicitor and client. In case this judgment comes before any Judge who is unfamiliar with the Bombay practice as opposed to the practice in England, I would say that that observation has reference to what I believe to be a peculiarity in these Courts of drawing a distinction between "costs as between solicitor and client" and "costs between solicitor and client," the former being more in the nature of what in England are costs on a higher scale, and the latter being the fullest possible indemnity and which I rather gather in this Court admit of very little, if any, real taxation. I need not dwell on that, because, as I have said, Mr. Setalvad confines his case to costs as between solicitor and client.

As regards the order to be made, Mr. Setalvad asks me to follow the form which was adopted by Mr. Justice Romer, as he then was, in *Trafalgar Co. Limited* v. *Francis* (1) which will be found in Seton, 6th Edition, Vol. III, p. 2142, Form No. 12, and similarly at p. 2072 in the 7th Edition. It will be noticed that at the bottom of that form is a note to this effect: "A motion to vary the minutes of this order as regards solicitor and client

(1) (1892) B. 758.

costs given against the third party was refused". The precise form of the order was "and as to the question of indemnity, declare that the defendant is entitled to be indemnified by the said *A. B.*, against all amounts payable by him under this judgment and let the defendant recover against the said *A. B.* any amounts so paid by him and his own costs of this action and of the third party proceedings to be taxed, etc., those of the action as between solicitor and client, but having regard to the fact that they are payable by the third party."

It will be seen there that the defendant's costs of the action are directed to be taxed as between solicitor and client and his costs of the third party proceedings as between party and party. That form of order has been followed in Ireland by Vice-Chancellor Chatterton in *Wiley* v. *Smith* (2). It will also be found that in *Hartas* v. *Scarborough* (3) Mr. Justice Wills made a somewhat similar order, that is to say, he gave what corresponds to the defendant here, his costs of the action as between solicitor and client. Another instance of solicitor and client costs being given is a decision of Mr. Justice Farwell in *Hooper* v. *Bromet* (4) which was reversed on another point in *Hooper* v. *Bromet* (5) and also in the *Great Western Railway* v. *Fisher* (6), a decision of Mr. Justice Buckley, and in *Born* v *Turner* (7), a decision of Mr. Justice Byrne. I do not say that all these cases are cases of the third parties, but they are cases where persons who in effect were entitled to an indemnity were given solicitor and client costs by the Court.

Now the decision on the other side is a decision in the King's Bench Division of Mr. Justice Kennedy, as he then was, in *Maxwell* v. *British Thompson Houston Co.* (8). That was the case of an indemnity against proceedings for negligence and there Mr. Justice Kennedy said:—

(2) (1894) 1 Ir. R. 153; 1 Ir. L. R. 73.
(3) (1889) 33 Sol. J. 661.
(4) (1903) 89 L. T. 37.
(5) (1904) 90 L. T. 234.
(6) (1905) 1 Ch. 316; 74 L. J. Ch. 241; 92 L. T. 104; 53 W. R. 279.
(7) (1900) 2 Ch. 211 at p. 217; 69 L. J. Ch. 593; 83 L. T. 148; 48 W. R. 697.
(8) (1904) 2 K. B. 342; 73 L. J. K. B. 644.

"It seems to me, in the absence of authority to the contrary, that a person who is indemnifying another against the costs of an action cannot, unless there are some special circumstances, be called upon to pay them as betwaen solicitor and client. He must pay them as between party and party, but I do not think he is bound to pay more." The reporter's note, however, at the foot of the judgment refers one to the above form in Seton and adds, "The attention of the Judge was not called to this at the time, but his Lordship has since brought it to the notice of the reporter."

Now, this case of Mr. Justice Kennedy is, perhaps, on the facts, rather different to the class of indemnity case one has to deal with here. But, however that may be, it is to my mind most material that the learned Judge's attention was not drawn to Lord Justice Romer's order nor to the Form in Seton, As to this, I must emphasize the fact that Seton is rather more than a mere ordinary text-book in the Chancery Division in England. It is a book that is in constant use there by Judges and Counsel and also by the Registrars whose duty it is to draw up the orders of the Court. Therefore, it is likely that any error will very soon be brought to the notice of the Court. It seems to me, with great respect to Mr. Justice Kennedy, that, as far as the authorities go, the balance of authority is in favour of giving costs, in a case like this, as between solicitor and client.

Then, if we turn and consider the matter from the point of view of discretion, I think that this balance of authority agrees with common fairness. Take the present case. To my mind, it is clear that the liability on these cotton contracts as between the defendant and third party as from the 21st May was on the third party and not on the defendant, and that the third party was to find all moneys necessary for financing these transactions. Why, then, if the defendant, acting in effect under the directions of third party and in effect as his agent, incurs personal liability for the benefit of the third party, why should he be left out of pocket, because the third party omits to carry out what he had promised to do, namely, to keep the defend-

ant in funds. The result is that the defendant is sued and has to pay the costs of the action brought by the plaintiffs. If I said that the defendant can only recover his party and party costs of that action, it would leave him with the difference between party and party costs and solicitor and client costs, which he would have to paw to his own solicitor. In other words, the third party would gain to this extent, that if he himself had been sued directly, he would have to pay his own solicitor and client costs but that as the defendant is sued, he can escape with party and party costs. What he is asking me to do is this, that because he used a cat's paw he should only pay party and party costs and be allowed to make the cat's paw, *viz.*, the defendant, pay the difference. I do not see any fairness in that. The costs of the third party notice itself seem to me to stand on a different footing. Treating the notice as a separate suit, the costs will follow the ordinary rule that a litigant even though successful only recovers party and party costs. That, no doubt, is the reason for the distinction drawn in Seton between the costs of the original action and the costs of the third party notice.

The right order, in my opinion, on this question of costs is to follow the above form in Seton, and I accordingly make my order in the term of that form.

As I have already said, the decree must be shown to me before it is passed and entered.

Attorneys for the Plaintiffs :—Messrs. *Little & Co.*

Attorneys for the Defendants :—Messrs. *Payne & Co.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 320 OF 1917.

December 20, 1919.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

Raja BHAGWAN BAKSH SINGH —DEFENDANT—APPELLANT

versus

DAMODARJI JOSHI AND OTHERS— PLAINTIFFS—RESPONDENTS.

Account, settled, when may be re-opened—Undue influence—Compound interest—Acquiescence—Interest after institution of suit, when may be awarded—Discretion of Court.

Settled accounts between two parties may be re-opened on the ground of substantial error or fraud; the existence of a fiduciary relation between the parties is not necessary. [p. 24, col. 2.]

It is open to a creditor to ask his debtor to execute documents in a particular form, and the fact that a creditor writes to his debtor's servant to obtain his master's signature to that form does not raise the inference that undue influence was to be used. [p. 23, col. 2.]

Where accounts contain clear and specific entries of compound interest, and they are accepted by the debtor without any objection on his part, it is a reasonable inference that he has agreed to pay compound interest. [p. 23, col. 2.]

The award of interest after institution of a suit is within the discretion of the Court and where, throughout the whole period of the dealings between the parties, compound interest has been charged and the total amount of such interest exceeds one-third of the amount of the claim, a Court would be justified in refusing future interest. [p. 25, col. 1.]

First appeal, against the decree of the Subordinate Judge, Benares.

The Hon'ble Mr. *Motilal Nehru*, The Hon'ble Dr. *T. B. Sapru* and Mr. *Jawahir Lal Nehru*, for the Appellant.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of Rs. 3,50,000, principal, and Rs. 58,746 1-6, interest, in all, Rs. 4,03,746-1-6, on the basis of a promissory note executed by the appellant on the 9th of November 1910.

The plaintiffs are a firm of jewellers and money-lenders of Benares, who carry on considerable business. The defendant-appellant is the Raja of Amethi and a Talukdar of Oudh. In 1904, a suit was pending against him in regard to his Estate and for the expenses of that suit he was in need of money. He was approached by the plaintiff's firm and dealings began with him. Large sums of money were advanced to him from time to time and he also purchased jewelry of considerable value from the plaintiffs. It is alleged, and not denied, that he received from the plaintiffs nearly three lacs of rupees in cash and it is stated that jewelry of the value of nearly Rs. 90,000 was supplied to him. Accounts were submitted to him from time to time and he signed them and, on two previous occasions, executed promissory notes for the amounts shewn by the accounts to be due. The final promissory note is that of the 9th of November 1910, for the principal sum of Rs. 3,50,000. The rate of

BHAGWAN BAKSH SINGH v. DAMODARJI JOSHI.

interest mentioned in the note is 8-annas per cent. per mensem, that is, 6 per cent. per annum, simple interest. The plaintiffs, however, state that the rate orally agreed upon was compound interest at the same rate with monthly rests and interest has been claimed at that rate. Credit has, of course, been given for payments made by the defendant.

The defendant-appellant, whilst admitting execution of the promissory note, asserted that the first plaintiff, Damodarji Joshi, had ingratiated himself into the favour of the defendant and acquired great influence over him; that in collusion with the defendant's servants he fraudulently caused the defendant to sign accounts and execute promissory notes; that it was understood between the parties that accounts would be explained and adjusted when final payment would be made; that this had not been done, and that the full amount of the last promissory note was not due to the plaintiffs. He urged that the accounts should be re-opened and fresh accounts taken of the dealings between the parties. He objected to the charging of compound interest, to the claiming of interest on the price of the jewelry sold to him, to the price of the jewelry and, in particular, to that of a blue diamond, and in substance he contended that he had been overcharged to the extent of about Rs. 50,000.

The Court below has decreed the claim in part. The learnad Subordinate Judge refused to re-open the accounts on the ground that a settled account could only be re opened where a fiduciary relation existed between the parties and no such relation existed in the present case. As to the blue diamond, he held that the first plaintiff was the agent of the defendant for the purchase of it and that he could only charge the price actually paid for it to the seller. The learned Judge, therefore disallowed Rs. 10,100 the amount of difference between the price charged and the amount paid. As to other articles of jewelry, he held that it had not been established that any excessive charge was made. He further held that the plaintiffs had wrongfully detained certain parcels of gold which they had taken from the defendant and pawned with the Allahabad Bank and that the defendant was entitled to interest on the value of the gold bars. He accordingly deducted from the claim the amount of such interest. He also was of opinion that the plaintiffs were entitled to obtain simple interest on the amount of the promissory note for Rs. 3,50,000 and not compound interest as claimed and he did not allow further interest for the period subsequent to the institution of the suit. The total amount for which a decree was passed was Rs. 3,51,255-9-3. The defendant has preferred this appeal and the plaintiffs have filed cross-objections in regard to the order of the Court below as to the gold bars and the interest for the period of the pendency of the suit and future interest.

It is contended on behalf of the appellant that it has been proved that he provisionally signed the promissory note on the understanding that full and true accounts would be rendered at the time of the final closing of the account and it was strenuously urged that, in any case, the appellant was entitled to have the accounts re-opened.

The view of the learned Subordinate Judge that settled accounts can be re opened only where a fiduciary relation exists is, in our opinion, incorrect. Settled accounts may be re opened on the ground of substantial error or fraud. This was held in *Williamson* v *Barbour* (1), where the law on the subject was thus laid down, by Jessell, Master of the Rolls:—

"If they (the errors) are sufficient in number and importance, whether they are errors caused by mistake, or errors caused by fraud, the Court has a right to open the accounts..... But..... when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party, that is, the trustee or agent, is the defendant, it is easier to open the account than it is in cases where persons do not occupy that position, that is to say, that a less amount of error will justify the Court in opening the account." His Lordship added that "Every case must depend on its own circumstances." The same view was held by the Privy Council in *McKellar* v. *Wallace* (2). In the present case it is clear that there was no fiduciary relation and that fraud was

(1) (1878) 9 Ch. D. 529 at p. 543; 47 L. J. Ch. 547; 37 L. T. 605.

(2) 5 M. I. A. 372; 8 Moo. P. C. 378; 1 Equity Rep. 309; 1 Sar. P. C. J. 453; 18 E. R. 988; 14 E. R. 144; 97 R. R. 62.

perpetrated. We have, therefore, to consider whether "the accounts have been shown to be erroneous to a considerable extent both in amount and the number of items."

As we have already said, it is admitted that large sums of the money were advanced to the appellant in cash. It is further admitted by the appellant that he received twelve articles of jewelry from the plaintiffs which are still in his possession and have been used by him or by members of his family. As regards these articles, exception has been taken chiefly in regard to the blue diamond. In respect of the other articles it was stated generally that the price had been overcharged. An attempt was made to support this allegation by the evidence of a jeweller, but this evidence is far from satisfactory. As we shall point out hereafter, the accounts submitted to the appellant from time to time as to the detailed value of these articles which were accepted without demur and as to which at no time during the whole course of the dealings between the parties was any objection raised. As for the blue diamond the Court below has reduced the price charged for it by Rs. 10,100. The ground on which it has done so, namely, that the plaintiffs were the agents of the defendant in the matter of the purchase of the blue diamond does not commend itself to us. The fact, however, remains that the account has been re-opened as to the price of the blue diamond and the plaintiffs have submitted to the order of the Court below in the matter and have taken no exception to it. It is not, therefore, necessary for us to enter further into the question of the price of the blue diamond. As to the other jewels there is no satisfactory reason for re-opening the account.

The remainder of the account between the parties consists of (1) moneys paid in cash to or on account of the appellant, (2) sums expended by the plaintiffs in connection with a garden-house of the appellant in Benares, and (3) interest on the moneys advanced as well as on the price of jewelry which remained unpaid. As we have mentioned above, there is no dispute in regard to the first item. It has not been denied that all the sums entered in the accounts were paid either to the appellant in cash or to his creditors such as the Benares Bank. The correctness of items of the second description has not been challenged, and the items have also been proved The total of these items is, moreover, comparatively small. It is the item of interest which is said to have been erroneously charged in the accounts and it is this item to which almost the whole of the argument addressed to us on behalf of the appellant was directed.

The plaintiffs have in their accounts charged compound interest with three monthly rests. The defendant appellant, denies that he ever agreed to pay compound interest and it is the charging of compound interest to which he objects and which is alleged to be a serious error in the accounts. There is no direct evidence, save the statement of the first plaintiff, Damodarji, that an agreement was entered into for the payment of compound interest. The statement of Damodarji on the point seems to be hearsay but we find that, ever since the commencement of dealings between the parties, on the 20th of November 1904, compound interest has been charged in the accounts. These accounts are printed on page 82 and subsequent pages of the respondent's book. It appears that since that date accounts were made out and submitted to the defendant. In the years 1904 and 1905 promissory notes appear to have been taken from the defendant on each occasion when money was borrowed by him in cash from the plaintiffs, but when the dealings were extended and mutual confidence was established the practice of taking promissory notes seems to have been discontinued. We find that in 1907 when partition took place between the several members of the plaintiff's firm an account was prepared of the amount due to the firm by the defendant. This account, which is printed on page 82 of the respondent's book, showed a balance of Rs. 1,14,672-7-9 as due by the defendant and was signed by him. Chhunnu Lal who made the partition added further interest and declared the total sum due up to 31st August 1907, and allotted it to the share of the plaintiffs. Not only was the account signed in recognition of its being correct but on the 24th of November 1907, a promissory note was executed by the defendant for the total amount due up to the aforesaid date, including compound interest. In this promissory note reference was made

to the accounts of the plaintiffs. In accounts for subsequent years compound interest was charged every quarter till on the 25th of October 1908, a balance was struck and signed by the defendant admitting Rs. 2,02,384-1-2 to be due, for this amount he executed a promissory note on the 19th of May 1909. After this date also dealings continued between the parties and on the 9th of November 1910, the promissory note for Rs. 3,50,000, which is the foundation for the suit, was executed. It recites that the account of the note was admitted to be due. In the accounts for the whole of this period compound interest was charged and there was no concealment or misrepresentation of any sort. The defendant asserts that the accounts were never explained to him and that he signed such papers and documents as he was asked to sign. It is said on his behalf that he was entirely under the influence of his servants, Muhammad Amin and Ragho Ram, that these men were bribed by the plaintiffs and that they obtained the defendant's signatures on accounts and other papers. The evidence on the record does not satisfy us that these men had such influence over the defendant that they could induce him blindly to sign accounts admitting liability for large sums of money and execute promissory notes for these sums. The defendant is the owner of a large estate and is apparently a man of affairs. He had managers, some of whom were Europeans, to look after his estate and his pecuniary dealings. It is not, therefore, likely that he did not satisfy himself as to the general correctness of the accounts. As we have said above, compound interest was charged every quarter and nothing was concealed. Many of the amounts paid by the defendant were credited towards interest. We do not think it probable that all these entries escaped the attention of the defendant on that they were withheld from him or that he was deceived in any way as regards those entries. It has not been proved to our satisfaction that Muhammad Amin and Ragho Ram were bribed. The only evidence to which our attention has been called consists of letters from which it appears that on one occasion a small sum of money was paid to Muhammad Amin and Damodarji offered to pay the expenses of his medical treatment when he was ill. This evidence is hardly sufficient to prove bribery. Another circumstance referred to on behalf of the appellant is that the plaintiff Damodarji wrote a letter to Ragho Ram in which he told him that the accounts should be signed and a promissory note drawn up in a particular form. It is not unusual for a creditor to ask his debtor to execute documents in a particular form but his writing to the debtor's servants to ask his master to sign in that form does not raise the inference that undue influence was to be used. Muhammad Amin and Ragho Ram have not been examined as witnesses, although they appear to have made over to their master some of the letters written to them by Damodarji, plaintiff, and they have not ventured to depose before the Court that they never explained accounts to their master and that he did not understand the accounts when he signed them and executed promissory notes. Under these circumstances, we are unable to hold that the appellant was ignorant of the contents of the accounts signed by him. As these accounts contained clear and specific entries of compound interest and they were accepted by the defendant without any objection on his part, he acquiesced in the charging of compound interest and the inference is not unreasonable that he had agreed to pay compound interest. In coming to this conclusion we have not overlooked the fact that in none of the early promissory notes executed by the defendant there is any mention of compound interest; but, for the reasons stated above, we think it is now too late for the defendant to repudiate the inclusion of compound interest in the accounts and to urge that the accounts are erroneous. The Court below was, in our opinion, right in refusing to re-open the account which was adjusted by the execution of the promissory note on which the claim is based.

The contention put forward on behalf of the appellant that it was agreed at the time of the execution of the promissory note in suit that the accounts would be explained and adjusted when payment would be finally made is, in our judgment, without force and it has not been established that such an agreement was entered into by the parties. It is true that Mr. McGregor, the manager of the defendant, wrote to the

plaintiffs on the 9th of April 1913, for a detailed account of their dealings with the Raja, but he said that he wanted this because Muhammad Amin had not got all the papers thereby implying that he had some of the papers. He repeated the request on June 7th, 1913 (see R. 40 and R. 41.) On the 1st of July 1913, however, he wrote to the plaintiffs as follows:—"I have seen your banking account with the Raja Saheb of Amethi and find that since the pro-note handed to you by the Raja Saheb for Rs. 3,50,000 on 9th November 1910, a further sum of Rs. 47,241-13-0 has accrued on interest, making up a total due to you of Rs. 3,97,241-13-0. I am arranging that, in the end of September 1913, if your amount is not paid off in full, a mortgage-bond will be executed including interest up to the date of its execution." This letter, which is printed on page 42 of the respondents' book, shows not only that the manager had seen the plaintiff's accounts but also that the amount of the promissory note in suit, together with subsequent interest, was due and that arrangements would be made for its payments. A letter in such unequivocal terms is inconsistent with the theory of a future adjustment of accounts.

A suggestion was finally made to the effect that the promiseory note in question was not executed on the date it bears but on a later date. There is, in our judgment, no foundation for this suggestion. The plaintiffs had nothing to gain by antedating the document.

For the above reasons, we are of opinion that the defendant's appeal is without force and must be dismissed.

We have now to consider the objections raised on behalf of the plaintiffs respondents.

The first objection relates to some bars of gold which the plaintiffs admittedly took from the defendant and did not return for a long time. The plaintiffs have stated in the plaint that the gold was given to them as security for the money due to them and this statement has been repeated by Damodarji in his deposition. The defendant, on the other hand, asserts that the bars of gold were taken from him by Damodarji for the purpose of raising money to enable him to purchase a pearl necklace. The gold bars were handed over to Damodarji on the 18th of July 1910, and it has been proved by incontrovertible evidence that he pawned them with the Benares Branch of the Allahabad Bank three days afterwards as security for a loan of Rs. 2,04,000 and they remained in the custody of the Bank till October 13 h, 1913, although the debt had been discharged in the previous month of December. The statement of Damodarji that the gold had been given to him as security for the money due to him is clearly untrue. In the receipt which he gave for the gold on the 18th July 1910 (page 114A) there is no mention of security at all and the letter which he wrote to the defendant on the 19th of July 1910 (page 97A) clearly negatives the allegation of security. In that letter he stated that the deposit (*i.e.*, the gold) would be detained for two or three months and clearly implied that it would be given back after that period. In a subsequent letter, dated December 10, 1910, (page 97A), referring to a demand for the gold, he said that it was of no use to him and added, "As it was kept with you so it is kept with me." He also said that he was making arrangements about it. It will be remembered that all this time the gold was pledged with the Allahabad Bank for the money borrowed from it by Damodarji, so that Damodarji was making an untrue representation in this letter. The statement he made in his deposition as to the date of the return of the gold was also clearly untrue. We are satisfied, in agreement with the Court below, that the gold was not given to the plaintiffs by way of security. The defendant has sworn that he asked for the return of the gold through Muhammad Amin. This is corroborated by the admission of Damodarji, as contained in the letter of the 10th of December 1910, to which we have referred above. It is thus manifest that the gold, which was of large value was wrongfully detained for upwards of three years in spite of demands for its return. The Court below was, therefore, justified in allowing compensation to the defendant for the wrongful detention of his gold and we think that the amount of compensation was properly and reasonably assessed. In our judgment, the objection of the plaintiffs in regard to the gold and the defendant's plea that the compensation awarded is inadequate are both untenable.

The next objection advanced on behalf of the respondents is that the Court below has improperly refused to award interest to them for the period of the pendency of the suit as also future interest. As we have already stated, the learned Subordinate Judge awarded simple interest only on the amount of the promissory note in suit and not compound interest as claimed. This he did up to the date of the institution of the suit. The plaintiffs have taken no exception to this award of interest, but they urged that further interest for the period subsequent to the date of the suit ought to have been awarded. The reason assigned by the Court below for its action may be open to criticisim. But a Court has a discretion to the award of interest after the institution of a suit of this description. Having regard to the fact that throughout the whole period of the dealing between the partiss compound interest has been charged and the total amount of such interest exceeds a lac of rupees the Court below was, in our opinion, justified in declining to award further interest. We, therefore, disallow the respondents' objection as to further interest.

We think that, although the appeal has failed, the respondents should not be allowed costs of the appeal as a mark of our disapprobation of the conduct of the principal plaintiff in making numerous statements in this case which we cannot help thinking were, to say the least of them, untrue statements. We accordingly dismiss the appeal and overrule the respondent's objections and direct the parties to bear their own costs in this Court.

Appeal dismissed.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 9 OF 1919.

April 30, 1920.

Present :—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick, Kt.

Maharaja SIR RAMESHWAR SINGH BAHADUR—DECREE-HOLDER—APPELLANT

versus

SUBU LAL JHA—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Decree, mistake in recitals in—Executing Court, whether can look behind decree.

Where in the recital part of a decree, the nature of the claim as set forward in the plaint is inadequately recited the executing Court is not in any way bound thereby, and it is within the competence of such Court to examine the record and to ascertain for itself what the actual existing circumstances are. [p. 26, col. 2; p. 27, col. 1.]

Letters Patent Appeal against a decision of Mr. Justice Coutts, dated the 10th March 1919, affirming that of the Officiating District Judge, Durbhanga, dated the 8th June 1918.

Messrs. *Purnendu Narain Sinha* and *Murari Prasad*, for the Appellant.

JUDGMENT.

MILLER, C. J.—In my opinion this appeal should be allowed. The question for determination is a somewhat technical one and arises in the following circumstances. The plaintiff brought a rent suit against his tenant claiming rent for three years. For the first two years the rent claimed was at the rate of Rs. 45, odd, in respect of the holding which during those two years consisted of 12 *bighas*, 5 *kattahs*, 8 *dhurs*. During the third year, as appears from the plaint, the area of the holding had been reduced by reason of a recognised transfer of a part of the holding and, therefore, for that year the rent was only Rs. 26, odd, in respect of the diminished area consisting of 6 *bighas*, 18 *katthas* $5\frac{1}{2}$ *dhurs*, and the total amount claimed, after giving credit for certain payments, was Rs. 111-12-0. The suit was apparently uncontested and the facts which I have stated as to the reduction of area, with a consequent reduction of rental, during the third year were clearly put forward in the plaint. An *ex parte* decree was passed and the operative part of the decree merely directed that the defendant should pay to the plaintiff the sum of Rs. 111-12-0. The recital in the decree, however, which purported to shew from the plaint the nature of the claim, merely stated that

the rental was claimed in respect to an area of 12 *bighas*, 5 *kattahs*, 8 *dhurs*, and that the rental claimed was Rs. 45, odd. That recital was not complete in the sense that it did not state that for the third year, as appeared from the plaint, the area had been reduced to 6 *bighas* odd and the *jama* to Rs. 26, odd. It seems clear that in the judgment itself, although we have not had the advantage of seeing the actual judgment, there was no adjudication in the proper sense of the term upon the question of the actual area of the holding and as the suit was undefended it is reasonable to suppose that the Court assumed, as it was bound to assume in the absence of any evidence to the contrary, that the holding at the date of the suit was of the smaller area, that is to say, 6 *bighas*, 18 *kattahs*, 5½ *dhurs*.

When the plaintiff applied for execution the learned Munsif presiding over the executing Court had his attention drawn to the fact that, whereas, according to the recital in the decree, the area was 12 *bighas*, odd, the area which the plaintiff sought to sell in execution was only 6 *bighas*, 18 *kattahs*, 5½ *dhurs*, and, therefore, without any explanation, which does not seem to have been afforded to him, he very properly came to the conclusion that the sale not being a sale of the whole area could only be treated as a sale in execution of an ordinary money-decree and not as a sale which would carry with it all the incidents of a sale under a rent-decree. From that decision the plaintiff appealed to the District Judge and then, for the first time, it was pointed out before the District Judge how the error had arisen, and that, although the Munsif upon the information he had, might have been justified in the conclusion which he drew, still in truth and in fact the area of the holding was not the larger area of 12 *bighas*, odd, but the smaller area of 6 *bighas*, odd, and, in these circumstances, his decision ought to be set aside and a sale ought to be ordered as a sale in execution of a rent-decree. The learned District Judge, although he admitted the actual facts to be accurate, as I have just stated them, came to the conclusion that, technically, the lower Court was right and that, therefore, the appeal could not be allowed.

On appeal from that decision to this Court the case was heard by a single Judge who took the same view as the District Judge and dismissed the appeal. The opinion of the learned Judge of this Court was that there had apparently been some mistake in the decree which, as the lower Appellate Court had stated, had been carelessly drawn up and that, in his opinion, there was no doubt that the view of law taken by the Court below was correct.

The only question, it seems to me, which we have to consider is whether in fact the executing Court was bound by that part of the decree which recited the nature of the claim, as set forward in the plaint, and was not entitled to look behind it and see what the actual existing circumstances were. He was undoubtedly bound by the operative part of the decree, that is to say, that the plaintiff was entitled to recover a sum of Rs. 111-12-0 and he had no discretion to consider in any way how far that might be right or might be wrong. By that part he was clearly bound. But the next question that had to be considered was, whether in fact what was being sold, or rather what the plaintiff asked to sell, was the whole holding or only a portion of it. That was solely and simply a question of fact to be decided at sometime or other before the sale took place and before the sale proclamation was issued. Had there been any adjudication by the Trial Court as to the exact area of the holding, that would have been binding upon the executing Court and the executing Court could not have gone behind it. In such circumstances, the executing Court would have been bound to decide, without any further enquiry, that an application to sell 6 *bighas* in pursuance of a judgment obtained for rent for a holding of 12 *bighas* should only be treated as execution of a money-decree but in the present case there was in fact no adjudication at all to that effect, and, therefore, that part of the decree which merely recited, and recited inadequately, the nature of the claim as set forward in the plaint was not, in my opinion, in any way binding upon the executing Court. The question which the executing Court had to determine was a question of fact and a question of fact upon which there had been no adjudication in the lower Court precluding such a determination, and, therefore, it was within the com-

petence of the executing Court to examine the record and to ascertain for itself whether in fact it was the whole holding or only a portion of it which was being sold. That the executing Court refused to do. No doubt, that refusal was due to the manner in which the case was presented before it, as the attention of the learned Munsif does not seem to have been drawn to the fact that the plaint shewed that the area at the time of the decree was only 6 *bighas*. When the matter came before the learned District Judge on appeal and the facts were clearly put before him I think that, at that stage, he ought to have allowed the appeal and ordered the sale to take place as a sale in execution of a rent-decree. In my opinion, this appeal ought to be allowed. The respondents have not appeared in this Court and, therefore, there will be no costs of the appeal and, having regard to the manner in which the case has been put forward in the Courts below, I do not think that we ought to make any order as to costs in favour of the present appellant.

MULLICK, J.—I agree.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

May 3, 1920.

Present:—Lord Viscount Haldane, Lord Viscount Finlay, Lord Moulton, Lord Sumner and Lord Parmoor.

TOOLSIDAS TEJPAL—APPELLANT

versus

M. P. VENKATACHALAPATHY IYER AND ANOTHER—RESPONDENTS.

Contract, construction of—Performance, condition for avoiding—Condition not coming into existence—Breach of contract—Damages, liability for.

The parties entered into a contract in India for the purchase and sale of Alizarine at a certain rate: the contract provided that if there was any fluctuation in the Syndicate rates, the conditions of the contract regarding the price would become void, and the price would be fixed by mutual consent. The Syndicate was composed of a German firm and an English member or members and regulated the supply and fixed the price of Alizarine. The Great War broke out and deliveries continued for some time, and then ceased. The purchasers brought the present action for damages for breach of the contract to continue the deliveries, and the question was, whether the War frustrated the contract either generally or by destorying the Syndicate:

Held, that the matter was purely an Indian one and there was nothing in the contract which in terms made any modification of the obligation of the sellers depend upon the continuance of the Syndicate; that as there was no fluctuation or alteration in the Syndicate rates, by reason of the Syndicate not having been operative, or for some other reason, the condition avoiding the contract if there was such fluctuation never came into operation and the contract continued on the footing of the rates specified, and that as the contract was broken the buyers were entitled to recover damages. [p. 28, col. 2.]

Appeal from the judgment of Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar, in Appeal No. 372 of 1915, dated the 2nd February 1917, affirming that of the Subordinate Judge, Madura, in Original Suit No. 31 of 1915, dated the 11th September 1915.

Messrs. *Leslie Scott, K. C.*, and *K. Brown*, for the Appellant.

Messrs. *Clauson* and *B. Dube*, for the Respondent.

JUDGMENT.

VISCOUNT HALDANE.—Their Lordships do not think it necessary to call on Counsel for the respondents.

On the view which the Board takes of this appeal, the question which arises is simply one of the construction of three letters, and it is, therefore, unnecessary for them to delay making a recommendation to the Sovereign.

The controversy arises with reference to a contract made for the sale of Alizarine, a coal-tar dye. The contract is one made between parties in India, who, so far as appears, contracted as principals, and it relates altogether to matters which took place and were to take place within India. The Courts below disposed of a number of points, but the only one which remains, and which has been discussed on this appeal, is the question of construction, which goes to the root of the litigation.

The contract to be construed will be found in three letters; the first of the 21st April 1914, the second of the 14th May in the same year, and the third of the 18th June of that year. By the first letter, after stating that the purchasers agreed to buy all

their Alizarine for a year from the date of the first delivery, and would not purchase from other dealers, the purchasers stipulate for a certain rebate and then proceed as follows:—

"The goods are to be invoiced as usual at Rs. 321-4 annas which will be paid within 15 days of delivery without interest. If the payment is delayed after that time an interest of 9 per cent. per annum will be paid by us. If there should be any fluctuation in the Syndicate rates the conditions laid down in this letter regarding the price and or bonus will be void and they will be fixed at such a time of fluctuation by mutual agreement. If this offer is not accepted within 15 days from the date hereof it will stand cancelled."

The letter was not accepted within the date fixed, but the next letter from the purchasers renews the offer, saying that they agree by way of fixing a quantity to take from the sellers "the delivery of two casks of 4 cwt. 40 per cent. Alizarine every month for 11 months and three casks for the 12th month." Then there is a letter of acceptance, the third letter, above referred to, written by the sellers.

The question which arises is of this nature. The War broke out, and affected the position which is now to be described. There was a Syndicate composed of an important German firm of Alizarine producers and an English member or members, and that Syndicate appears to have been in the practice of regulating the supply and fixing the prices as regards India and elsewhere, and the "Syndicate rates" referred to in the first of three letters are the rates the Syndicate fixed. There is no other description of the Syndicate in the letters nor reference to the Syndicate excepting so far as contained in the term 'Syndicate rate." It has been argued that the letters show that the continuance of the Syndicate, which may or may not have been put an end to by the War, was vital to the continuance of this contract, and that when deliveries ceased to be made the contract was at an end. There was a considerable stock of Alizarine in India when the War broke out, and deliveries continued for some time.

The purchasers brought the present action in which they recovered Rs. 15,000 damages, for breach of the contract to continue the deliveries. The question is whether the War frustrated that contract, either generally or by destroying the Syndicate. As their Lordships have pointed out, the matter is purely an Indian one, and there is nothing in the contract which in terms makes any modification of the obligation of the sellers depend upon the continuance of the Syndicate. The reference is to "Syndicate rates" and these may well be rates publicly announced by the Syndicate. If so, the only question is what happens if these rates are no longer issued. In the opinion of their Lordships the meaning of the words used, the only words that can be taken into consideration, is this that, as there was no fluctuation or alteration in the Syndicate rates, by reason of the Syndicate not having been operative, or for some other reason, the condition avoiding the contract, if there was such fluctuation, never came into operation and the result was that the contract continued on the footing of the rates specified in the part of the letter set out above, and that, as the contract was broken, the buyers properly recovered damages for breach in the Courts below.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondents:—Mr. *H. S. L. Polak.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 47 OF 1919.

February 24, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

KARIM ELAHI SHETI—APPELLANT

versus

SHER AHMED HAJI MIR AHMED—RESPONDENT.

Bombay High Court Rules, Ch. VIII, rr. 127 to 133—Letters Patent (Bombay), cl. 12—Third party procedure—Cause of action arising partly within jurisdiction—Leave of Court—Procedure—Res judicata.

KARIM ELAHI SHETI v. SHER AHMED HAJI MIR AHMED.

When a defendant asks the Court to ssue a third party notice in a case in which leave has to be obtained under clause 12 of the Letters Patent, then an application should be made to the Judge for such leave to be endorsed on the notice in the same way as it is endorsed on a plaint. [p 31, col 2]

An order on a summons for direction under the rules relating to third party procedure merely amounts to this, that the third party comes into the suit as if he was an added party defendant and then it is open to him at the trial to raise any issues which an added defendant is entitled to raise, one of which is, whether leave ought not to have been given under clause 12 of the Letters Patent as he was residing outside the jurisdiction [p. 30, col. 1.]

Before it can be assumed that leave has been granted under clause 12 of the Letters Patent it must be proved that an application was made to the Judge under clause 12 of the Letters Patent, and if the Judge makes the order it should appear clearly on the face of it that he was giving leave under clause 12 of the Letters Patent. [p. 30, col. 1.]

Appeal from the decision of Mr. Justice Marten reported as 58 Indian Cases 16.

Messrs. *Inverarity* and *Kanga*, for the Appellant.

Messrs. *Bahadurji* and *M. C. Setalvad*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The questions in this appeal arise out of the third party procedure which was introduced some years ago by means of certain Rules numbering 127 to 133 of the High Court Rules. There is no mention in the Civil Procedure Code of third party procedure. The intention is to prevent a multiplicity of suits by bringing in third parties against whom a defendant claims contribution or indemnity. The first step is to issue a notice by leave of the Court or a Judge. A copy of the notice is served on the required person according to the rules relating to the service of writs of summons. In this Court, the practice regarding the service of writs of summons is somewhat different from that in England, where the action is commenced by a writ, and it is after that that directions are given for filing the pleadings.

In this case a notice was issued against one Haji Karim Elahi Sheti at the request of the defendant. Then, in the ordinary course, the matter came before the Chamber Judge for directions. Under rule 130 the Court or Judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the Court or Judge may direct. Then, under rule 131 the Court or a Judge upon the hearing of the application mentioned in rule 130 may, if it shall appear desirable to do so, give the third party liberty to defend the suit, upon such terms as may be just, or to appear at the trial and take such part therein as may be just.

On the 5th October 1917, an order was made by the Chamber Judge on an application for directions whereby it was ordered that the summons for directions be made absolute and the third party was to file his written statement within four weeks from the date of the order and file his affidavit of documents within ten days after the time to file his written statement had expired, and the third party was to be at liberty to appear at the trial of the action and take such part therein as he might be advised and should be bound by the result of the trial. It was further ordered that the question of the liability of the third party to indemnify the defendant should be tried at the trial of the action but subsequent thereto.

When the suit came on for hearing, the first issue that was raised was this:—"Whether this Court has jurisdiction to try this suit between the defendant and the third party?" As between the plaintiff and the defendant the claim seems to have been admitted. But the third party disputed the liability which the plaintiff claimed had arisen on the transactions between himself and the defendant. The Court, therefore, tried the questions at issue between the plaintiff and the defendant and passed a decree for Rs. 55,783 9 4 and interest, less Rs. 28,000, paid on account.

Then, the Court proceeded to deal with the first issue, the issue of jurisdiction, and came to the conclusion that the question of jurisdiction was *res judicata* on the ground that it had been decided by the Chamber Judge that the Court had jurisdiction to bring in the third party at the hearing of the suit between the plaintiff and the defendant, and also had jurisdiction to decide the questions between

the third party and the defendant on the contract of indemnity.

Now, it is quite certain from the records, and from what was told the Court by Mr. Kanga who appeared at the argument of the summons for directions, that Mr. Justice Kajiji never applied his mind to the question whether or not the Court had jurisdiction to decide the matters in issue between the plaintiff and the defendant, the original parties to the suit, on the one hand, and the third party, and had never decided that leave was unnecessary under clause 12 of the Letters Patent.

The appellant was, therefore, reduced to this argument, that it must be assumed from the order made on the summons for direction that, as a matter of fact, it had been decided that leave under clause 12 of the Letters Patent was unnecessary. I am afraid I cannot accede to that argument. The only way in which a matter at issue between the parties can be held to be *res judicata* when it has not been actually decided by the Court is under section 11 Explanation IV, of the Civil Procedure Code: "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

But it was not necessary on the summons for directions that this point of jurisdiction should have been decided. On that summons the defendant wanted to bring in the third party into the proceedings instituted by the plaintiff against him, and, although the learned Judge might have decided at that time to refuse directions, from the fact that he gave directions it cannot be assumed that he decided the point of jurisdiction. The order on the summons for directions merely amounts to this, that the third party comes into the suit as if he was an added party defendant and then it is open to him at the trial to raise any issues which an added defendant is entitled to raise, one of which is: "Whether leave ought not to have been given under clause 12 of the Letters Patent as he was residing outside the jurisdiction." Therefore, in my opinion, Mr. Justice Kajiji never decided that the Court had jurisdiction to deal with the third party and the question remained to be decided at the hearing of the action. It would have been better if it had been decided at the commencement of the proceedings. Had it been decided in favour of the third party he could go out altogether instead of remaining while the questions between the plaintiff and the defendant were being fought out. It is quite clear that only a part of the cause of action, if any, arose within the jurisdiction. Therefore, leave under clause 12 of the Letters Patent was absolutely necessary.

But it is suggested that the order giving leave to issue the third party notice contained a direction that the notice should be served upon the prospective third party by sending it by registered post to his address at Peshawar, and we are asked to assume from that that it is equivalent to leave under clause 12 of the Letters Patent. We do not know how the order came to be drawn in this form or whether the Judge's attention was drawn to these particular words, or whether the Judge, as a matter of fact, thought he was giving leave under clause 12 of the Letters Patent. I do not think we are entitled to assume that he did think he was giving leave under clause 12 of the Letters Patent.

The notice is served according to the rules relating to the service of writs of summons. In the case of an ordinary suit leave is obtained from the Judge to file the suit under clause 12 of the Letters Patent when the plaint is presented, and after that the summons goes out and if leave has been obtained, then it will follow that the summons will go to be served on the defendant outside the jurisdiction. But I think it extremely necessary, in my opinion, before it can be assumed that leave has been granted under clause 12 of the Letters Patent that it must be proved that an application was made to the Judge under clause 12 of the Letters Patent and if the Judge makes the order it should appear clearly on the face of it that he was giving leave under clause 12 of the Letters Patent. This is always done in the case of plaints which are presented to the Chamber Judge.

In my opinion, therefore, in the first place, the matter is not *res judicata*. In the second place, leave was not granted, and

never has been granted, under clause 12 of the Letters Patent, as it ought to have been, if the Court was to have jurisdiction over the third party.

The result must be that the appeal succeeds. The decree against the defendant will stand. The decree against the third party is reversed and the third party must go out of the action and is entitled to his costs throughout.

HEATON, J.—The interesting and important point to my mind here is, whether the question of jurisdiction is *res judicata*; that is, whether the question was decided either explicitly or impliedly by Mr Justice Kajiji when he made his Chamber, order of the 5th of October 1917. Certainly it was not decided explicitly. So it has to be considered whether it was decided impliedly, and that can only be if the third party was under an obligation to place the question before Mr. Justice Kajiji and demand from him a decision on the point.

In order to consider whether the third party was under such obligation, we have to look to the theory and practice of third party procedure. As far as I can understand it, it involves what may be called a triangular duel in which every one of the three parties has to launch an attack against, and be prepared to meet an attack from, each of the other two.

Now, before a party is dragged into litigation of this character, it is provided, and very properly provided, that a Judge's order must be obtained and, having regard to the actual words of Rules 127 to 133 of the High Court rules, it seems to me tolerably clear that what a Judge has to decide is, primarily, whether the third party is or is not to be brought into the suit; whether, in short, there is to be this triangular duel; or whether the matter is to be disposed of by one or possibly two duels of a more normal type. In considering whether the third party ought or ought not to be brought into the suit the Judge is not necessarily concerned in any way with the defence of the third party. What he is concerned with is, to determine whether there is apparently a case against this third party which it is proper or convenient that he should be required to meet in the particular suit and the result, as I understand the rules and theory of third party procedure, is that, when the third party is appointed to a suit, it is open to him, when the suit comes on for trial, to take every line of defence that he possibly can. Possibly, the Judge could consider the question of jurisdiction if insisted to do so. But as that would be one of the defences of the third party in the suit, the Judge was not bound to consider it, nor was the third party bound to ask the Judge to determine it. It seems that he did not ask the Judge to do so nor did the Judge do it. And so it does not seem to me that Mr. Justice Kajiji's order in any way restricted the capacity of the third party to take any defence he chose. One of the defences he chose to take was that the Court had no jurisdiction. As my Lord the Chief Justice has pointed out, that is a perfectly correct line of defence. The Court had no jurisdiction. I concur in the order proposed.

MACLEOD, C. J.—I think it is desirable to point out that when a defendant asks the Court to issue a third party notice in a case in which leave has to be obtained under clause 12 of the Letters Patent, then an application should be made to the Judge for such leave to be endorsed on the notice in the same way as it is endorsed in a plaint.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 282 OF 1919.

October 12, 1920.

Present:—Mr. Justice Abdul Raoof.

Musammat BAKHTAWAR, MINOR, THROUGH FAZIL—DEFENDANT—PETITIONER

versus

SHOP OF KESAR SINGH GURDIT SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, object of - Reference to arbitration—Benefit of minor—Court, duty of.

BAKHTAWAR v. KESAR SINGH-GURDIT SINGH.

The object of Order XXXII, rule 7, is that when a guardian of a minor party to a suit wishes to take the decision of a case out of the hands of ordinary Courts of Justice and to have it decided by a Court chosen by the parties, the Court ought to take into consideration the circumstances of the case and see whether the reference would be to the benefit of the minor. The Court ought, in such a case, to apply its mind fully to the matter and see whether the reference would really be to the benefit of the minor. Where the Court accords its sanction to the reference without any valid reason the reference is bad and the whole proceeding is vitiated.

Petition, under section 44 of Act IV of 1914, for revision of the decree of the Senior Subordinate Judge, 1st Class, Montgomery, dated the 28th November 1918, reversing that of the Munsif, 1st Class, Montgomery, dated the 23th June 1918.

Lala *Bishen Nath*, for Mian *Muhammad Sharif*, for the Petitioner.

Mr. *Abdul Razaq*, for the Respondent.

JUDGMENT.—This was a suit against a minor for the recovery of a sum of money which had been borrowed by the father of the minor. The minor was represented by her guardian *ad litem*, Fazil, her maternal grandfather. The Court of first instance, after considering the evidence, held that the debt was not proved. The suit was accordingly dismissed. The plaintiff preferred an appeal to the lower Appellate Court. On the 8th of October 1918 a petition was presented to the Court stating that the parties had agreed that the decision of the appeal should be referred to one Majhi as the arbitrator. According to Order XXXII, rule 7, Civil Procedure Code, a reference to arbitration by a guardian of a minor could not be made without the sanction of the Court. Evidently, such leave was asked for and was granted by the Court by an order dated the 8th October 1918. The order runs thus:—"A reference to arbitration will be to the benefit of the minor because the writing bears a thumb impression of the minor's father. By an investigation out of Court the truth will be determined." On the same date, *i.e.*, the 8th of October 1918, another order was made referring the matter to the arbitrator for decision. The arbitrator made an award on the 12th of November 1918 decreeing the claim of the plaintiff to the extent of Rs. 140. On this award a decree was passed by the learned Senior Subordinate Judge on the 23th November 1918. The present petition for revision has been filed against this decree.

The examination of the record shows that the learned Senior Subordinate Judge treated the matter of sanction rather lightly. The object of Order XXXII, rule 7, is that, when a guardian of a minor party to a suit wishes to take the decision of a case out of the hands of ordinary Courts of Justice and to have it decided by a Court chosen by the parties, the Court ought to take into consideration the circumstances of the case and see whether the reference would be to the benefit of the minor. The order quoted above clearly shows that the learned Senior Subordinate Judge did not apply his mind to the matter carefully. He says that the reference would be to the benefit of the minor because the writing bears a thumb impression. Evidently, what he means is that the entry in the *bahi* on which the suit is brought bears the thumb impression of the father of the minor girl. That is hardly any reason for coming to the conclusion that the reference was to the benefit of the minor. A very salutary rule contained in rule 7, Order XXXII, has been practically ignored by the learned Senior Subordinate Judge. The result is that the whole proceeding is vitiated. The reference to arbitration was bad. The award made by the arbitrator is invalid and the decree based upon such an award is bad in law.

I accordingly set aside the decree, and remand the case to the lower Appellate Court under Order XLI, rule 23, Civil Procedure Code, with a direction that it may be re instated on its original number of pending appeals and be disposed of on the merits according to law. Costs will abide the result.

Case remanded.

NANDI *v.* EMPEROR.

LAHORE HIGH COURT.
CRIMINAL REVISION No. 1092 OF 1919.
December 1, 1919.
Present :—Mr. Justice Abdul Raoof.
Musammat NANDI *alias* ZAINAB—PETITIONER
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 494—Chamar woman becoming convert to Islam *and marrying* Musulman *during lifetime of first husband—Offence—Ignorance of law—Sentence.*

The mere fact of a Chamar woman becoming a convert to Islam does not dissolve her marriage with her Chamar husband, and if she marries a second time during the lifetime of her first husband she is guilty of an offence under section 494 of the Penal Code.

In such a case, the fact that the woman thought her conversion had dissolved her previous marriage may be treated as extenuating her offence, although it does not absolve her from liability.

Revision from the order of the Sessions Judge, Lyallpur, dated the 13th August 1919, upholding that of the Magistrate, 1st Class, Lyallpur, dated the 23rd June 1919, convicting the petitioner.

Mr. *Ram Chand Manchanda*, for the Petitioner.

Mr. *Sleem*, for the Respondent.

JUDGMENT.—On the facts found, which are now practically admitted before me, there can be no possible doubt as to the correctness of the conviction in this case, *Musammat* Nandi *alias* Zainab, the applicant before me, was admittedly a married woman, being the wife of the complainant, a *Chamar*. She changed her religion and became a *Mussalman* and one month and four days after married Rukan Din. The complainant thereupon brought a charge against *Musammat* Zainab, Rukan Din and two others under section 494, Indian Penal Code. As I have stated above, both the Courts have found that the marriage had actually taken place between the *Chanar* and *Muasmmat* Nandi. Counsel for *Musammat* Zainab attempted to argue that by the conversion of the petitioner to Islam, the marriage-tie had come to an end, but, having regard to the weight of authorities on this point, the learned Counsel very frankly admitted that he could not press the matter further. The law on this point is very clearly explained at page 437 of Ameer Ali's Muhammadan Law, Volume II. It is thus stated there :—

"Where the parties are scripturalists and the wife becomes a convert to Islam the same procedure would be followed, *viz.*, if the conversion takes place in a country subject to the laws of Islam, the faith will be offered for acceptance to the husband and on his refusal the Judge will make a decree for separation or cancellation of the marriage."

Admittedly, there has been no decree of this kind in this case, and it cannot be denied that India is *Dar-ul Islam* where Muhammadan Law is administered. Therefore, dissolution of marriage could not have taken place in this case without a decree of Court. This view of the law was adopted by the learned Judges of the Calcutta High Court in a case of *Ram Kumari, In the matter of* (1). In addition to this case, the following cases also may be looked at *Government of Bombay* v. *Ginga* (2), *Jamna Devi* v. *Mul Raj* (3), *Emperor* v. *Musammat Ruri* (4), *Crown* v. *Gholam Fatima* (5). Having regard to the facts found, and the authorities above mentioned, I cannot but uphold the conviction. The learned Counsel has drawn my attention to the following remarks to be found in *Crown* v. *Gholam Fatima* (5), at page 51 :—

"But though ignorance of the law, and the fact the woman thought her conversion had dissolved her former marriage, are insufficient excuses, yet I think they extenuate her offence, and a very lenient punishment is sufficient."

This applies with equal force to the facts of the present case, and I think that, under the circumstances, the sentence of six months' rigorous imprisonment is rather too severe. On the question of sentence the learned Counsel appearing on behalf of the Government has argued that the fact that the marriage took place one month and four days after the petitioner's conversion to Islam, leads to the conclusion that the

(1) 18 C. 234; 9 Ind. Dec. (N. S.) 176.
(2) 4 B. 330; 5 Ind. Jur. 259; 2 Ind. Dec. (N. S.) 726.
(3) 49 P. R. 1907; 83 P. L. R. 1908; 110 P. W. R. 1907.
(4) 48 Ind. Cas. 493; 5 P. R. 1919 Cr.; 20 Cr. L. J. 3; 13 P. W. R. 1919 Cr.
(5) 32 P. R. 1870 Cr.

conversion must have been resorted to with a design to put an end to the marriage-tie and that, therefore, the petitioner should not be shown any leniency. The conclusion suggested does not necessarily follow. Having regard to the circumstances of this case, I think, a more lenient sentence would meet the exigencies of the case. I reduce the sentence to three months' simple imprisonment. In other respects, the application is disallowed. The petitioner should surrender to her bail before the District Magistrate.

Revision accepted in part.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 328 OF 1920.
May 21, 1920.
Present:—Mr. Justice Walsh.
RAM DAS—CONVICT—APPLICANT
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act X of 1872), s. 518, order under, nature of—Order made in 1873—Disobedience of order in 1920, whether punishable—Penal Code (Act XLV of 1860), s. 188.

Accused was convicted under section 188 of the Penal Code for disobeying an order purporting to have been passed by the District Magistrate in 1873 under section 518 of the Criminal Procedure Code of 1872:

Held, that the conviction could not be sustained, inasmuch as an order made under section 518 of the Criminal Procedure Code of 1872 could not enure for all time but had a temporary operation only. [p. 35, col. 2.]

Criminal reference made by the Sessions Judge, Bareilly, dated the 8th May 1920.

FACTS appear from the following Reference of the Sessions Judge:—

The applicant Ram Das has been convicted under section 188, Indian Penal Code, and sentenced to a fine of Rs. 50 for disobeying an order of the District Magistrate of Bareilly, dated the 7th February 1873, which forbade all religious processions proceeding with music within the limits of the Municipality except in certain specified thoroughfares.

This order must appeal to any one who knows the narrowness of the Bareilly city streets and the obstruction which the crowds usually attracted by a band must cause as a very reasonable one. It appears to have been consistently respected ever since, and no instance of any breach of it leading to prosecution and conviction has been brought to my notice. The legality of the order which has been disobeyed has, therefore, now for the first time come under scrutiny nearly 50 years after it was passed.

The learned Joint Magistrate has considered the order as if it was a Municipal Bye law and finding that there has been no repeal of any previously made bye-laws has held "therefore" that the order of Mr. Daniels is still in force.

There is, however, in the present case no question of disobedience to a Municipal Bye-law. No Municipal proceedings in connection with the bye law have been proved and the prosecution was not instituted as required by section 314, Act II of 1916. The Government Pleader does not justify the conviction from that point of view. His argument is that the order of Mr. Daniels was passed under section 518, Act X of 1872 (the Code of Criminal Procedure in force at the time of the passing of the order).

The order itself says clearly that it is a "*rubkar Kachehri faujdari zila* Bareli *ijlas* Mr. C. I. Daniels, *Sahib Bahadur*, Magistrate *Zilla*" That being so, there can be little doubt that, though the Code of Criminal Procedure and its relevant section are not quoted, the order was intended to be one under section 518 of that Code.

On behalf of the applicant two points are urged:—

(1) That the District Magistrate had no jurisdiction to make an order of this nature under section 518 binding for all time.

(2) That the procession in question was not a religious procession, and that the order of 1873 only relates to religious processions.

The latter of these arguments does not appear to me tenable. A funeral procession in this country—and in most countries—is essentially a religious observance. That the order of 1873 has been observed in the past in regard to funeral processions is not disputed, and it may be held to indicate the general view that funerals are associated with religion. I, therefore, find against the applicant on this point.

The other contention, however, must, I

think, be accepted, in view of the rulings of the various High Courts on the point, to which my attention has been directed.

Section 518 does not, in so many words, for-bid a permanent order but the explanation attached to it says that this section is intend ed to provide for cases where a speedy remedy is desirable.

Act X of 1882, which repealed Act X of 1872, says, in section 2, that "all orders, made...underanyenactmenthereby repealed... shall be deemed to have been made under the corresponding section of this Code." The corresponding section of the Code of 1882 was section 144 which lays down that, "No order under this section shall remain in force for more than two months from the making thereof; unless (in certain cases) the Local Government by notification in the official Gazette otherwise directs." There is no proof or suggestion that the order of 7th February 1873 has been given a permanent character by Government by notification in the official Gazette. The fact that the bye-law on which the order of 7th February 1873 was based was said to have been sanctioned by Government does not affect the case

The character of orders under section 518, Act X of 1872, has been considered by the Allahabad, Calcutta and Madras High Courts, and the rulings of all are in the same spirit.

In *Gopi Mohun Mullick* v. *Tara Moni Chowdhrani* (1) a Full Bench of the Calcutta High Court held that "a Magistrate is not empowered to pass an order under section 518 of Act X of 1872 which has more than a temporary operation; the grant of what is in effect an order for a perpetual injunction is entirely beyond his powers."

The same principle was applied in *Muthialu Chetti* v. *Bapun Saib* (2). This was in respect of an order directing that all music should cease when any procession is passing a certain place of worship, the order having been passed for the preservation of the public peace.

In *Queen Empress* v. *Sheodin* (3) Mr. Justice Mahmud referred to and followed the Calcutta Full Bench ruling above quoted. This was a case in which the applicants for revision had been fined under section 188, Indian Penal Code, for not obeying in 1886 an order passed in 1873 under section 518 of Act X of 1872, defining the route and hour of an annual religious procession.

These rulings appear to me to make it clear that orders passed under section 518 of Act X of 1872 have a temporary operation only. Orders of this nature may be given a permanent character in certain circumstances by the Local Government; and it is open to the District Magistrate to take steps now in this direction.

Meanwhile, I am of opinion that the conviction of Ram Das under section 188, Indian Penal Code, cannot be justified, and I refer the case to the Hon'ble High Court with a recommendation that the conviction be set aside.

Before submission to the High Court, a copy of this order will go to the District Magistrate for any remarks that he may have to make.

JUDGMENT.—I agree with the views of the sessions Judge and direct the conviction for the breach of this order to be set aside and the fine, if paid, to be returned. I agree also with the District Magistrate that the order, being a perfectly well-known one, which has been respected for fifty years, it is peculiarly unfortunate that it should be obstructed now on technical grounds, but we, sitting in the judicial Courts, cannot be influenced by these considerations. The obvious remedy is to obtain a fresh order and confirmation of such order by the Local Government, or a Municipal Bye-law to be adopted by the Municipality about which, as it is a religious question, there might be more difficulty. However, I direct a copy of this opinion to be sent to the District Magistrate.

Order set aside.

(1) 5 C. 7; 4 C. L. R. 309; 2 Shome L. R. 217; 2 Ind. Dec. (N. S.) 617.

(2) 2 M. 140; 5 Ind. Jur. 28; 2 Weir 68; 1 Ind. Dec. (N. S.) 369.

(3) 10 A. 115; A. W. N. (1888) 25; 6 Ind. Dec. (N. S.) 77.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 149 OF 1920.

April 26, 1920.

Present:—Mr. Justice Wilberforce.

KHUSHI RAM—APPLICANT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *ss.* 145, 146—*Attachment of property—Magistrate, power of, to release property from attachment.*

Section 145 of the Criminal Procedure Code contemplates the existence of a dispute regarding property likely to lead to a breach of the peace and proceedings thereunder are only initiated for this purpose. When all likelihood of a breach of the peace has disappeared, all necessity ceases for maintaining any orders passed on account of the dispute.

Where property is attached under section 146 of the Criminal Procedure Code, the Magistrate has inherent power to release the property from attachment as soon as he is satisfied that all likelihood of a breach of the peace has disappeared, for instance, where one of the parties to the dispute dies leaving the other party as his heir. In such a case the judgment of a competent Court is not a *sine qua non* before the property can be released.

Criminal revision from the order of the Magistrate, 1st Class, Ludhiana, dated the 19th September 1919.

Mr. *Balwant Rai*, for the Petitioner.

JUDGMENT.—This is a somewhat novel case and *prima facie* not free from difficulty. Owing to an application under section 145, Criminal Procedure Code, and the impossibility of deciding between the rights of the parties, a house was attached in 1903 and has remained under attachment since that time. Shadi Ram, complainant, was on the one side and the petitioners were on the other side. They now allege that Shadi Ram has died and that no further dispute remains regarding the rights to the house as they are Shadi Ram's reversioners. They, therefore, ask for the release of the house from attachment. The Magistrate, however, refused their application on the ground that no judgment of a competent Court was produced as is required by section 145. Their learned Counsel applies for revision of this order on the ground that section 146 is not exclusive, and that an attaching Magistrate has inherent power to release from attachment. He is unable to cite any clear authority in favour of his proposition, but refers to *Joykissen Mookerjee, In re* (1) and *Queen v. Kaly Kishore Roy* (2), in both of which judgments it was apparently assumed that a Magistrate had a legal power of removing an attachment made by him. It appears to me that there can be no doubt that this is the intention of the law, as section 145 contemplates the existence of a dispute regarding property likely to lead to a breach of the peace and proceedings thereunder are only initiated for this purpose. When all likelihood of a breach of the peace has disappeared, all necessity ceases for maintaining any orders passed on account of the dispute. This must certainly be the case in a proceeding like the present where one of the disputants has died and left as his heirs the other party, if the facts stated in the application are true.

I, therefore, accept the application for revision, and, setting aside the Magistrate's order, direct him to enquire into the truth of the petitioners' allegations and to pass orders accordingly.

Revision accepted.

(1) 24 W. R. 40 Cr.
(2) 25 W. R. 68 Cr.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 51 OF 1920.
March 17, 1920.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

PRAMATHA NATH BARAT—
PETITIONER
versus
Rai P. C. LAHIRI *Bahadur*—
OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 76, 79, 342—Criminal Procedure Code (Act V of 1898), s. 342—Mistake of fact—Police Officer acting under invalid order, whether entitled to protection—Revision—Acquittal, order of—High Court, interference by.

An order by the Commissioner of Police of Calcutta regarding the treatment while under suspension of members of the Calcutta Police Force was published in the *Calcutta Police Gazette* After the order had been in force for some considerable time, it was discovered that the approbation of the Local Government had not been obtained within the meaning of section 9 of the Calcutta Police Act, but before this was discovered a Deputy Commissioner of Police, acting under the order, made an order for the confinement of a Head Constable who filed a complaint against the Deputy Commissioner for wrongful confinement. The Trial Court acquitted the Deputy Commissioner on the ground that he was labouring under a mistake of fact that the order under which he acted was a legal order and he was, therefore, protected by the provisions of sections 76 and 79 of the Penal Code : [p. 40, col. 2]

Held, that the Deputy Commissioner had been rightly acquitted.

Unless the setting aside of an order of acquittal is urgently demanded in the interests of public justice the High Court will not, in the exercise of its powers of revision, set aside such an order. [p. 40, col. 2.]

Rule against the judgment of the Chief Presidency Magistrate, Calcutta, dated the 2nd July 1919.

FACTS appear from the judgment.

Mr. *N. Sen* (with him Mr. *B. P. Chakrabarty* and Babus *Dhirendranath Mukherjee*, and *Probhat Chandra Dutta*), for the Petitioner.—Sections 76 and 79 of the Indian Penal Code have no application to the circumstances of the present case. The learned Chief Presidency Magistrate was wrong in treating a mistake of law as one of fact. The Circular order under which the accused purported to act not being sanctioned by the Governor in Council was illegal. Refers to section 9 of the Calcutta Police Act. In connection with this matter an earlier Rule came before your Lordships which is reported as *Pramatha Nath* v. *P. C. Lahiri* (1). The order which a Police Officer is bound to carry out must be a legal order. See *Queen Empress* v. *Latifkhan* (2). On the question of good faith, I would refer your Lordships to *Dhania* v. *F. L. Clifford* (3). It is not necessary for me to prove malice. With regard to what constitutes ignorance of law I would refer your Lordships to *Queen Empress* v. *Fischer* (4).

[SANDERSON, C. J.—How does the above ruling help you ? It merely lays down that every body is supposed to know the Statute Law of the land.]

If I can show that the order under which the accused purported to act was illegal, it is no defence that the accused did not know that it was illegal.

[SANDERSON, C. J.—Was not the accused bound to obey the order of his superior ?]

I cannot say whether he should obey or not, but what I do submit is that, if it transpired that the order was illegal, the accused would be liable for the consequence.

That the Circular order under which the accused purported to act was not legal has been admitted by the learned Advocate-General. See *Pramatha Nath* v. *P. C. Lahiri* (1). The maxim "*respondeat superior*" has no application to the present case. See *Queen Empress* v. *Latifkhan* (2). Refers to *Reg.* v. *Tolson* (5). As to the meaning of section 76 of the Indian Penal Code, see *Niamat Khan* v. *Empress* (6).

The Advocate-General (with him Mr. *S. R. Das*, Standing Counsel and Rai *Tarak Nath Sadhu* Bahadur), for the Opposite Party.—In this case the accused acted under the orders of the Commissioner of Police published in the *Calcutta Police Gazette*, which is an Official Gazette and is the property of the Government of Bengal. If he disobeyed the order he would have been liable to criminal prosecution. See section 15B, sub-section (*c*) of the Calcutta Police Act. The whole question is whether he acted under a mistake of fact or under a mistake of law. Ignor-

(1) 54 Ind. Cas. 63; 46 C. 581; 21 Cr. L. J. 15.
(2) 20 B. 394 at p. 397; 10 Ind. Dec. (N. S.) 825.
(3) 13 B. 376; 7 Ind. Dec. (N. S.) 250.
(4) 14 M. 342 at p. 354 (F. B.); 1 M. L. J. 458; 1 Weir 802; 5 Ind. Dec. (N. S.) 239.
(5) (1889) 23 Q. B. D. 168 at p. 172, 58 L. J. M. C. 97; 60 L. T. 899; 37 W. R. 716; 16 Cox C. C. 629; 54 J. P. 4.
(6) 17 P. R. 1883 Cr.

ance of a Statute or the misconstruction of the Statute may amount to an ignorance of law. But an order published in the *Police Gazette* which he was bound to obey and which he did obey in good faith constituted a mistake of fact when it turned out that the order was not strictly legal. If the order is a perfectly legal order on the face of it and he acted in good faith under that order, he is entitled to be protected. If every Police Officer was to enquire whether the order of his superior was a perfectly legal order before he acts upon it, it would be impossible to carry on the Police Administration. The cases cited by my learned friend have really nothing to do with the facts of the present case. This is an appeal against an order of acquittal and your Lordships are not bound to interfere unless your Lordships are satisfied that substantial injustice has been done.

Mr. *B. K. Chakraborty*, in reply.—It is one of the well-known rules that you cannot keep a man in confinement for an indefinite period. See the Police Act (V of 1861) and the Code of Criminal Procedure. You cannot, therefore, keep a man in confinement unless authorised by law. The attention of the accused was specifically drawn to the illegality of the order under which he purported to act. He had, therefore, no justification to keep the Head Constable in wrongful confinement subsequent to the 20th of February 1919. When his attention was so drawn. Finally, it would be a dangerous weapon in the hands of the Police and would be a great danger to public liberty if such mistakes of law are interpreted as mistakes of fact. Section 13B of the Police Act cannot protect the accused.

JUDGMENT.

SANDERSON, C. J.—This was a Rule granted to show cause why the order complained of should not be set aside. The order complained of was an order of the learned Chief Presidency Magistrate by which he acquitted the accused, Rai Bahadur Purno Chandra Lahiri, under section 258 of the Code of Criminal Procedure.

The facts which it seems to me are necessary for the purpose of my judgment are set out in the report of the case *Pramatha Nath* v. *P. C. Lahiri* (1) which appears in Indian Law Reports, 46 Calcutta, page 581, and I need not repeat them. That is a report of the hearing of a Rule which had been obtained by Promotha Nath Barat on behalf of his brother Provat Nath Barat. The learned Chief Presidency Magistrate had dismissed the complaint made against the accused person under section 203 of the Code. Then the Rule was obtained: upon the hearing of the Rule the learned Advocate-General said that he could not support the order and, further, he found difficulty in supporting the contention that the Circular which was relied upon was authorized by law. Consequently, the learned Judges who heard the Rule directed that the matter should be re-heard by the learned Chief Presidency Magistrate. The complaint thereupon again came before the learned Chief Presidency Magistrate. The complaint was in respect of an alleged vaxations and wrongful detention of Provat Nath Barat, he being a Head Constable in the Calcutta Police Force, and the accused being Deputy Commissioner. On this occasion the learned Chief Presidency Magistrate acquitted the accused under section 258 of the Code. Thereupon, the Court was again moved for a Rule and the learned Judges who heard that Rule thought that an opportunity ought to be given to the petitioner to make an application to the Local Government. Consequently, the petitioner was allowed to withdraw the application, and the learned Judges said that if the Local Government did not take action in the matter then they would hear the petitioner's application. Thereupon, the petitioner moved the Local Government, but, on the 25th of November last year, the Local Government intimated that it was not prepared to move in the matter. Consequently, this application came before the High Court again, and my learned brothers Mr. Justice Chaudhuri and Mr. Justice Newbould granted the Rule which I have now before me.

In my judgment, the whole question depends upon whether the Deputy Commissioner, Lahiri, is protected by the provisions of section 76 or the provisions of section 79 of the Indian Penal Code. The learned Counsel who appears to support this Rule has urged that there would be a grave danger to the public if it were held that a man was entitled to take shelter and receive protection for his illegal acts under

a plea of ignorance of the law. I do not intend, by anything I say, to whittle away the principle which has been for a long time accepted with regard to that matter. It is not really necessary in this case to say anything about it, for the learned Advocate General has not disputed that principle. I only mention it because the learned Counsel for the petitioner referred to it in his reply.

The learned Advocate General has shown cause against the Rule on the ground that the Deputy Commissioner, Lahiri, was not guilty of any offence, because, by reason of a mistake of fact and in good faith, he believed himself to be bound by law to obey the instructions of the Commissioner of Police and to make the order of the 14th of February 1919. He further urged that the Deputy Commissioner had not committed any offence because, by reason of a mistake of fact and in good faith, he believed himself to be justified in making the order which he did on the 14th of February 1919.

Now, as regards the good faith of the Deputy Commissioner; in the learned Presidency Magistrate's Court there was an allegation that the Deputy Commissioner had acted maliciously. The learned Magistrate, however, found as a fact that there was nothing in that allegation. To use his own words, he said: "I find there is no evidence of malice in the accused's action nor was it suggested by Borat that any such motive existed."

As regards the alleged mistake of fact, the order in question was contained in the *Calcutta Police Gazette* of the date of the 9th of June 1917, and it purported to be by way of cancelling a previous order which was published in the *Calcutta Police Gazette* of the 20th of February 1917. That previous order was:

"All Constables and Head Constables placed under suspension are to be ordered to report themselves to the Central Lock-up Guard." The order published in *Calcutta Gazette* of the 9th of June 1917 was in the following terms:

"Officers of all ranks when placed under suspension are subject to the same rules, regulations and discipline, as when not suspended.

"All Head Constables and Constables placed under suspension are to be ordered to report themselves to the Superintendent Head Quarters Force. They will be confined to quarters and are not to be allowed to leave the Lal Bazar compound without the specific permission of the Superintendent Head Quarters Force or any other officer detailed by him for the purpose." The *Calcutta Police Gazette*, on the face of it, purports to be the property of the Government of Bengal. It was stated in evidence that the above-mentioned order had been consistently obeyed and followed from the time it was published in June 1917. The events which form the basis of this case occurred in January 1919 so that the order had been in force, for about 18 months. It was conceded by the learned Counsel who supported this Rule and who opened the argument that if the order published in the *Police Gazette* had received the approbation of the Government of Bengal, he would have had nothing to say. But it is contended (and it is admitted) that the order in question had not in fact received the approbation of the Government of Bengal within the meaning of section 9 of the Calcutta Police Act of 1866: and, consequently, it was argued by him, and admitted by the learned Advocate-General, that it was in fact an invalid order.

In my judgment, having regard to the facts which I have mentioned, and having regard to the further fact that it was proved that the *Calcutta Police Gazette* was the medium through which the Commissioner of Police communicates all orders and regulations issued by him ordinarily having the sanction of law, for the guidance of Police Officers and which orders have to be obeyed and carried out by all Police Officers, and having regard to the fact that this order had been in force for about 18 months and had been consistently acted upon and obeyed, the Deputy Commissioner was justified in assuming that the order had received the approbation of the Government of Bengal. The Deputy Commissioner was labouring under a mistake of fact and was not labouring under a mistake of law. The learned Chief Presidency Magistrate said: 'His, the accused's mistake was not one of law, inasmuch as it did not involve any mistake in the construction or ignorance of the existence of any enactment, but involved ignorance that certain requisities and

formalities had not been complied with," that is to say, that in fact the Government of Bengal had not given its approbation to the regulation or order which had been published in the *Calcutta Police Gazette* of the 9th of June 1917. Consequently, subject to what I have to say with regard to the further point which was raised by Mr. Chakrabarty, I agree with the learned Chief Presidency Magistrate that the Deputy Commissioner, Lahiri, in respect of the making the order of the 14th of February, was protected by the provisions of section 76 and by the provisions of section 79. In my judgment, he was labouring under a mistake of fact, and he in good faith believed himself bound by law to obey the order, which was published in the *Calcutta Police Gazette* of the 9th of June 1917, and to make the order of the 14th February 1919. Further, in my judgment, by reason of a mistake of fact and in good faith, he believed himself to be justified by law in making the order of the 14th of February 1919.

But it was urged by Mr. Chakrabarty in reply, that whatever may have been the position of the Deputy Commissioner on the 14th of February when he made the order of that date, he cannot be protected by sections 76 and 79 in respect of the detention which was subsequent to 20th of February 1919: and the learned Counsel referred us to the petition which was presented to the learned Chief Presidency Magistrate, on behalf of Provat Nath Borat on that date, in which it was contended that the detention of the Head Constable, Provat Nath Borat, was illegal. Certain reasons were set out in the petition as showing that the detention was illegal. There was no specific allegation in the petition that the order published in the *Police Gazette* on the 9th of June 1917 had not received the approbation of the Government of Bengal: but the learned Counsel stated (I have no doubt correctly) that on that date the learned Pleader who was appearing for the Head Constable had stated in Court that that was one of the points on which he relied. As I intimated to the learned Counsel during the course of the argument, I am not satisfied that the Deputy Commissioner Lahiri was responsible for the detention after the 20th of February 1919. I find that the learned Chief Presidency Magistrate referred the matter of the petition to the Commissioner of Police and the Commissioner made a report to the Chief Presidency Magistrate; and, I am by no means satisfied that the Deputy Commissioner Lahiri was responsible for the detention after that date. This point does not seem to have been specifically taken in the Chief Presidency Magistrate's Court. It must be remembered that this is a case in which the accused person has been acquitted and we are asked to make the Rule absolute and set aside that order of acquittal, and the rule is that this Court on revision does not exercise its jurisdiction to set aside an order of acquittal, unless it is of opinion that "it is urgently demanded in the interest of public justice" [*Faujdar Thakur* v. *Kasi Choudhuri* (7)] and, having regard to the fact that the materials before me do not satisfy me that the Deputy Commissioner Lahiri was directly responsible after the 20th of February 1919 for the detention of the Head Constable, Provat Nath Borat in my judgment, it would not be right for this Court to make this Rule absolute.

For these reasons, in my judgment, the Rule should be discharged.

WALMSLEY, J.—I agree.

Rule discharged.

(7) 27 Ind. Cas. 186; 42 C. 612 at p. 616; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1674 OF 1919.

March 27, 1920.

Present:—Mr. Justice Martineau.

SITA RAM—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Opium Act (I of 1878), ss. 3, 9 (d) (f)—Morphia, whether opium—Sale and transport of morphia, whether offence.

Morphia is not included in the term 'opium' as defined in section 3 of the Opium Act, not being a preparation or admixture of opium or a drug prepared

from the poppy. The sale or transport of morphia is not, therefore, an offence under section 9 of the Opium Act.

Criminal revision from the order of the Sessions Judge, Ambala, dated the 17th June 1919, modifying that of the Magistrate, 1st Class, Ambala, dated the 31st May 1919, convicting the petitioner.

Dr. *Gokal Chand*, for the Petitioner.

Mr. *O'Connor*, (for Government Advocate), for the Respondent.

JUDGMENT.—The petitioner is a physician who has been selling and transporting pills known as *anti*-opium pills, which are said to be a cure for the opium eating habit. They contain 2·4 per cent. of morphia, and as the petitioner has no license to sell and transport morphia he has been prosecuted for infringing the rules under the Opium Act and convicted of offenses under section 9, clauses (*d*) and (*f*) of that Act, and the conviction has been upheld by the Sessions Judge.

The question is, whether the sale and transport of morphia without a license is an offence under the Opium Act, and this depends upon the question whether morphia is included in the definition of opium contained in section 3 of the Opium Act, which says that opium includes also poppy-heads, preparations or admixtures of opium and intoxicating drugs prepared from the poppy. The Courts below have held that morphia is a preparation of opium, but I cannot agree with them. Morphia is prepared from opium, but there is a clear distinction between a preparation from opium and a preparation of opium. Morphia is only one of many ingredients of opium, and I am unable to see how it can be called a preparation of opium when it does not contain the various ingredients which opium contains. It would be more accurate to describe opium as a preparation of morphia than morphia as a preparation of opium.

That morphia is not included in the term "opium" as defined in the Opium Act was apparently recognized when the rules published in Punjab Government Notification No. 954, dated the 16th October 1916, as amended by Notification No. 6583-C., and I., dated the 27th March 1917 (page 73 of Volume II of the Punjab Excise Manual) were framed, for in rule 1 (*f*) the definition of the expression "opium" given in the Act is amplified by the statement that that expression does not include morphia or its preparations. That rule must have been overlooked when proceedings were taken against the petitioner.

The fact of the petitioner having infringed the rules published in Notification No. 955, dated the 16th October 1916 (on page 101 of the Manual) regulating the sale and transport of morphia is immaterial if there is no penalty for their infringement.

I hold that morphia is not included in the term "opium" as defined in the Opium Act, not being a preparation or admixture of opium or a drug prepared from the poppy.

I, therefore, accept this application, set aside the conviction and sentence, and acquit the petitioner. The fine, if paid, will be refunded.

Decision accepted.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 30 OF 1920.

June 11, 1920.

Present :—Mr. Justice Jwala Prasad.

Sheikh ABDUL ALI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 190, 200—Cognizance of offence under cl. (c) of section, when can be taken—"Police report", what amounts to—Complainant, failure to examine—Irregularity.

A necessary condition for taking cognizance of a case under clause (c) of section 190 of the Criminal Procedure Code is for the proceedings to be instituted upon information received from any person other than a Police Officer or upon the Magistrate's own knowledge or suspicion.

The report of the Police is not restricted merely to reports under Chapter XIV of the Criminal Procedure Code upon information lodged to the Police but embraces all reports by the Police sub-

mitted under section 24 of the Police Act. An application by the Police to a Magistrate to take action against a person amounts to a "Police report" within the meaning of the term in clause (*b*) of section 190 of the Criminal Procedure Code. [p. 44, col. 1.]

The failure to examine a complainant under section 200 of the Criminal Procedure Code is a mere irregularity which can be subsequently cured and does not vitiate the proceedings. [p. 44, col. 2.]

Application against the order passed by the Sub-Divisional Magistrate, Bhagalpur, dated 11th December 1919.

Mr. *S. A. Sami*, for the Petitioners.

Mr. *Monohar Lall*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The petitioners have moved this Court against an order of the Sub-Divisional Officer of Bhagalpur, dated 11th December 1919, summoning them under section 155, Indian Penal Code, and contend that the order is bad in law and *ultra vires* on account of the omission on the part of the Magistrate to examine the complainant on oath under section 200 of the Code of Criminal Procedure before issuing processes against the accused.

The Sub-Inspector of Police of Bhagalpur Mufassil investigated into a riot said to have been committed, on the 3rd December 1919, on some land, in which the petitioners are said to have been interested and ultimately submitted a charge sheet in that case. He made a separate application to the Magistrate on the 8th December 1919 stating that the riot had taken place for the benefit of the petitioners, who claimed interest in the subject-matter of the dispute.

The Sub Inspector was not examined on oath under section 200 before summoning the accused. The District Magistrate in his report submitted to this Court in answer to the rule issued upon him, says that cognizance was taken under clauses (*b*) and (*c*) of section 190 of the Code of Criminal Procedure. Clause (*c*) has obviously no application. In the order in question, dated the 11th December, the Magistrate expressly orders the prosecution of "all the 6 men noted in the Police report." Therefore, the information upon which the Magistrate summoned the accused, was clearly received from a Police Officer, which is expressly excluded from section 4 (*h*). The Magistrate nowhere says that he instituted the proceedings upon information received from any person other than a Police Officer or upon his own knowledge or suspicion regarding the commission of the offence, in respect of which the accused were summoned by him. This is a necessary condition for taking cognizance under clause (*c*). The Magistrate did not comply with section 191, namely, to inform the accused that they were entitled to have the case tried by another Court as is required on cognizance having been taken under clause (*c*). This also shows that the Magistrate did not take cognizance under that clause.

As to clause (*b*), Mr. Sami contends on behalf of the petitioners that the application of the Sub Inspector was not a Police report within the meaning of the term in that clause, which must be limited to a Police report submitted under section 173 of the Code with respect to an offence cognizable by the Police. It is urged that the offence under section 155, Indian Penal Code, disclosed in the application of the Sub-Inspector is not a cognizable one by the Police. The Sub Inspector had no power to investigate that offence, or to submit his report thereon which might fitly be called a Police report. In this contention Mr. Sami is undoubtedly supported by the Full Bench case of *King-Emperor* v. *Sada* (1) and *Ram Lal* v. *Emperor* (2) decided by a Single Judge of this Court. He is also supported by the case of *Chidambaram Pillai, In re* (3). The Allahabad High Court and the Burma Chief Court, and recently the Calcutta High Court, have taken a contrary view; *vide*, *Sarfaraz Khan* v. *Emperor* (4), *Nga Saw Ke* v. *Emperor* (5) following an earlier case of the same Court in *King-Emperor* v. *Nga Thaung* (6), *Harihar Roy* v. *Emperor* (7), *Bhairab Chandra Barua* v. *Emperor* (8). The Full Bench

(1) 26 B. 150; 3 Bom. L R. 586.
(2) 55 Ind. Cas. 285; 1 P. L. T. 73; 21 Cr. L. J. 269.
(3) 1 Ind. Cas. 36; 32 M. 3; 5 M. L. T. 16; 9 Cr. L. J. 130.
(4) 19 Ind. Cas. 314; 11 A. L. J. 33'; 14 Cr. L J. 218.
(5) 27 Ind. Cas. 145; U. B. R. (1914) II, 19; 16 Cr. L. J. 97.
(6) 1 Cr. L. J. 1047; U. B. R. (1904-06) I, Cr. Pro. 25.
(7) 52 Ind. Cas. 595; 23 C. W. N. 481; 29 C. L. J. 383; 20 Cr. L. J. 675.
(8) 53 Ind. Cas. 698; 46 C. 807; 29 C. L. J. 318; 23 C. W. N 484; 20 Cr. L. J. 791.

decision of the Bombay High Court and the other authorities were considered in the last two cases of the Calcutta High Court referred to above.

The Bombay and Madras cases would confine the Police report referred to in clause (*b*) to the Police report submitted in cognizable cases under section 173 of the Code. The other High Courts would not place any such limitation and would not confine them only to reports under Chapter XIV of the Code, far less to reports in cognizable cases only. The opinion, therefore, seems to be equally divided and it is, therefore, a difficult task to decide which view is correct.

The difficulty has been enhanced by the absence of definition of the words "Police report" either in the Code of Criminal Procedure or in the Police Act (V of 1861) or in the General Clauses Act.

Under section 190, cognizance may be taken, (1) upon a complaint of facts, which constitute such offence.

(2) Upon a Police report of such facts.

(3) Upon information received from any person other than a Police Officer or upon his own knowledge or suspicion that such offence has been committed.

All offences cognizable by a Magistrate must, therefore, come within one or other of the aforesaid clauses.

When cognizance is taken under clause (*a*) upon a complaint, the Magistrate is required to examine the complainant on oath under section 200 before taking action upon the complaint.

"Complaint" has been defined in section 4 (*h*) as meaning the allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person has committed an offence, but it does not include the report of a Police Officer. The object of excluding Police report from the definition of "complaint" is, obviously, to exclude it from the operation of section 200 of the Code and to obviate the necessity of examining the Police Officer before taking action upon his report.

Now, Chapter XIV of the Code deals with information to the Police and their power to investigate. Such an information to the Police may be of a cognizable offence or of a non cognizable offence. When the information relates to a cognizable case, it has to be reduced to writing in the form prescribed by the Code called "First Information report" (section 154). In the case of non cognizable offence, substance only of the information is to be entered in the Station Diary (section 155).

The Police is bound to investigate into the information relating to the commission of a cognizable offence. He is not required to investigate a non cognizable offence unless he is directed to do so by an order of the Magistrate and, when so directed, he is bound to investigate the same just as a cognizable offence (clauses 2 and 3 of section 154). In either case, when the Police Officer makes investigation under Chapter XIV, he is required to submit to the Magistrate a report under section 173 in the form prescribed by the Local Government. The report under section 173 may be of a cognizable offence or of a non-cognizable offence, when the Police Officer is directed by the Magistrate to investigate it. The Magistrate will, therefore, be competent under section 190 (*b*) to take cognizance of an offence upon a Police report relating to a non-cognizable offence, for section 137 is not confined only to reports in cognizable cases. Power of a Police Officer to investigate and submit his report under section 173 is the same in cognizable and non-cognizable cases, the only distinction being that, in the latter case, he must have received order of the Magistrate to investigate into it.

The view taken in the Bombay and Madras cases and in the case of this Court, *Ram Lal* v. *Emperor* (2), that a report of the Police must necessarily be of a cognizable case under section 173, does not appear to be borne out by the aforesaid provision in Chapter XIV.

The question then is, whether a Police Officer can make any report outside the provision of Chapter XIV of the Code. The Chapter deals with the reports upon the information lodged to the Police, as the heading of that Chapter and sections 154 and 155 clearly indicate. But is the action of Police confined only to an information lodged before him, or can he investigate into offences of his own initiative, or without any information lodged by any person? Every Police Officer is, under Act V of 1861, a member of the Police Force

and the word "Police" is, therefore, defined in section 1 to include all persons enrolled under the Act. The duties of a Police Officer have been defined by that Act and not by the Code of Criminal Procedure. The Code deals with the duties of Police, only so far as they relate to investigation of offences under the Code. Section 24 of the Act lays down:

"It shall be lawful for any Police Officer to lay any information before a Magistrate and to apply for a summons, warrant, search warrant or such other legal process as may by law issue against any person committing an offence."

This duty of laying information and of moving the Court for action is irrespective of any information lodged to the Police by any person referred to in Chapter XIV of the Code of Criminal Procedure. Now, when a Police Officer acts under section 24 of the Police Act and submits his information, regarding the commission of the offence to the Magistrate and applies for action to be taken thereon, does it not become a report of that officer? It would seem to me that the answer must be in the affirmative. The report of the Police is, therefore, not restricted only to reports under Chapter XIV upon information lodged to the Police, but embraces all reports by the Police submitted under section 24 of the Act. This is also borne out by the fact that, neither in clause 4 (*h*) excluding the Police report from the definition of complaint, nor in clause (*b*) of section 190 empowering the Magistrate to take cognizance upon a Police report, it is expressly said that such a report must be a report under Chapter XIV of the Code or report only of a cognizable offence. We cannot restrict the meaning of "Police report" and, to my mind, we have no right to do so by reading into clause (*b*) of section 190, or in clause (*h*) of section 4, words that are not there. The Legislature thought it desirable to leave it unrestricted and we must interpret the law as it is.

The word "report" in clause (*b*) is designed to distinguish it from a complaint or information lodged by a private person before a Magistrate. Complaint by a private person to a Magistrate comes under clause (*a*) and information by the private person to a Magistrate comes under clause (*c*). A report to a Magistrate by the Police comes under clause (*b*). The only limitation laid upon the report is that it must state facts which constitute an offence. Applying this test to the application of the Police Sub-Inspector, dated the 9th December 1919, which I so far purposely refrained from calling a Police report, I have no doubt that it states facts, which *prima facie* disclose an offence against the petitioners, and, with great respect to the opinion of the learned Judges who have taken a contrary view, I hold that the said application of the Sub-Inspector is a Police report within the meaning of the term in clause (*b*) of section 190, and that the cognizance was properly taken by the Magistrate under that clause. The Magistrate was, therefore, not required to examine the Sub Inspector before issuing processes against the accused. In this view, no question of the irregularites arises and the contention of the learned Counsel on behalf of the petitioners must fail.

If, on the other hand, the report of the Police Officer was not a report within the meaning of clause (*b*) of section 190 and was only a complaint under section 4 (*h*) of the Code, the omission to examine the Sub Inspector under section 200 was a mere irregularity and would not vitiate the proceedings against the petitioners, as held in the two recent decisions of the Calcutta High Court referred to above and also by this Court in the case of *Emperor* v. *Heman Gope* (9). The irregularity, if any, can even now be cured by examining the Sub-Inspector on oath and taking action thereon, as the case is at its initial stage.

It has also been urged before me that petitioners Nos. 1, 2 and 3 are the occupiers of the land in question, on which the riot is said to have taken place, and have been sent up for trial for the offences connected with the riot, and hence they could not be charged with an offence under section 155 of the Indian Penal Code, inasmuch as that section implies that the riot must have been committed by persons other than the occupiers and holders of the land. This is a matter of consideration by the Magistrate, who has got seizin of the case.

Another objection has been raised that

(9) 58 Ind. Cas. 459; 1 P.L.T. 349; 21 Cr. L. J. 779.

the case under section 155 should not be tried until the disposal of the riot case. This contention is two fold. Firstly, that it has not yet been established that the riot had taken place upon the land and so the petitioners could not be prosecuted for an offence under section 155, and secondly, that the petitioners, particularly Nos. 1, 2 and 3, will be prejudiced in their defence in this case so long as the rioting case is not disposed of.

It appears to me that the Deputy Magistrate, Mr. Datt, on the 22nd January 1920, upon the application of the Court Sub-Inspector ordered the present case to be postponed till the disposal of the rioting case. This order was, however, set aside by the Sub Divisional Officer on the 1st May, and the case has been ordered to proceed. On the 10th May 1920, an application was made on behalf of the accused, similar to that made by the Court Inspector on the 22nd January. The Sub Divisional Magistrate has rejected this petition as well, and the reason given for not acceding to the prayer of both the parties, the case would then be inordinately delayed. There is some force in the contention of Mr. Sami that the riot, which is *sub judice*, must be established before the case under section 155 can proceed, and also that the accused would be seriously prejudiced in defending themselves in this case, so long as the riot case is not disposed of and that the accused Nos. 1, 2 and 3 would be still more prejudiced and inconvenienced in defending themselves simultaneously in both the cases. I understand the trial of the rioting case has already commenced and witnesses are being examined and will, I hope, be finished within a reasonable time.

For all these reasons, I think, that this case must be postponed till the disposal of the rioting case, and I accordingly direct the stay of this case.

Proceedings stayed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 711 OF 1919.
CRIMINAL REVISION PETITION No. 603 OF 1919.
January 22, 1920.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Coutts-Trotter.

HUSSAINA BEARI—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 211—Workman's Breach of Contract Act (XIII of 1859), s. 1, complaint under, withdrawn before passing of any order, whether "criminal proceeding."

The mere initiation of a proceeding under the preliminary portion of section 1 of the Workman's Breach of Contract Act for execution of the work or for re-payment of the advance which is withdrawn before any order is made therein is not a "criminal proceeding" within the meaning of section 211 of the Penal Code. [p. 48, col. 2.]

Criminal revision petition under sections 435 and 439 of the Criminal Procedure Code, against the conviction and sentence of the accused by the Sessions Judge, South Kanara, in Criminal Appeal No. 19 of 1919, filed against the conviction and sentence of the accused by the Sub-Divisional Magistrate, Coondapur, in Calendar Case No. 33 of 1918.

FACTS appear from the judgment.

Mr. *B. Sitarama Rao*, for the Petitioner.—The conviction of the accused is bad in law. The proceedings under the first part of Act XIII of 1859 are not criminal. There is no penalty immediately following on the enquiry under that part. An order for specific performance is made as a result of that enquiry and the penal portion is embodied in the second part of the section, wherein disobedience of the order is made punishable. Therefore, the presentation of a complaint under the section is not the institution of criminal proceedings within the meaning of section 211, Indian Penal Code; see *Anusooni Sanyasi, In the matter of* (1), *King-Emperor* v. *Takasi Nukayya* (2). In *Derby Corporation* v. *Derbyshire County Council* (3), in a case under the Rivers Pollution Prevention Act, it was held that the initial stages of proceedings which result in orders for injunction by

(1) 28 M. 37; 1 Weir 671; 2 Cr. L. J. 149.
(2) 24 M. 660; 1 Weir 673.
(3) (1897) A.C. 550; 66 L. J. Q. B. 701; 77 L. T. 107; 46 W. R. 48; 62 J. P. 4.

County Judge are not criminal proceedings but that the proceedings become penal only when the accused are punished for disobedience of the order. See also *Reg.* v. *Whitchurch* (4).

Mr. *V. L. Ethiraj*, for the Public Prosecutor, for the Crown.—It was found as a fact that the complaint was a false one. The preamble of the Act shows that it was intended to be a penal enactment. The offence referred to in the Act is the original offence of breach of contract, which it is the policy of the Act to prevent and for which eventually punishment is provided. The first part of section 1 of Act XIII of 1859 cannot be detached from the second part. All that the first part does is to give a *locus pœnitentiæ* to the accused in the event of his complying with the order either for return of the advance or for performance of the stipulated work. There is a punishment provided in the event of his not complying with the order. Every step from the presentation of the complaint must be deemed to be a criminal proceeding. The enactment is, in form and substance, and by its preamble, a penal one.

ORDER.—In this case the accused was charged under section 211 of the Indian Penal Code with making a false charge against one Angara Mukari, under section 1 of the Workman's Breach of Contract Act, XIII of 1859. In order to determine the point at issue, which is one of considerable interest, it is necessary to examine both the wording of section 211 of the Indian Penal Code, under which the accused was convicted, and the wording of the Workman's Breach of Contract Act. Section 211 of the Penal Code is as follows:

"Whoever, with intent to cause injury to any person, institutes or causes to be instituted, any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person shall be punished, etc."

By the Workman's Breach of Contract Act, section 1, it is enacted as follows:

"When any artificer, workman or labourer shall have received from any master or employer, resident or carrying on business in any Presidency town, or from any person acting on behalf of such master or employer, an advance of money on account of any work which he shall have contracted to perform, or to get performed by any...artificers, workmen or labourers,...shall wilfully, and without lawful or reasonable excuse, neglect or refuse to perform, or get performed, such work according to the terms of his contract, such master or employer, or any such person as aforesaid, may complain to a Magistrate of Police, and the Magistrate shall thereupon issue a summons or a warrant, as he shall think proper, for bringing before him such artificer, workman or labourer, and shall hear and determine the case." And section 2 enacts: "If it shall be proved to the satisfaction of the Magistrate that such artificer, workman or labourer has received money in advance from the complainant on account of any work, and has wilfully, and without lawful or reasonable excuse, neglected or refused to perform, or get performed, the same according to the terms of his contract, the Magistrate shall, at the option of the complainant, either order such artificer, workman or labourer to re-pay the money advanced, or such part thereof as may seem to the Magistrate just and proper, or order him to perform, or get performed, such work according to the terms of his contract; and if such artificer, workman or labourer shall fail to comply with the said order, the Magistrate may sentence him to be imprisoned with hard labour for a term not exceeding three months."

It was proved in the lower Court, and it is not contested here, that the proceedings launched under section 1 of the Workman's Breach of Contract Act were, in fact, falsely brought and that the charge was a baseless one, and indeed it was withdrawn almost immediately the case came on. The employer has been convicted under section 211 for falsely bringing those proceedings. The only point he takes before us is that the proceedings under the Workman's Breach of Contract Act are not criminal proceedings within the meaning of section 211, Indian Penal Code.

There has been a good deal of argument as to what the dividing line is in matters of this kind between criminal and civil proceedings and various analogies were suggested on one

(4) (1881) 7 Q. B. D. 534; 50 L. J. M. C. 99; 45 L. 879; 29 W. R. 922; 45 J. P. 617.

side or the other of the line. But we think that this matter has been clearly decided by a ruling of the House of Lords in England on a very analogous set of statutory provisions, so that it is needless to indulge in wide speculations as to the precise *differentia* of criminal from civil proceedings in general. If one looks at the Act, the preamble of it would certainly lend colour to the idea that the Act regarded some portion, at any rate, of the proceedings as criminal because the preamble recites that much loss and inconvenience are sustained by employers from fraudulent breach of contract on the part of workmen who have received advances and actually recites the inadequacy of the remedy by a suit in the Civil Courts and adds that

"It is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment," and it goes on to enact the provisions which have been already set out.

It was argued on behalf of the respondent that the offence referred to in the Act must be regarded as the original offence of breach of contract, because that is the thing which, in the terms of this preamble, the Act sets out to punish or, at any rate, to prevent. There have been decisions of this Court to the effect that the offence created by the Act is not the original breach of contract on the part of the workman but his subsequent disobedience to what we may call the order for specific performance which entails the punishment by imprisonment. That opinion was expressed by a Bench of three Judges of this Court, Sir Arnold White, C. J., Davies and Benson, JJ., in *Anusoori Sanyasi, In the matter of* (1) and Sir Arnold White says:

"The offence created by the Act is not the neglect or refusal of the workman to perform his contract but the failure of the workman to comply with an order made by the Magistrate that the workman re-pay the money advanced or perform the contract."

There is a similar ruling in *King-Emperor* v. *Takasi Nukayya* (2). Perhaps, logically, the offence is something that comprehends both those elements. The offence is completed when the workman who has broken the contract and who has had an order under section 2 made against him fails to obey that order of the Magistrate. The necessary ingredients in the offence are: he must have broken a contract; an order under section 2 must have been passed and he must have disobeyed that order. When those elements are present, there is an offence as it would be defined for statutory purposes, *e.g.*, for insertion in a Criminal Code. To that the argument is that the whole proceedings must be regarded as one and that, as the offence, as we have defined it, when completed, culminates in a liability to punishment by imprisonment which, of course, obviously savours of a criminal proceeding, every step from the inception must be regarded as a step in a criminal proceeding, and it is said that you cannot split up a statutory procedure into two parts, one of which you are prepared to call criminal and the other civil. The argument, to our minds, is disposed of by the case of *Derby Corporation* v. *Derbyshire County Council* (3). In that case there had been a proceeding under the Rivers Pollution Prevention Act of 1876. The Act, in its general scheme, provided something very much of the nature of the remedy in this case. The proceedings by the Act are laid in the County Court, the Civil Court of the District. By the Act, the County Council is enabled to bring proceedings against persons who are alleged to have offended against the Act by polluting rivers. Thereupon, the County Court Judge has power to pass orders (if he finds that there was pollution) either in the nature of an injunction or by allowing a limited time for new measures to be taken or a new scheme carried out to obviate or abate the pollution. After the time limited by the order has expired, it is competent to the local authority to apply to the County Court Judge for a penal order levying a sum of money for every day that the defendant continues in default. In this case, the County Council had started proceedings for an order against the Derby Corporation. In the course of those proceedings they applied to the learned County Court Judge for an order for discovery of documents. They said that it was impossible for them to put before the Court the proper materials with regard to the methods of disposal of sewage and so forth carried out by the Corporation unless the Corporation were compelled to make discovery of documents, plans, maps and so forth. That was resisted on the ground that the

nature of the proceedings was penal or criminal because the proceedings that were commenced were a step towards the recovery of a penalty, and reliance was placed in argument upon the case of *Reg.* v. *Whitchurch* (4) to which I shall refer presently. The House of Lords held, that discovery could be ordered because the initial stage of the proceedings was not criminal or penal at all. Lord Herschell, at page 552, says :

"I will deal with the first objection, namely, that this is a penal proceeding—a proceeding which may end in a penalty. It seems to me nothing of the kind. This proceeding never can end in a penalty. All it can end in is an order under such terms and conditions as the County Court Judge thinks reasonable to prevent or abate a nuisance. The Legislature has provided that, if that order is disobeyed, then the County Court Judge may impose a penalty not exceeding £50 a day, as he thinks reasonable, payable to such persons as he thinks right, upon the authority or person who has disobeyed the order. My Lords, that is a separate and independent proceeding. It is true it is taken, as it is said, in the action or the proceeding, but it is really a separate proceeding in which the penalty for disobedience is imposed. The proceeding itself is no more a proceeding that may subject the present appellants to a penalty than is every proceeding which is ever taken in a Court of justice."

Their Lordships held, that where you have a remedial power vested in the Court in the first instance, followed by a penalty on disobedience of the order made in the first instance, it is the second proceeding alone that is penal in character and the first has no penal character whatever.

The case of *Reg.* v. *Whitchurch* (4) was a proceeding under the Public Health Act of 1875. Section 94 of that Act vests in the various local authorities, as defined by the Act, the power to serve notice on a person by whose act any nuisance cognizable by the local authority is caused, requiring the person on whom the notice is served to abate the nuisance within the time specified by the authority and carry out the works required for the purpose. Then, by section 93, on non-compliance with the notice, the local authority can lay a complaint before a Justice of the Peace and he can issue a summons requiring the person named in the complaint to appear before a Court of summary jurisdiction and the Court of summary jurisdiction is enabled by section 96 to make an order for the execution of the works, and may also by the same order impose a penalty on the person on whom the order was made. It is obvious that the analogy of that case cannot be applied to the present one. The proceeding of the local authority corresponds to the first proceeding in the second section of the Workman's Breach of Contract Act where the Magistrate, in the first instance, makes an order in the nature of an order for specific performance. In the Public Health Act that part is not vested in a Court but is left to the local authority in the first instance, which goes very strongly to show that you cannot regard that part of the proceedings which is not even in a Court as in any way criminal. Then, when the matter comes before the Magistrate he has jurisdiction from the very outset, without any further default being made, to impose a penalty, as Lord Davey pointed out in *Derby Corporation* v. *Derbyshire County Council* (3).

We are of opinion, that the authority of the House of Lords finally establishes that, in cases of an analogous kind, the initial proceedings which can only end in the nature of an order for specific performance must be separated from the final proceedings which will issue on disobedience of that order. It is the latter portion of the proceedings alone that can in any way be described as criminal proceedings and may come under section 211, Indian Penal Code. In the present instance, the only proceedings that were launched were under the preliminary portion of the section for execution of the work or for re-payment of the advance, and we are of opinion that those not being criminal proceedings the present conviction cannot be sustained and must be quashed.

Conviction quashed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 6 OF 1918.

June 15, 1920.

Present :—Mr. Justice Walmsley and Mr. Justice Buckland.

PROVASH CHANDRA CHATTERJEE —DEFENDANT—APPELLANT

versus

JAHAR-UD-DIN MONDAL AND ON HIS DEATH HIS HEIRS ASIMADDI MONDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *s.* 15—*Omission to comply with provisions of section, effect of—Landlord and tenant—Permanent tenure-holder, heirs of, failing to get registration of names, position of.*

The interests of the heirs of a recorded permanent tenure-holder in the tenure, cannot be destroyed by proceedings to which they were not parties, merely because they omitted to comply with the provisions of section 15 of the Bengal Tenancy Act. [p 50, col. 2.]

Appeal against the decree of the 1st Additional District Judge, 24-Pergannahs, dated the 25th of August 1917, modifying that of the Munsif, 2nd Court, at Basirhat, dated the 28th of February 1916.

FACTS appear from the judgment.

Babu *Brojolal Chakraburty* (with him Babu *Gurudas Sinha*), for the Appellant.—I am the landlord and I obtained a decree against the sole recorded tenant in a suit for rent. Therefore, in execution of that decree the entire tenure passed to the auction purchaser. Under section 15 of the Bengal Tenancy Act, the heirs of the original tenure-holder were bound to notify the succession to the landlord. By omitting to comply with the provisions of that section, they are not entitled now to question the validity of the proceedings to which they were not parties. Refers to *Nitayi Behari Saha Paramanik* v. *Hari Govinda Saha* (1).

Babu *Biraj Mohan Mozoomdar* (with him Babu *Banku Behari Mullik Chowdhuri*), for Deputy Registrar, for the Respondents.—There is no definite finding that the tenure in question was a permanent tenure, so that section 15 of the Bengal Tenancy Act does not apply. Even if it does apply, mere omission of the heirs to register their names in the landlord's *sheristha* cannot have the effect of cancelling their interest in the tenure by a proceeding to which they were no parties. Besides, it has been found that the landlord in registering the name of Gafur was perfectly aware that he was excluding the heirs of the original tenure-holder, so that *Nitayi Behari Saha Paramanik* v. *Hari Govinda Saha* (1) has no application. See *Jeo Lal Singh* v. *Gunga Pershad* (2).

Babu *Brojolal Chakraburtty* replied.

JUDGMENT.—The facts from which this appeal arises are as follows: one Ekim Molla had three Jamas; he died about 1290 B. S. leaving a widow, Bibijan, and two daughters: the daughters died before their mother: one of them, Arifa left a son, Gafur, who survived his grandmother. Bibijan died in 1309. In 1907 the landlord brought a rent suit for the rent of the three *jamas* against Gafur alone, and obtained a decree, and in execution of that decree he caused the *jamas* to be sold and bought them himself in January 1908 after which he granted settlement to various tenants.

One of the plaintiffs is a sister, Bibijan, and the other plaintiffs are the sons of a second sister. They claim to be the heirs of Bibijan: they say that Gafur did not inherit any interest in the *jamas*, and that the decree against him only had no effect so far as they are concerned.

The first defendant, the appellant, is the landlord. The other defendants are tenants to whom the landlord granted settlement after his purchase: they have not contested the suit, and we are not concerned with them.

In addition to a claim by inheritance, the plaintiffs set up the claim that Ekim Molla had transferred the entire interest to Bibijan by a *hebanama*, and also that, after Ekim's death, Bibijan had held the land adversely to her daughters and others for over twelve years. Both these claims have been decided against the plaintiffs and both the lower Courts have found that the plaintiffs cannot claim more than the share which had passed to Bibijan by the death of her husband, and, later, of her daughter. The first Court found this share to be 5 annas, 12 *gandas*, odd, but the lower Appellate Court fixed it at 4 annas, 1 *ganda*, odd; and, although the third ground in the memorandum of appeal relates to this point,

(1) 26 C. 677; 13 Ind. Dec. (N. s.) 1033.

(2) 10 C. 996 at p. 1001; 5 Ind. Dec. (N. s.) 664.

nothing was said about it in argument, so the interest in dispute must be taken to be 4-annas, 1 *ganda*, odd, share in the *jamas*.

It is common ground that after Bibijan's death Gafur's name was registered in the landlord's *serista*, while the plaintiffs' names were not so registered. The decree was obtained by the landlord against the sole recorded tenant.

The contention of the appellant-landlord is that, as he obtained a decree against the sole recorded tenant, the execution sale passed the entire tenure, and the plaintiffs are bound by the decree and the sale.

On the other hand, the case for the plaintiffs is that as they were not parties to the suit, and as Gafur did not represent them, their interests were not affected by the decree and the sale. The lower Courts have accepted this view.

As to the nature of the tenancy, it appears that the landlord urged that the *jamas* were *raiyati jamas*, and that he did so to bring in the suit within the special rule of limitation. His own Pleader, however, had to admit that the *jamas* were tenures. Now the plaintiffs suggest that, though they may be tenures, they are not proved to be permanent tenures: their claim by inheritance, however, is based on one of the characteristics of a permanant tenure, and, although the pleadings carry the history of the tenures back for more than sixty years, there is no reference to any time limit, so I have no doubt that the tenures in dispute are permanent tenures.

Another preliminary point is in regard to the nature of the sale. One of the grounds taken in the memorandum of appeal is that the sale was a sale under a rent decree, that is, that it had the effect of a sale held under Chapter XIV of the Tenancy Act. The learned Vakil for the appellant, however, has not pressed this point: he says that the lower Courts are wrong in treating the decree as a money-decree but that the effect is the same in the circumstances of this case. His argument is that as the *jamas* are permanent tenures the plaintiffs ought to have registered their names in accordance with the provisions of section 15 of the Tenancy Act, that as they did not do so, the landlord was under no obligation to seek them out, that it was enough for him to sue Gafur, who had caused his name to be registered, and that, whatever view be taken of the nature of the decree, inasmuch as it was against the sole recorded tenant, the whole interest passed. In other words, he urges that, by omitting to comply with the provisions of section 15 of the Tenancy Act, the plaintiffs incurred the penalty of having their interest destroyed by proceedings to which they were not parties.

Before examining this broad proposition, it is desirable to refer again to the pleadings and to the findings of fact recorded by the lower Courts. I have already said that according to the landlord, now appellant, the tenancies were *raiyatis*, and further that they were non-transferable. He also said that Gafur and his father possessed the lands by cultivating them. With regard to registration, he said that Gafur's name was registered in his *serista*, not that Gafur had complied with the provisions of section 15 of the Tenancy Act. Then, the findings of the lower Courts about this registration are not favourable to the landlord: the first Court says that Rahamatulla got his son's name registered to defeat the plaintiff's claim, while the learned Judge points out that Rahamatulla was then in the service of the landlord, and he says that the landlord must have been perfectly aware that in registering the name of Gafur alone he was excluding Bibijan's heirs.

It is true that the plaintiffs did not take the steps which they ought to have taken to safeguard their interests, but, in view of the facts and findings which I have just mentioned, I do not think that mere failure on the part of the plaintiffs to cause their names to be registered entitles the landlord to succeed. In the case of *Nilayi Behari Saha Paramanik* v. *Hari Govinda Saha* (1) the learned Judges did not rest their decision on the bare proposition now advanced for the landlord as they might have done had they thought it correct, but they referred to the special features of the case and they quoted with approval the dictum of Sir Richard Garth, C. J., in an earlier case* that "the sale must be one which in justice and equity ought to operate as a sale of the

*See *Jeo Lal Singh* v. *Ganga Pershad*, 10 C. 1096—*Ed.*

tenure." In the present case that cannot be said of the sale, and, therefore, I think that we should affirm the decision of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 206 OF 1919.

October 18, 1920.

Present:—Mr. Justice Abdul Raoof.

RAM JAS—APPELLANT

versus

KATHA SINGH AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 10, 47—Death of debtor—Continuance of proceedings—Legal representatives of debtor, whether can be brought on record.

Proceedings in insolvency do not abate by reason of the death of the debtor, and the Court has power to bring on to the record of the insolvency proceedings the names of the personal legal representatives of the deceased insolvent.

Miscellaneous first appeal from the order of the District Judge, Lyallpur, dated the 21st December 1918.

Mr. *Nanak Chand*, for the Appellant.

Sardar *Kharak Singh*, for the Respondents.

JUDGMENT.—The only question that arises for the decision of this appeal is, whether, by reason of the death of the insolvent, the proceedings in insolvency had abated. The provisions of section 10 of the Insolvency Act are clear on the point and supply a clear reply on the question. The section runs thus,—

"If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive."

The only matter which requires consideration is, whether the personal legal representatives of the deceased debtor ought to have been substituted in his place on the record. Section 47 of the Act provides that,

"Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction." The Court, therefore, had power to bring on the record of the insolvency proceedings the names of the legal representatives of the deceased insolvent. The application for the substitution of the names was made and the Court apparently granted that application, because notices were issued to the legal representatives to show cause why an order for insolvency should not be made on the application of the creditor. Apparently, therefore, the Court had not "ordered otherwise", but had allowed the proceedings to continue within the meaning of section 10 of the Insolvency Act. I allow this appeal, set aside the order of the Court below rejecting the application and send the case back to it under Order XLI, rule 23 to be re instated to its original number and be disposed of according to law.

Costs will abide the result.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 321 OF 1918.

December 22, 1919.

Present:—Mr. Justice Teunon and Mr. Justice Beachcroft.

NOOKOOR CHANDRA MULLICK—DECREE-HOLDER—APPELLANT

versus

RAJANI KANTA GHOSE AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2)—Decree - Order setting aside ex parte decree—Rubkari drawn up—Rubkari, whether decree—Execution—Limitation, terminus a quo.

An order granting "with costs" an application to set aside an *ex parte* decree was made on 27th February 1915, and on the 8th March 1915 a document, described as a "*rubkari*", was drawn up which specified the amount of the costs payable to the successful applicant On 6th March 1918 the applicant applied in execution for realisation

of his costs, but his application was dismissed as time-barred, the Court holding that the *rubkari* was a decree, and that limitation commenced on 27th February 1915:

Held, that the *rubkari* was not a decree within the meaning of section 2 (2) of the Civil Procedure Code but was an order within section 2 (14) of the Code which completed and rendered the order of 27th February 1915 capable of execution, and limitation commenced to run from 8th March 1915, and, therefore, the application for execution was within time.

Appeal against the order of the Officiating Subordinate Judge, 2nd Court, Hooghly, dated the 29th of July 1918, affirming the order of the Munsif, 3rd Court, at Serampore, dated the 2nd of April 1918.

FACTS appear from the judgment.

Babu *Sitaram Banerjee*, for the Appellant.—This appeal arises out of an application for execution of a formal order for costs. What happened was this. I applied for setting aside an *ex parte* decree. My application was granted with costs on the 27th of February 1915 but a formal document specifying the amount payable to me by way of costs was not drawn up till the 8th of March following. On the 6th of March 1918 the appellant before your Lordships applied for the execution of his decree for costs.

I submit that both the Courts below have fallen into an error in holding that my application for execution is barred by limitation. Order XX, rule 7, of the Code of Civil Procedure cannot apply to the present case. In this case the amount of costs was not ascertained till the 8th of March 1915. On the 27th of February 1915, the date on which judgment was delivered, there was no decree in my favour which could be executed. Time did not begin to run against the decree-holder until he knew the amount for which execution was to issue.

[TEUNON, J.—In computing the period of limitation for an application to execute a decree the time requisite for taking copy of judgment and decree is not excluded.]

Yes, my Lord.

Refers to *Ratnachallam* v. *Venkatrama Ayyar* (1) and *Vydianatha Iyer* v. *Subramanian Patter* (2).

The formal order for costs was not a decree within the meaning of section 2, clause (2) but it was an order capable of execution passed in favour of the decree-holder within the meaning of section 2, clause (3) of the Code of Civil Procedure.

Babu *Braj Mohun Majumdar*, for the Respondents.—The date of the decree is the date on which the judgment was pronounced. Refers to *Afzul Hossain* v. *Umda Bibi* (3), *Golam Goffar Mandal* v. *Golzan Bibi* (4) and *Rakhal Das Majumdar* v. *Jogendra Narain Majumdar* (5). In this view, the present application for execution was clearly barred by limitation. If it be said that the *rubkari* was not a decree within the meaning of section 2, clause (2), Civil Procedure Code, then I submit that no second appeal lies in the present case.

But *Sitaram Banerjee* briefly replied.

JUDGMENT.

TEUNON, J.—In this case it appears that on the 27th February 1915 the Munsif of Serampore granted "with costs" what was in effect an application for setting aside an *ex parte* decree.

On the 8th of March following, a formal document described as a "*rubkari*" was drawn up. In this document the sum (Rs. 26-10-0) payable by way of costs to the successful applicant was specified.

On the 6th March 1918 the applicant, who is the appellant before us, applied in execution for the realisation of his costs.

The question before us is, whether the application in execution is barred by limitation.

Both the Courts regarded or treated the "*rubkari*" of the 8th of March 1915 as a decree and, applying the provisions of the Civil Procedure Code, Order XX, rule 7, held that limitation ran from the 27th of February 1915, and that the appellant's application was barred.

In this, we are of opinion, they have fallen into error.

The *rubkari* is not a decree within the meaning of section 2 (2) of the Code, but is an order within the meaning of section 2 (14) which completes and renders capable of execution the incomplete order made on the 27th of February. Limitation, therefore, runs from the 8th of March 1915 and the present application is, therefore, within time.

It is next contended that, in the view

(1) 29 M. 46.
(2) 10 Ind. Cas. 552; 36 M. 104; 21 M. L. J. 546; 10 M. L. T. 69; (1911) 2 M. W. N. 93.

(3) 1 C. W. N. 93.
(4) 25 C. 109; 13 Ind. Dec. (N. S.) 75.
(5) 3 Ind. Cas. 391; 10 C. L. J. 467.

thus set out, no second appeal lies, but this is to overlook the definition of decree-holder in section 2 (3) and also the provisions of section 36 of the Code, which has the effect of making the question that arose and now arises between the parties one determined under the provisions of section 47 of the Code.

In the result, this appeal is decreed with costs. Hearing fee one gold *mohour*.

BEACHCROFT, J.—I agree.

Appeal decreed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 12 OF 1920.

July 20, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

MANILAL MOTILAL AND OTHERS —DEFENDANTS—APPELLANTS

versus

GOKALDAS ROWJI AND OTHERS —PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, Sch. II, paras. 20, 21—Arbitration—Reference made after institution of suit—Award, whether can be recorded as adjustment—Procedure.

The provisions of paragraphs 20 and 21 of Schedule II of the Civil Procedure Code have no application to cases where the matters referred to arbitration are already the subject-matter of a suit between the parties to the reference. [p. 59, col. 1.]

Where the parties to a suit agree to refer the matters in dispute to arbitration without the intervention of the Court and an award is made on such submission prior to the decision of the suit, the submission and the award can be recorded under Order XXIII, rule 3 of the Civil Procedure Code as an agreement adjusting or compromising the suit and a decree can be passed in terms of the award. [p. 56, col. 2.]

The procedure to be adopted by parties to a suit who enter into an agreement to refer the matter in dispute in the suit or part of it to arbitration without the intervention of the Court may be summarised as follows:—

They may make the agreement an order of Court and then paragraphs 1 to 16 of the Second Schedule apply.

If they do not make the agreement an order of Court;

(*a*) they cannot ask for the agreement to be filed under paragraph 17;

(*b*) they cannot ask for the award, if made, to be filed under paragraphs 20 and 21;

(*c*) if an award is made and both parties accept it, they can apply for a consent decree in terms thereof, and there will be no need to apply for an order recording the terms of the adjustment;

(*d*) if the plaintiff disputes the award for any reason, and proceeds with the suit, the defendant can plead the award and have the case set down for hearing on the issue whether the award is binding as an adjustment;

(*e*) if the defendant disputes the award, the plaintiff can set the case down for trial on the issue whether the adjustment should be recorded;

(*f*) either party can file a suit to enforce the award and apply for a stay of the original suit. [p. 58, cols. 1 & 2.]

Appeal from the order of Kajiji, J.

Mr. *Strangman*, Advocate General, for the Appellants.

Mr. *Campbell*, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs filed this suit against the defendants claiming Rs. 2,925 as damages for breach of a contract, dated the 10th July 1917. By an agreement of reference, dated the 25th September 1919, the matters in dispute were referred to the sole arbitration of one Ramchander Pitamber without the intervention of the Court. The first meeting before the arbitrator was held on the 17th October: the next on the 29th November when only the defendants were present. The arbitrator made his award on the 30th November allowing Rs. 1,750 for damages and Rs. 56 for costs to the plaintiffs. Meanwhile, the plaintiffs had written, on the 25th November, to the arbitrator that they revoked his authority as arbitrator and cancelled the submission. The plaintiffs then moved for an *ex parte* decree on the ground that the defendants had not filed their written statement, but the defendants were given time to enable them to file the award. On the 21st January 1920 the defendants gave notice that they would move that the award should be recorded as an adjustment or compromise of the suit, and for a decree being passed in terms thereof. The motion was heard before Kajiji, J., who dismissed it on the ground that the award could not be recorded as an adjustment under Order XXIII, rule 3, while, as the agreement to refer had been made without the intervention of the Court, the application could not

be made under the Second Schedule of the Civil Procedure Code.

This brings before us a question which has caused much difference of judicial opinion. We are dealing with an agreement to refer made by the parties to a suit without the intervention of the Court, followed by an award. We are not concerned with what may be the rights of the parties when an agreement to refer has been made and nothing further has been done. Clearly, that cannot be recorded as an adjustment. If the parties wish to make it an order of Court they can do so under Part I of the Second Schedule. Here there has been an award, the validity of which is disputed by one of the parties. It was held in *Pragdas* v. *Girdhardas* (1) that such an award could be recorded as an adjustment under section 375 of the Code of 1882, corresponding to Order XXIII, rule 3, of the present Code. There was a conflict of decisions between the Calcutta, Madras and Bombay High Courts on the one side and the Allahabad High Court on the other on the question whether the Court could pass a decree on an adjustment except with consent of the parties, and the addition of the words "where it is proved to the satisfaction of the Court" have been added to set at rest that conflict. If then, an award is disputed, can a party ask the Court to try the question whether or not the award is valid, and if proved to be valid, to pass a decree in accordance therewith? This was doubted by Beaman, J., in *Rukhanbai* v. *Adamji* (2) as the learned Judge thought that an application could only be made under Order XXIII, rule 3, where the parties had accepted the award. In *Shavaksha* v. *Tyab Haji Ayub* (3) I held that section 89 excluded any such applications being made under Order XXIII, rule 3, as that section directed that all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder should be governed by the provisions contained in the Second Schedule save so far as it was otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force. In *Harakhbai* v. *Jamnabai* (4) it was held by Davar, J., that Order XXIII, rule 3, came within the definition of "any other law for the time being in force" but, with all due respect for that learned Judge, I cannot agree. In the first place, Order XXIII, rule 3, makes no mention whatever of references to arbitration and I do not think it was ever intended by the Legislature that it should apply to arbitration proceedings as such. It is only by treating an agreement to refer, combined with the award as an adjustment by lawful agreement or compromise, that arbitration proceedings can possibly be brought within the scope of that rule. But beyond that it would be contrary to all canons of construction of Statutes that where, an Act lays down that certain proceedings should be governed by the provisions contained therein relating thereto, save where provision was made by some other law in force, the provisions of the Act itself should be considered as laying down "some other law for the time being in force." The words "except as provided for in this Act" would have to be used. If, then, references to arbitration made otherwise than by an order in a suit, as the reference in this case, was and all proceedings thereunder, are to be governed by the provisions of the Second Schedule, unless the Indian Arbitration Act or some other Act applies, and no such Act applies to this case, we must look to the Second Schedule to see whether any of its provisions lays down the procedure to be followed by the parties to this reference. It has been contended that none of the provisions covers the case of an agreement to refer made by the parties to a suit without the intervention of the Court. In *Harivalabdas Kalliandas* v. *Utamchand Manekchand* (5) it was held that an agreement to refer by parties to a suit could be filed under section 523 of the Code of 1882. The Court was of opinion that section 525 also contemplated arbitration without the intervention of the Court by 'any person' and with respect to "any matter", and contained no express exception as to parties to a suit or to matters in litigation in a suit actually pending. It was remarked that the procedure in such cases,

(1) 26 B 76 at p. 78; 3 Bom. L. R. 431.
(2) 1 Ind. Cas. 622; 33 B. 69; 10 Bom. L. R. 366.
(3) 37 Ind. Cas. 140; 40 B. 386; 18 Bom. L. R. 559
(4) 19 Ind. Cas. 783; 37 B. 639; 15 Bom. L. R. 340.
(5) 4 B. 1; 4 Ind. Jur. 410; 2 Ind. Dec. (N. s.) 51.

as provided by sections 523 and 525, *viz.*, that the application should be numbered and registered as a suit, was not the best adapted to a case where the matter was already before the Court, and would necessitate an application for stay of proceedings in that suit. In *Vyankatesh Mahadev* v. *Ranchandra Krishna* (6), where the application was also to stay the suit after an agreement to refer without the intervention of the Court had been entered into, Hayward, J., considered that that decision must be looked upon as a doubtful authority since the decision of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (7). The facts in that case were that, after a suit had been filed the matters in dispute were referred to arbitrations. When the award was made, both parties objected to it. The Subordinate Judge before whom the application to set aside the award was heard overruled all objections and passed a decree in terms of the award. From this decree the defendants filed an application for leave to appeal to the Chief Court of the Punjab. The Judge who admitted the appeal being of opinion that no appeal lay, allowed the application to be amended so as to make it an application for revision in case the Court that heard the appeal should decide that no appeal lay. The question whether or not an appeal lay or was prohibited by the last clause of section 522 of the Civil Procedure Code of 1882 was referred to a Full Bench which decided that no appeal lay. Thereafter, an application for revision was entertained and the decree of the Subordinate Judge was modified. From this decision of the Full Bench and the judgment of the Division Bench on revision the defendants appealed to the Privy Council. The whole argument turned on the proper construction of section 522, now represented by paragraph 16 of the Second Schedule. Their Lordships said at page 182 :

"The Chapter in the Code of Civil Procedure on *Reference to Arbitration* (Chapter XXXVII) deals with arbitrations under three heads :—

I. Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court.

II. Where parties, without having recourse to litigation, agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case, all further proceedings are under the supervision of the Court.

III. Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to the award "

Then, at page 183 occurs the following passage :

"In cases falling under heads II and III, the provisions relating to cases under head I are to be observed so far as applicable. But there is this difference which does not seem to have been always kept in view in the Courts in India. In cases falling under head I the agreement to refer, and the application to the Court founded upon it, must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads II and III proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award as the case may be—under the cognizance of the Court. That is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression, as defined in the Civil Procedure Code."

Eventually, it was held that there was no appeal from the decree and that the application for revision was incompetent.

In *Tincowry Dey* v. *Fakir Chand Dey* (8) the parties to a suit agreed to refer the matters in dispute to arbitration. An application was made under section 375 to record the argeement as an adjustment, and the learned Chief Justice, in dealing with the question, remarked, incidentally, that the decision in *Ghalam Khan* v. *Muhammad Hassan* (7) seemed to import that section

(6) 27 Ind Cas. 46; 38 B. 687; 16 Bom. L. R. 653.
(7) 29 C. 167 at pp. 182; 183 (P. C.); 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 6 C. W. N. 226; 25 P. R. 1902; 8 Sar. P. C. J. 154.

(8) 30 C. 218; 7 C. W. N. 189.

523 did not apply where there was a pending suit, and doubted that the decision in *Harivalabdas Kalliandas* v. *Utamchand Manekchand* (5) could stand. In *Venkatachellam Reddi* v. *Rungiah Reddi* (9) it was held that an order of a Court filing an agreement to arbitrate presented by the parties to a suit is a decree and is appealable. *Ghulam Khan* v. *Muhammad Hassan* (7) was referred to and the Court considered that the three heads under which arbitrations were classified in that case corresponded to arbitrations initiated by applications under sections 506, 523 and 525 of the old Code. That is perfectly correct, but the learned Judges were only concerned with the question whether the application before them, an agreement to refer by parties in a suit, was covered by paragraph 17 of the Second Schedule. Clearly, it was not, but the question whether paragraph 20 covered applications such as the one before us was not, and could not have been, considered.

Nor, as I have pointed out, was that the question before the Court in *Vyankatesh Mahadev* v. *Ramchandra Krishna* (6). Still it is clear that the second head in the judgment of the Privy Council in *Ghulam Khan's case* (7) covers only arbitrations by parties who have not had recourse to litigation, and that, therefore, an agreement to refer by parties to a suit cannot be filed under paragraph 17 of the Second Schedule. But it is contended that it is by no means so certain that the third head covers only arbitration by parties who have not had recourse to litigation. In my opinion, however, the description of the first head of arbitrations makes it clear that the parties to a litigation, who desire to refer their disputes to arbitration, must go to the Court for an order of reference if they wish the arbitration proceedings to continue under the provisions of the Second Schedule. And there is no reason why they should proceed under paragraph 17 when paragraphs 1 to 16 prescribe the procedure to be followed in a most exhaustive manner.

The decision, therefore, in *Harivalabdas Kalliandas* v. *Utamchand Manekchand* (5) must be considered as overruled. I also have come to the conclusion that my decision in *Shavaksha* v. *Tyab Haji Ayub* (3), allowing the application under Order XXIII, rule 3, to be altered to one under paragraph 20 of the Second Schedule was wrong. But I cannot agree with Kajiji, J., when he says that an award in a reference by parties to a suit without the intervention of the Court cannot be a valid award. Nor can I agree with the dictum in *Vyankatesh Mahadev* v. *Ramchandra Krishna* (6), which, with due respect, appears to be *obiter*, that the action of parties to a suit in withdrawing and obtaining a decision by private arrangement can be treated as a nullity, as it can form the foundation for another suit.

It is quite true that the Court will not take cognizance of any proceedings by the parties which in effect oust its jurisdiction. It will not stay its own proceedings merely because one party brings to its notice that there has been an agreement to refer the suit to arbitration. Nor, if there is an award, will it proceed in the manner provided by any of the provisions of the Second Schedule.

But there is no reason why, when the award is brought to its notice, it should not try the issue whether the award is not binding on the parties under the general principles of the law of contract, by proceeding under Order XXIII, rule 3.

It is not usual when the parties to a suit are agreed upon terms to formally record the agreement under Order XXIII, rule 3, and then pass a decree in terms thereof.

But, when parties have been negotiating for a settlement, and one party considers a settlement has been arrived at, which the other party denies, or where there has been a settlement which one party seeks to avoid on any of the grounds on which an agreement can be avoided, recourse is had to Order XXIII, rule 3, so that the Court may determine whether an adjustment has actually been made or whether an adjustment made is one which can be recorded.

When the terms of the adjustment have been settled by an arbitration and award out of Court, the same considerations apply by analogy. The parties may agree to ask for a consent decree. In such a case, the true position appears to be that the Court will not look at the arbitration proceedings, but only at the consent terms, as it makes no

(9) 12 Ind. Cas. 372; 36 M. 353; 10 M. L. T. 248; 21 M. L. J. 990; (1911) 2 M. W. N. 249.

difference whether those terms have been arrived at by agreement between the parties acting by themselves or have been settled by a third party chosen by them. There is no particular reason in either case for having recourse to Order XXIII, rule 3.

But if the plaintiff, ignoring the award, proceeds with the suit, the defendant may plead that there has been an adjustment. This is in effect what has happened in this case.

In *Lowes* v. *Kermode* (10) the facts were somewhat similar. The defendant obtained a rule to stay proceedings on the ground that, after issue joined and notice of trial given, the parties had agreed to refer the cause to arbitration and that an award had been made The plaintiff said he had revoked the submission before award made. The Court said:

"What we should do in case of an undisputed award, is another question. Here, the award is disputed; and the Court will not, upon motion, decide the controverted matter. The award must be pleaded, when the plaintiff may either reply or demur; but the question will most properly be disposed of by a Jury."

So in *Storey* v. *Bloxam* (11), at the hearing, the defendant proposed to give in evidence an award made in his favour on an agreement to refer the cause after issue had been joined, and Lord Kenyon held that it could not be given in evidence but must be pleaded as a plea *puis darrein continuance*.

If the procedure prescribed by those decisions should be followed in this Court, when the plaintiff moved for an *ex parte* decree for want of a written statement, the defendant should have been told to file his written statement pleading the award instead of being given time to apply that the award should be filed.

Then the question could be tried in the suit and not by motion, whether the award was binding on the parties.

Since the decision in *Fragdas* v. *Girdhardas* (1), High Court Rule 212 has been passed, which provides that no decree in a suit, save as provided in rule 348 (decree in terms of an award filed under paragraph 10 of the Second Schedule), shall be passed unless the suit appears on the Daily Trial Board. As Order XXIII, rule 3, contemplates the passing of a decree if the adjustment is recorded, the proper procedure is not by motion, but by putting down the suit for hearing, and it is desirable that the party relying on an ajustment should plead it beforehand so that the issue can be properly tried. Leaves can always be obtained for a supplementary pleading.

In *Harakhbai* v. *Jamnabai* (4) the order made was:

"The suit will be set down for hearing... when the first defendant will, in the first instance, proceed to satisfy the Court that the adjustment has been properly and justly obtained and the plaintiff will then be entitled to urge any ground that may be open to her to show that the award which is sought to be enforced against her as an adjustment ought not to be recorded and a decree passed in terms thereof."

Whether the suit is set down for hearing an application to record an adjustment, or is set down for trial, an order must be passed recording or refusing to record the adjustment, as an appeal lies against such an order though not against the decree passed in terms of an adjustment. This somewhat paradoxical procedure is necessitated by the fact that the term 'consent decree' is applied to a decree passed against a party who stoutly denies he has given his consent, when, as a matter of fact, it is found that he has consented. The result is that, if a defendant pleads an award and the Court finds that the award is binding, the Court passes a consent decree, but must first make an order which is appealable that the award is binding.

In *Fragdas* v. *Girdhardas* (1) the appellant contended, *inter alia*, that the award was falsely and fraudulently made, by the arbitrators purporting to make the same without holding any meetings or examining any books of account and without giving the defendant any opportuntity of appearing before them in support of his case.

These questions do not appear even to have been considered by the Trial Court or the Appeal Court which confirmed the decree passed in the terms of the award.

Jenkins, C. J. said:

"Several objections have been taken to the decree under appeal. First, it is said that Chapter XXXVII of the Civil Procedure Code, 1882, is an exhaus-

(10) (1818) 8 Taunt. 146 at p. 147; 2 Moore 30; 129 E. R. 239.

(11) (1796) 2 Esp. 504.

tive exposition of the power to refer to arbitration pending a suit. I can find nothing, however, in Chapter XXXVII which invalidates a proceeding not in accordance with its provisions beyond the result that non compliance deprives a party of a right to claim the consequences the Chapter prescribes, and I, therefore, think the objection cannot succeed."

It was contended from this judgment by Beaman, J., in *Rukhanbai* v. *Adamji* (2), that a party objecting to an award had to submit to a decree in terms of the award without his objections being heard, and there are grounds for such a conclusion from the bare record of the case as reported. If that had really been decided, I should be inclined to say it was wrong, but it does not appear whether the defendant actually persisted that his objection should be heard or merely objected to the procedure.

It certainly cannot be that a party to a suit submitting to arbitration would be under an implied promise to accept the award whatever its nature might be, and however it had been arrived at. And this was the view taken by Davar, J., in *Harakhbai* v. *Jamnabai* (4). It all comes to this, that a party to a suit setting up an award by arbitration out of Court must satisfy the Court that there has been an adjustment by lawful agreement which entitles him to ask that the suit should be stopped and a decree passed in terms thereof. The Court must then decide on the general principles of the law of contract whether or not there has been such an adjustment. In the case of an arbitration and award, Order XXIII, rule 3, requires a certain amount of amplification. The suit is not adjusted by the agreement to refer, but by what is implied in that agreement, namely, that the parties agree to be bound by the terms of an award which has been properly made in accordance with the agreement. If the award is proved to have not been so made, then there can be no adjustment.

It may be as well to summarise the procedure to be adopted by parties in a suit who enter into an agreement to refer the matter in dispute in the suit or part of it to arbitration.

They may make the agreement an order of Court, and then paragraphs 1 to 16 of the Second Schedule apply.

If they do not make the agreement an order of Court,

(*a*) they cannot ask for the agreement to be filed under paragraph 17;

(*b*) they cannot ask for the award, if made, to be filed under paragraphs 20 and 21;

(*c*) if an award is made and both parties accept it, they can apply for a consent decree in terms thereof, and there will be no need to apply for an order recording the terms of the adjustment;

(*d*) if the plaintiff disputes the award for any reason and proceeds with the suit, the defendant can plead the award and have the case set down for hearing on the issue whether the award is binding as an adjustment;

(*e*) if the defendant disputes the award, the plaintiff can set the case down for trial on the issue whether the adjustment should be recorded;

(*f*) either party can file a suit to enforce the award and apply for a stay of the original suit.

The provisions of the Code of 1882 relating to arbitration were transferred with certain modifications to a separate Schedule in the hope that, at no distant date, they might be transferred into a comprehensive Arbitration Act. Unfortunately, that hope has not been realized, with the result that the law relating to arbitration still remains in a most undesirable condition.

The appeal must be allowed, but, I think, the order giving time to the defendant to file the award was also wrong. He should have been told to file his written statement pleading the award. I am told that he has now filed his written statement so that he can apply to have the suit set down for trial on the issue whether the award is binding.

FAWCETT, J.—The questions for determination may be stated as follows:—

(1) Do paragraphs 20 and 21 of Schedule II of the Civil Procedure Code apply to cases where the matters referred to arbitration are already the subject-matter of a suit between the parties to the reference?

(2) If they do apply, what effect does a decree under paragraph 21 have upon the suit?

(3) If the parties to a suit agree to refer the matters in dispute to arbitration without the intervention of the Court, and an award is made on such submission, prior to the

decision of the suit, can the submission and award be recorded under Order XXIII, rule 3, Civil Procedure Code, as an agreement adjusting or compromising the suit, and a decree be passed in terms of the award?

(4) If questions (1) and (3) are answered in the negative, what remedy is open to a person interested in the award to enforce it?

I agree with the learned Chief Justice that the first question should be answered in the negative. The words "any matter" and "any person", used in paragraph 20, are no doubt very wide, and it contains no express exception as to parties to a suit or to matters in litigation in a suit actually pending. But the same applies to paragraph 17, with the substitution of "difference" for "matter;" and the ruling in *Harivalabdos Kalliandas* v. *Utamchand Manekchand* (5) that section 523 of the Code of 1877 (corresponding to this paragraph 17) applied to parties between whom a suit is pending about the matters referred to arbitration, is virtually overruled by *Ghulam Khan* v. *Muhammad Hassan* (7) as pointed out by Hayward, J. in *Vyankatesh Mahadev* v. *Ramchandra Krishna* (6). I also concur with his view in the same case that paragraphs 1 to 16 are intended to prescribe the only provisions in the Schedule by which the Courts' jurisdiction to determine the matter in dispute after a regular hearing can be ousted by a submission to arbitration and an award thereon. This is supported by the general nature of the heading to paragraphs 1-16, *viz.*, "Arbitration in suits," and the fact that paragraphs 17 and 20 both require that an application under them "shall be numbered and registered as a suit"—a procedure which is inappropriate, where a suit between the parties is already pending. These considerations apply as much to paragraph 20 as to paragraph 17, and in *Ghulam Khan's case* (7) it seems to me their Lordships of the Privy Council intended head III of those specified in the judgment (at page 182) to exclude (just as much as head II) the case dealt with in head I, *viz.*, "Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit." The words "the agreement of reference" in head III were, I think, intended to refer to an agreement of the kind specified in head II, *viz.*, "where parties *without having recourse to litigation* agree to refer their differences to arbitration." If so, the *obiter dictum* in *Harivalabdas Kalliandas* v. *Utamchand Manekchand* (5) in regard to section 525 (now Schedule II, paragraph 20) is also dissented from by the Privy Council.

In view of the above answer to the first question [which agrees with the view taken in *Vyankatesh Mahadev* v. *Ramchandra Krishna* (6)], the second does not arise. But even supposing the first question is answered in the affirmative, I think that a decree obtained under paragraph 21 (2) cannot operate of itself as a decree in the suit. The proceedings under paragraphs 20 and 21 would not be proceedings *in the suit*, but entirely separate proceedings like those for filing an award under sections 11 to 15 of the Indian Arbitration Act, 1899. This has already been ruled in *Shivlingrao* v. *Rango* (12). The decree could, it seems to me, at most operate as *res judicata* under section 11, Civil Procedure Code, as being a decision in a "former suit" [*cf.* Explanation I to section 11, paragraph 20 (2) of Schedule II, *Wazeer Mahton* v. *Chuni Singh* (13), *Vyankatesh Chimaji* v. *Sakharam Daji* (14), *Muhammad Newaz Khan* v. *Alam Khan* (15) and *Ponnusami Mudali* v *Mandi Sundara Mudali* (16)]. Otherwise, the Court would still have to decide the issues after a regular hearing, according to the procedure laid down by the Code, unless the suit is withdrawn in consequence of the decree obtained under paragraph 21, or a consent decree is passed.

On both these grounds I concur with the learned Chief Justice in thinking that the decision in *Shavaksha* v. *Tyab Haji Ayub* (3) should be overruled.

The third question is one on which, in my opinion, a good deal can be said on either side. But I have come to the conclusion that there is no sufficient ground for our differing from the view taken in *Pragdas* v. *Girdhardas* (1), and that the question should accordingly be answered in the affirmative, at any rate until *Pragdas* v. *Girdhardas* (1) is overruled by a Full Bench or the Privy Council.

(12) 8 Bom. L. R. 777.

(13) 7 C. 727; 9 C. L. R. 377; 3 Ind. Dec. (N. S.) 1016.

(14) 21 B. 465; 11 Ind. Dec. (N. S.) 312.

(15) 18 C. 414 at p. 419 (P. C.); 18 I. A. 73; 15 Ind Jur. 284; 6 Sar. P. C. J. 26; 70 P. R. 1891; 9 Ind. Dec. (N. S.) 276.

(16) 27 M. 255 at p. 257; 14 M. L. J. 356.

There is, certainly, a very considerable weight of authority in favour of the view that an agreement to refer the matter in suit to arbitration and the award made thereon may amount to an adjustment of the suit by lawful agreement, within the meaning of Order XXIII, rule 3, Civil Procedure Code, and the corresponding section 375 of the Code of 1882. In the arguments reported (at page 689) in *Vyankatesh Mahadev* v. *Ramchandra Krishna* (6), it was stated that all the High Courts were in agreement on this point. I am not sure if this is correct, but, at any rate, there are the following reported opinions to that effect: *Samibai* v. *Premji* (17), *Ghellabhai* v. *Nandubai* (18), *Pragdas* v. *Girdhardas* (1), *Harakhbai* v. *Jamnabai* (4), *Venkatachellam Reddi* v. *Rungiah Reddi* (9) and *Chinna Venkatasami Naicken* v. *Venkatasami Naicken* (19). This view seems also supported by the remarks of Vaughan Williams, L. J., and Farwell, L.J., in *Doleman* v. *Ossett Corporation* (20). The former says, (at pages 253-4), referring to a case like the present and the 11th section of the Common Law Procedure Act, 1854, allowing a stay of an action pending arbitration proceedings:

"The only effect of failing to obtain the order to stay the action was to leave the parties in the same position in which they were before the passing of the 11th section of the Common Law Procedure Act, 1854, *i. e.*, in the position that the jurisdiction of the Courts was not ousted, and that the Court ignored the pendency of the arbitration, and, therefore, held a plea of pendency of an arbitration in the same matter to be bad, but allowed the plea of an executed award to be good, and I think allowed it to be good even if the award was executed after action brought. It was allowed, in fact, as accord and satisfaction completed after action...It is true that, generally speaking, the obstacles in the way of the arbitrator, if one of the parties refuses to attend, are so great that it is difficult, and sometimes practically impossible, for the arbitrator to go on with the arbitration; but if the arbitrator gets over these difficulties, and goes on and makes his award, I think his award constitutes accord and satisfaction."

Farwell, L. J., in the same case says, (at pages 272, 273):—

"It is also clear that any binding agreement between the parties settling all the disputes raised in the action made after writ is a good defence as a plea *puis darrein continuance* (now pleaded under Order XXIV), whether such agreement is a direct settlement between the parties themselves, or made by means of a third person to whom they have referred the dispute after writ, or by means of an award made after writ in an arbitration existing before writ, if both parties subsequent to writ carry on the arbitration, and agree to an award being made notwithstanding the action. But this is because it is always open to litigants to settle their differences after writ as they please."

Fletcher-Moulton, L. J., no doubt, holds (page 269) that—

"There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision."...

But he expressly excepts the case where "the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred." His objection that the Court's jurisdiction cannot be ousted applies to a case (like the one there under consideration) where there was a reference to arbitration, subsequent to the commencement of the action, *without the consent of one of the parties.*

Order XXIII, rule 3, Civil Procedure Code, contains provisions corresponding to the plea of "accord and satisfaction after writ," referred to in the case just cited. The principle of treating an agreement to refer to arbitration after suit, together with the award thereon, as on the same footing as a direct settlement between the parties themselves, for the purposes of such a plea appears to me to be one which has very high authority in its favour. After all, it is only an application of the maxim *certum est quod certum reddi potest* There is an agreement to settle the matters in dispute in the way decided on by the arbitrator, and as

(17) 20 B. 304; 10 Ind. Dec. (N. S.) 762.
(18) 21 B. 335 at p 341; 11 Ind. Dec. (N. S.) 227.
(19) 51 Ind. Cas. 827; 42 M. 625; 36 M. L. J. 291; (1919) M. W. N. 221; 25 M. L. T. 397.
(20) (1912) 3 K. B. 257; 81 L. J. K. B. 1002; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

soon as he decides, the result is an ascertained settlement, as much as if the parties had settled the dispute themselves.

I would, however, qualify the above by predicating that the award to be effective for such a plea must be a valid one, according to the general rules of law governing the validity of awards in arbitration proceedings. This, in effect, would mean the English Common Law on the subject, which in turn is substantially expressed in paragraph 15 (1) (*a*) and (*b*) of Schedule II of Code [*cf. Ganga Sahai* v. *Lekhraj Singh* (21).]

In *Rukhanbai* v. *Adamji* (2), Beaman, J., objects that,—

"Under the principle of *Pragdas* v. *Girdhardas* (1) no sooner has a party made an irregular submission, on which an award, no matter how full of defects, has been passed than the other party can bring it in under section 375 and, without having any objections investigated, get a final decree upon it."

With due respect, I submit that in *Pragdas* v. *Girdhardas* (1) the Court went on the assumption that the award was a valid one. No doubt, one of the grounds of appeal (No. 5) was that the award was improperly passed, but no reference is made to this in the reported arguments of the appellant's Counsel (pages 77, 78). The probability is, therefore, that this objection was not pressed. Also, I can see no sufficient ground for saying that the Court cannot go into objections to the validity of an award under Order XXIII, rule 3 The Court under that rule has to be satisfied that the suit has been adjusted by a lawful agreement or compromise, and even though there may have been a lawful agreement to refer the matters in dispute to arbitration, still there will have been no real "adjustment," if the reference has merely resulted in an invalid award. Under general principles of justice, equity and good conscience, the Court is surely justified in holding that an award improperly procured or vitiated by corruption or misconduct on the part of the arbitrator does not constitute an "adjustment" under Order XXIII, rule 3. Or, it may be put in another way. There can, of course, be an express agreement in the submission that the parties will raise no objection to the award on the ground of misconduct, etc., *cf.* Halsbury's Laws of England, Volume I, Article 996 at page 481 ; but otherwise I take it that the implied objection to perform the award of the arbitrator will not be extended beyond an obligation to perform an award which [to use the language of the Privy Council in *Muhammad Nawaz Khan* v. *Alam Khan* (15) has "ordinary legal validity," *i.e.*, an award which is not a legal nullity, or liable to be set aside for misconduct, &c. In the latter view, there is no "agreement" to accept an award of the kind just mentioned, so as to bring the case under Order XXIII, rule 3. As an instance of a Court going into such questions under Order XXIII, rule 3, I may cite *Kulsum Fatma* v. *Ali Akbar* (22).

With due deference, it seems to me that, to make a distinction between a case where both parties accept, the award [which Beaman, J., in *Rukhanbai* v. *Adamji* (2) at page 74 says will constitute an adjustment under the rule], and a case where one of the parties dishonestly repudiates his submission, [as in *Rukhanbai's case* (2)] or raises unsustainable objections to the validity of the award is giving the latter an advantage, which is contrary to the terms of Order XXIII, rule 3, *cf. Khobhari* v. *Jhaman* (23). It is in principle a reversion to the view that a disputed compromise did not fall under section 375 of the Code of 1882. The Legislature has shown its approval of the decisions that such a dispute did not prevent the application of the provisions in question by the insertion of the words "where it is proved to the satisfaction of the Court that" at the commencement of the rule.

Another objection taken in *Rukhanbai's case* (2) at page 73 is, that Chapter XXXVII of the then Civil Procedure Code (corresponding to Schedule II of the present Code) provides a special procedure for extraordinary extra-judicial methods of settling disputed claims, and it must have been the intention of the Legislature that that procedure, and no other, was to be followed. But this seems to me to be opposed to the same learned Judge's opinion in *Vyankatesh*

(21) 9 A. 253 at p. 264; 5 Ind. Dec. (N. S.) 604.

(22) 39 Ind. Cas. 730; 39 A. 401 at p. 408; 15 A. L. J. 452.

(23) 34 Ind. Cas. 220; 23 C. L. J. 482.

Mahadev v. *Ramchandra Krishna* (6) (at page 693) that,—"Doubtless any parties litigating in Court have perfect liberty to compose their differences amongst themselves by entering into any lawful agreement, compromise or satisfaction." The passage I have cited from *Doleman* v. *Orsett Corporation* (20) show that there is the highest authority for treating a submission to arbitration made after suit, *plus* the award thereon, as an adjustment of the suit by lawful agreement; and it seems to me very improbable that the Legislature intended to prevent such an adjustment being made. The view taken on this point in *Progdas* v. *Girdhardas* (1) is, I submit, correct.

Then, does section 89 of the Code prevent Order XXIII, rule 3, Civil Procedure Code, operating in such a case? On this point I concur with the view taken by Davar, J., in *Harakhbai* v. *Jamnabai* (4), which is also taken by the Madras High Court in *Chinna Venkatasami Naicken* v. *Venkatasami Naicken* (18). No doubt, the words "other law for the time being in force" are inappropriate for covering a provision of the Code itself, such as Order XXIII, rule 3. But the Legislature in enacting section 89 probably had not that particular rule at all in their mind, and had no intention of affecting it one way or the other. The main object of section 89 clearly is to give effect to the provisions of Schedule II as if they had been enacted in the body of the Code. Section 89 was needed only because of the relegation of Chapter XXXVII of the Code of 1882 to a Schedule and no change of procedure was, in my opinion, intended. This is in accordance with the general rule that "the Legislature must not be taken to intend any alteration in the law beyond what it explicitly declares in express terms or by unmistakeable implication." [Maxwell on Interpretation of Statutes, 3rd Edition, page 113; *Canlas Narrondas, In the matter of* (24) and *Bhagwant* v. *Kedari* (25)]. It seems to me to be a case where the rule of construction laid down by Romilly, M. R., in *Pretty* v. *Solly* (26) should be applied. He says:—

"The general rules which are applicable to particular and general enactments in Statutes (if they were repugnant) are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same Statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the Statute to which it may properly apply."

Here, Order XXIII, rule 3, constitutes a particular enactment (read with section 121) regarding the compromise of a suit, while section 89 is a general enactment regarding arbitration, for the words "all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder" are of a general nature: they could scarcely be made any wider than they are. I think, therefore, that, in accordance with the rule of construction I have mentioned, section 89 should not be read as affecting the particular enactment contained in Order XXIII, rule 3, so far as that covers the case of an award on a reference to arbitration. In these circumstances, I do not see why the words "save in so far as is otherwise provided... by any other law for the time being in force" should not be construed as covering a law enacted by the Code itself. Taken in their literal and ordinary meaning, the words are wide enough to permit of this interpretation; and the mere fact that particular provisions of the Code are not specifically excepted does not, in my opinion, suffice to exclude them from the benefit of the saving clause, if they otherwise appropriately fall under it.

There is no clear evidence of any intention of the Legislature to exclude Order XXIII, rule 3, from this benefit; and (as I have already said) there is a presumption against any alteration of the law regarding section 375 of the Code of 1882, as laid down in *Progdas* v. *Girdhardas* (1).

I do not think that the words "other law," as used in the Code, must *necessarily* mean some law other than that contained in the Code. Thus, in section 96 (1) of the Code, a general right of appeal (not restricted to certain grounds as a second appeal is by section 100) is given from "every decree passed by any Court exercising original jurisdiction." The only saving is "where other-

(24) 11 B. 138 at p. 142; 6 Ind. Dec. (N. S.) 91.
(25) 25 B 202 at p. 209; 2 Bom. L. R. 986.
(26) (1859) 26 Beav. 606 at p. 610; 33 L. T. (O. S.) 72; 122 R. R. 263; 53 E. R. 1032.

wise expressly provided in the body of this Code or by any other law for the time being in force." This "other law" must, I think, be read to cover the provisions in Schedule II, paragraphs 15 (2) and 21 (2), which restrict the right of appeal from a decree under those paragraphs to one upon the specific ground that "the decree is in excess of, or not in accordance with, the award." Otherwise, there is a repugnancy between the general right conferred by section 96, and this specific enactment. It may be noted that the provisions of the Second Schedule are not given legislative effect "as if enacted in the body of this Code," like the provisions of the First Schedule under section 121: so that they can only come under the saving clause in section 96 by treating them as any "other law for the time being in force." The case is stronger with regard to Order XXIII, rule 3, which, under section 121, has effect as if enacted in the body of the Code, and is, therefore, on an equal footing in this respect to section 89. Also "other law" in section 89 is clearly a law other than the Indian Arbitration Act, 1899: whereas in section 96 it might be argued that "other law" must mean a law other than the Code.

As to the fourth question, I agree with the learned Chief Justice that, if Order XXIII, rule 3, cannot be availed of, either party who wishes to enforce the award can file a suit to enforce it, and apply for a stay of the original suit. Also a defendant can, under Order VIII, rules 8 and 9, Civil Procedure Code, with the leave of the Court, plead the award in bar of the action on the original demand; *cf. Bhajahari Saha Banikya* v. *Behary Lal Basak* (27).

But, in view of my answer to the third question, I concur in allowing the appeal with costs throughout.

As to the question of the proper procedure for having the award considered by the Court in the suit, it seems to me that Original Side Rule 242 only debars the Court from *passing a decree*, unless the suit appears on the trial board. There is nothing in it, therefore, to prevent the Court from proceeding, at any rate up to the stage of ordering the agreement (comprised in the agreement to refer and the award thereon) to be recorded under Order XXIII, rule 3, and it can then direct the suit to be set down on the trial board for passing a decree in accordance with this order. But I understand that the procedure preferred by the learned Chief Justice will put the Court in a better position to decide any questions in issue by taking evidence in the ordinary way. Also, there is the precedent of the rule in England that, if an action is compromised out of Court and the compromise is not made an order of Court, it cannot be enforced by motion in the action [Halsbury's Laws of England, Volume XXIII, page 167, foot-note (*h*)]. I defer, therefore, to his opinion in the matter. At the same time, to prevent possible misapprehension, I may say that we are both agreed that, so far as the Mofussil is concerned, the requisite proceedings can be taken on a mere application to have the alleged agreement recorded under Order XXIII, rule 3, and that a formal pleading of the award under Order VIII, rule 9, is unnecessary.

Appeal allowed.

(27) 33 C. 881; 4 C. L. J. 162.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1311 OF 1918.

December 10, 1919.

Present:—Justice Sir Ernest Fletcher, Kt.

MOHENDRA LAL BISWAS AND OTHERS —PLAINTIFFS—APPELLANTS

versus

JAGAT CHANDRA DEY AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17 —Appeal, second—Suit, character of, whether can be altered—Suit for possession, whether can be converted into suit for enforcement of mortgage.

It is not open to a plaintiff in second appeal to apply to alter the character of his suit so as to convert it from a suit for possession into one to enforce a mortgage. [p. 64, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Chittagong, dated the 6th of March 1918, affirming that of the Munsif, 3rd Court, at Patiya, dated the 31st of January 1917.

MOHENDRA LAL BISWAS *v.* JAGAT CHANDRA DEY.

Babu *Paresh Chandra Sen*, for the Appellants.

Babu *Jyot sh Chandra Sirkar*, for the Respondents.

JUDGMENT.—This is an appeal preferred by the plaintiffs against the decision of the learned Subordinate Judge of Chittagong, dated the 6th March 1918, modifying the decision of the Munsif of Patiya. The plaintiffs brought the suit out of which the present appeal arises to recover possession of certain plots of land and the allegations made in the plaint are these: One Ram Gopal was formerly entitled to the lands in suit. He mortgaged them in 1895 to one Ramgati. Ramgati subsequently transferred his mortgage to the plaintiffs' father. The plaintiffs' father then instituted a suit on his mortgage, obtained a decree and had the property brought to sale in execution thereof, and himself became the purchaser at the auction sale held on the 7th January 1913. The present suit was contested by the defendants Nos. 6 and 15. The defendant No. 6 alleged that Ramgopal had no title to the land in Schedule 3 of the plaint in the present suit and that the defendants Nos. 6 to 13 were in possession of the land of Schedule 5 as prior mortgagees. The defendant No. 15 set up the case that he was the landlord of the property in Schedule 3, and that neither the plaintiffs nor the mortgagor had any right to any such land. The Munsif held that the plaintiffs were entitled to recover the land of Schedule 3 but he dismissed the suit as regards the Schedule 5 land. Thereupon, both parties appealed to the learned Subordinate Judge and the learned Subordinate Judge dismissed the suit as regards both the Schedules 3 and 5. Against that decision, the plaintiffs have appealed to this Court and what has been urged in the present appeal is this; that the present suit ought not to have been dismissed as regards these lands but that the Court ought to have converted it into a suit to enforce a mortgage and that the defendants might have been called upon in the present suit to redeem. The mortgage suit in which the plaintiffs' father had the property brought to sale in execution was instituted under the provisions of the Transfer of Property Act and what has been found by the learned Judge in this case is that, at the time of the institution of the former mortgage suit, the predecessor of the defendant No. 6 was in possession, and, therefore, the present plaintiffs or, rather, their father by the use of a reasonable diligence could have gone to and asked the defendant No. 6 what was the nature of the right he claimed and having ascertained that, could have decided as to whether he should be joined as a party. It is not suggested that they did so and the finding of the learned Judge of the lower Appellate Court is not in their favour. What seems to me to be quite clear is this, that if it became a material question as to whether or not the plaintiffs knew at the date of the mortgage suit of this interest that is now set up by the contesting defendants, that would involve the settlement of an issue and also the determination of certain facts. It is much too late now in the Court of second appeal to ask to alter the character of the suit when the plaintiffs have been at any rate partially unsuccessful in the first Court and wholly unsuccessful in the lower Appellate Court so far as these two particular plots are concerned. This application, if it is assented to, would require a remand to determine new facts and the plaintiffs, if they seriously relied upon this point, ought to have made the application much earlier and not in second appeal. In my opinion, the plaintiffs have made out no grounds for disturbing the judgment of the learned Judge of the lower Appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

In dismissing the appeal, I would only wish to observe this. The original number of the suit in the primary Court was 204 of 1915 and it is close upon five years after the institution of the suit that the Court is asked to alter the nature of the suit which would involve a remand to have further issues of fact determined in a case that is pending since 1915 and of which the value, as given in the memo. of appeal, is only Rs. 10. The learned Vakil for the appellants has advanced no arguments which would lead me to think that the interest of justice requires that this petty suit instituted so early as in 1915 should be brought to life again and sent back to the primary Court for the determination of further issues of fact.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL SUIT No. 18 1919.

December 9, 1919.

Present:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

IDARAPALLI DHANUSHKOTIRAYUDU (DEAD) AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VANKAYALA VENKATARATNAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Service inam—*Lands disannexed from office—Possession, whether adverse to holder of office.*

Where lands attached to the office of *karnam* as service *inam* become disannexed from the office and for a large number of years are enjoyed by a person who does not claim the office as ordinary private property, the possession of the lands by such a person for more than twelve years is adverse to the holder of the office against whom that person acquires a prescriptive title to the land.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 14 of 1916, (on remand) (Original Suit No. 52 of 1915, on the file of the District Court, Godavari), dated the 27th July 1918.

Mr. *A. Krishnaswami Aiyar*, for the Plaintiff Appellant.—Emoluments attached to an office are wages and are different from being the 'property' of any individual. Hence the title thereto can vest strictly on the official and not in the individual who is for a time such official. Hence the widow's possession can confer no title on her as she is not in any way the holder of the office. At most it is no better than mere permissive possession. Hence it cannot be adverse. See *Vusa Chandrakantam* v. *Vusa Subbarayudu* (1) and *Bhaiaji Thakur* v. *Jharula Das* (2). Immoveable property forming part of emoluments stands on the same footing as other emoluments. *Kamalathammal* v. *Krishna Pillai* (3),

Next, even possession under an adverse claim cannot change the character of the property. Adverse possession can only be of the right granted before enfranchisement, and cannot destroy the rights of the Crown which vested in the office of *karnam* or enfranchisement. See Inam Rules. Board of Revenue Standing Orders.

Mr. *V. Ramesam*, for the Respondents.—(Madras) Regulation VI of 1831 did not exempt the question of emoluments attached to the office of *karnam* from the cognisance of the ordinary Civil Courts. Hence Article 144 and section 23 of the Limitation Act apply and the right ceases to exist at the end of the period. *Neelachalam* v. *Kamaraju* (4), *Venkayya* v. *Surama* (5), *Muppidi Papaya* v. *Ramana* (6). The starting point is the alienation and not the appointment to the office of *karnam*. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (7). Both the cases cited for the appellant are cases where there is a real disannexure from the office and so cannot apply.

Mr. *A. Krishnaswamy Aiyar*, in reply.—On principle it cannot be said that the person holding the office has 'property' in the emoluments in the strict sense of the term. See *Durga Prashad Singh* v. *Trebini Singh* (8).

JUDGMENT.

ABDUR RAHIM, J.—The facts on which this appeal depends are to be found in paragraph 12 of the judgment of the lower Court. A woman, called Seshama, was in possession of Items Nos. 1, 2, 4, 8 and 9 for about 30 years prior to 1873 and then she alienated the properties to some third persons. The plaintiff's father set up his right as reversioner in respect of these properties and disputed the alienations. In settlement of that dispute, the alienees executed a deed of settlement in 1900 and that

(1) 25 Ind. Cas. 685; 1 L. W. 827 at p. 830; 16 M. L. T. 347; (1914) M. W. N. 745.

(2) 24 Ind. Cas. 501; 42 C. 244; 18 C. W. N. 1029; 27 M. L. J. 100; 1 L. W. 543; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176; 20 C. L. J. 360, 16 Bom. L. R. 845 (P. C.).

(3) 8 Ind. Cas. 993; 20 M. L. J. 781 at p. 784; 9 M. L. T. 73.

(4) 14 M. L. J. 438.

(5) 12 M. 235; 4 Ind. Dec. (N. S.) 514.

(6) 7 M. 85; 7 Ind. Jur. 595; 2 Ind. Dec. (N. S.) 644.

(7) 23 M. 271 (P. C.); 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind Dec. N. S.) 591.

(8) 45 Ind Cas. 527; 45 I. A. 251; 24 M. L. T. 407; 28 C. L. J. 508; 9 L. W. 60; 21 Bom. L. R 569; 43 C. 362 (P. C.).

deed expressly recites that the claim was made by the plaintiff's father by virtue of his reversionary right. The Subordinate Judge has found that these lands were originally attached to the *karnam's* office as service *inam*; but, upon the facts which he has stated, he came to the conclusion that the land became disannexed from the office and that, therefore, the plaintiff's father acquired an absolute right to them subject only to any right of resumption which the Government may have.

The argument of Mr. Krishnaswami Aiyar, in the first place, is that these lands must be regarded as emoluments of the office of *karnam*, that they could never cease to be as such, and that the rules of limitation have no application. In support of this proposition he relies upon a ruling of the Privy Council in *Bhainji Thakur* v. *Jharula Das* (2). There the dispute related to the office of *shebait* and his rights to receive the surplus offerings. Their Lordships held that the offerings could not be disannexed from the office and that Article 144 of the Limitation Act, upon the facts found, did not apply. There was no question there of the right of acquisition of any immoveable property by persons holding that property for more than 12 years and it is difficult to see any analogy between the facts of that case and those of the present. Mr. Krishnaswami Aiyar also relied on a sentence in the judgment in *Vusa Chandrakantam* v. *Vusa Subbarayudu* (1). But there my learned brother found that the possession of the defendant was permissive and stated that, even if the possession of the defendant was adverse, it would not make any difference. The facts, so far as it can be gathered, were that the defendants claimed to be in joint possession of certain land along with persons holding an office in connection with a temple. There is nothing in the judgment to support the proposition put forward on behalf of the appellants. Similarly, the facts of the case in *Kamalathammal* v. *Krishna Pillai* (3), are altogether different from the facts of the present case, and I cannot see that there any claim was set up to the land on the ground of prescription or adverse possession.

On the other hand, the ruling in *Neelachalam* v. *Kamarazu* (4), following *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (7), a decision of the Privy Council, makes it perfectly clear that Article 144 and section 28 of the Limitation Act applies to such a case as this. An earlier decision of this Court in *Muppidi Papaya* v. *Kamana* (6) is also to the same effect.

It was next argued by Mr. Krishnaswami Aiyar that the Government has a right to treat the land as service *inam*, and that they did in fact so treat it as they afterwards enfranchised the *inam* by imposing quit rent. We are not concerned in this case with the right of the Government either to enfranchise the land or to impose quit rent. We are dealing in this case with the rights of the parties *inter se*, and as between them it would seem to be impossible to hold that, upon the facts as they happened, the property had not become the absolute property of the plaintiffs.

For a large number of years the property had been enjoyed by persons who never claimed the office of *karnam*, as far as it appears from the evidence, as ordinarily private property, and the plaintiffs acquired the property from such persons under an alienation. The plaintiffs or their father did not acquire the property by virtue of the office of *karnam*.

This appeal must be dismissed with costs.

AYLING, J.—I agree.

M. C. P.

Appeal dismissed.

DIN DAYAL *v.* GURSARAN LAL.

ALLAHABAD HIGH COURT.
LETTERS PATENT APPEAL No. 108 OF 1918.
February 14, 1920.
Present:—Mr. Justice Tudball and
Mr. Justice Rafique.
DIN DAYAL—DEFENDANT—APPELLANT
versus
GURSARAN LAL AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 56, applicability of—Provincial Insolvency Act (III of 1907), ss. 16, 34—Adjudication, sale before—Receiver, right of.

The rule of marshailing in the case of purchasers, embodied in section 56 of the Transfer of Property Act, has no application as between purchaser and purchaser, the provisions of that section being limited to the case in which the party claiming marshalling is a purchaser, and the party against whom it is claimed is the original mortgagor. [p. 69, col 2 p. 70, col. 1.]

Inasmuch as section 16 of the Provincial Insolvency Act does not control the provisions of section 34 thereof, a purchaser in the course of execution of the property of a debtor, after he has filed an application to be adjudicated insolvent, but before the date of the adjudication order, acquires a good title to the property against the Receiver, the ownership in the property not vesting in the Receiver. [p. 71, col. 1.]

Letters Patent Appeal against the following judgment of Mr. Justice Abdul Raoof, dated the 2nd August 1918 :—

ABDUL RAOOF, J.—This appeal has arisen out of a suit for contribution brought by Nanak Pershad, plaintiff, in whose place the present respondents have been substituted as his legal representatives, against Din Dayal, defendant-appellant. In order to understand the contentions raised by the parties, it is necessary to set out, in some detail, the facts which are either found or admitted by the parties.

A list of seven houses is attached to the plaint. One Ganga Parshad is stated to have been the owner of these houses. On the 16th of August 1903 the said Ganga Persad contracted to sell house No. 1 to one Gurdayal, brother of the defendant-appellant, for Rs. 80, out of which Rs. 40 was paid in advance at once. On 20th of April 1905, he mortgaged the house No. 1 along with the six other houses to one Kallumal for Rs. 600. On the 15th August 1905 he executed a second mortgage for Rs. 400 in favour of the same Kallumal, mortgaging the same houses. On the 5th of January 1907 Gurdayal sued for the specific performance of the contract of sale of 1903, and obtained a decree on the 5th of February 1907. On the 24th of April 1907, a sale-deed was executed, in pursuance of the decree, in favour of Gurdayal, with respect to the house No. 1 and possession was delivered to him. On the same date, Gurdayal sold the house to his brother Dindayal and gave possession to him. On the 10th of January 1910, Nanak Pershad, the plaintiff, obtained a simple money-decree against Ganga Pershad for the sum of Rs. 166 and, in execution of this decree, he attached the houses Nos. 2 and 3, and applied for their sale. Kallumal, the mortgagee, applied to the Court executing the decree, praying that the houses may be sold subject to his charge under the mortgages in his favour, and that a proclamation may be made to that effect. This application was allowed and the houses Nos. 2 and 3 were sold and purchased by Nanak Pershad on the 12th of June 1911 subject to the mortgage charge of Kallumal. The sale was confirmed on the 14th of July 1911. On the 6th of June, Ganga Prasad had applied to the Insolvency Court at Cawnpore to be declared an insolvent, mentioning the name of Nanak Pershad in the list of the creditors given in his application. On the 22nd of July an order of adjudication was made. On the same date, on the application of Kallumal, mortgagee, the Insolvency Court ordered the houses Nos. 2 and 3 to be sold by the Receiver to discharge his mortgage. On the 25th of July Nanak Pershad put in an application in the Insolvency Court objecting to the sale of the houses by the Receiver on the ground that they had been purchased by him before the order of adjudication and that they had not vested in the Receiver. The only order made by the Insolvency Court on this petition was "*shamil misil rahe*" (Let it be placed on the record). On the 29th of July 1911, the Receiver applied to the Insolvency Court for an injunction prohibiting Nanak Pershad from taking possession of houses Nos. 2 and 3, and an order was made accordingly. On the 3rd of August 1911, Nanak Pershad applied to have the injunction set aside, stating that

he was the owner of the houses, and that he was not a creditor of the insolvent. This application was rejected and the reason for its rejection was stated by the Court that, he had not purchased the houses free from incumbrance. On the 14th of December, however, Nanak Pershad was required to pay off the mortgage of Kallumal by the end of January 1912. The houses were subsequently sold by the Receiver on the 25th of July 1912 for the sum of Rs. 1,875. Out of this sum Rs. 1,629-10 3 were paid to Kallumal in satisfaction of his two mortgages, on the 1st of August 1912. The balance of Rs. 245 5 9, after deducting the Receiver's fee, was handed over to Nanak Pershad. On these facts the plaintiff sued to recover Rs. 179 5-3 with interest from the 1st of August 1912, total Rs. 292 6-3, by way of contribution from the defendant as the purchaser of the house No. 1. There was some dispute as to the valuation of the house No. 1, and as to the proportionate amount claimable in respect of it, but this was settled by mutual agreement which was recorded in a *rubkar* dated the 1st of July 1915, which is to be found on the record as paper No. 320. The defendant contested the suit mainly on the following grounds:—

That the house No. 1 had been purchased on the 24th of April 1907 in pursuance of the contract of sale of 1903, and that, as there was no mortgage existing at the date of the contract and that also as Gurdayal, the vendee, had no notice on the 24th of April 1907 of the mortgages of the 24th of April 1905 and the 16th of August 1906, the charge created under those mortgages was not binding on him and that no contribution could be claimed against him. Some other minor pleas were also raised in the written statement but, as those were decided against the defendant by the Courts below and as to which there is no further contention, it is not necessary to mention them here. There is, however, one plea, which though not taken in the written statement, appears to have been urged in the Court below and is also urged in this Court. Shortly put, the plea comes to this, "that the mortgages of Kallumal were not redeemed by the plaintiff but were paid off by the sale of the houses Nos. 2 and 3 by the Receiver; therefore, the plaintiff had no right to claim contribution.

The Court of first instance repelled all the pleas raised in defence and passed a decree in favour of the plaintiff for the recovery of Rs. 223-10 11 by the sale of the house No. 1. On an appeal to the lower Appellate Court the judgment and decree of the first Court were upheld. The defendant has now preferred a second appeal to this Court and the following grounds have been urged against the decision of that Court. As to the effect of the mortgages of Kallumal on the house No. 1, the contention of the learned Vakil for the appellant is two-fold. In the first place, he contends that the mortgages having been effected after the contract of sale, the mortgagor had no power to bind the interest of Gurdayal, who, having purchased the house on the 24th of April in good faith and without notice, must be taken to have acquired it without any charge. The agreement to sell conferred no title on Gurdayal, as, according to section 54 of the Transfer of Property Act, a contract of sale of itself does not create any interest in or charge on any property with respect to which the contract is made. On the date on which the sale-deed was executed, Gurdayal, therefore, had no interest, in or charge on the house No. 1. The two mortgages in favour of Kallumal were registered and according to the rulings of this High Court, Gurdayal must be taken to have had notice of them when he purchased the house No. 1. His second contention is that, inasmuch as all the seven houses mortgaged by Ganga Pershad were subject to a common charge and one of them was sold to Gurdayal, he was entitled to have the charge satisfied out of the remaining six houses first. In support of this contention, he has relied on the provision of section 56 of the Transfer of Property Act, and has argued that Gurdayal and his transferee, the present defendant-appellant, can claim the same equity against the representatives of Ganga Pershad, the seller, as they had a right to claim against him under the section. He has relied on "Dart on the Law of Vendors and Purchasers", 7th Edition, Volume II, page 946, Chapter XIV, section 6. The law on the point is thus stated there:—

"Where an estate subject to a paramount charge becomes divided among several purchasers, it becomes a matter of some difficulty to determine the proportions in

which they are to bear it and between themselves. The authorities seem to lead to the following conclusions, *viz.*, —

"If two estates, X and Y, are subject to a common charge, and estate X is sold to A, A will, as against the vendors, and his representatives, have a *prima facie* equity, in the absence of express agreement, and whether or not he had notice of the charge to throw it primarily on estate Y in exoneration of estate X.

"If, then, estate Y is subsequently sold to B with notice of the charge and of the prior sale X to A, B purchases with notice of A's equity, and the entire charge must rest primarily upon Y"

In my opinion the passage above quoted is against the appellant's contention In this case, it is not shown that Nanak Pershad, the purchaser of the houses Nos. 2 and 3, had notice of the purchase of the house No. 1 by Dindayal and of his equity against Ganga Pershad, the seller. A faint attempt was made to argue that Nanak Pershad must be taken to have had notice of the decree for specific performance dated the 5th of February 1907, and of the sale-deed, dated the 24th of April 1907, which was executed in pursuance of the said decree, but no rule of law or decision was cited in support of this argument. He has also relied on Ghosh's Law of Mortgages in India, Volume 1, pages 365 and 366, 4th Edition, where this question is fully discussed with special reference to the rules laid down in 'Dart on Vendors and Purchasers' to which reference has been made above. But the conclusion at which the learned author has arrived is not favourable to the appellant's case. At page 367 the learned author states, "The correctness of the doctrine, however, has been questioned by Mr. Justice Story, who thinks that there is great reason to doubt whether it is maintainable upon principle; for, as between the subsequent purchasers, it is difficult to perceive that either has any superiority of right or equity over the other; on the contrary, says the distinguished Judge, there seems strong ground to contend that the original incumbrance or lien ought to be borne rateably between them according to the relative values of the estate (Story's Equity, section 1233 *a*)." Again, at page 368, towards the conclusion of the discussion of the subject, the learned author writes that, "Robbing Peter to pay Paul, is not, as Lord Macnaughten said in a recent case, a principle of equity, and it is satisfactory to find that in the only case in our reports in which the question has been discussed, the Calcutta High Court refused to follow the rule of the inverse order and, if I may venture to say so, rightly, for there is no sound reason, in the absence of special circumstances, for preferring one purchaser for value, to another". The Calcutta case referred to in this quotation is *Magniram* v. *Mehdi Hossein Khan* (1). It was held in that case that the rule of marshalling in the case of purchasers as laid down in section 56 of the Act did not apply to a case between purchaser and purchaser; section 56, being limited in its operation to the case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. The learned Judges at pages 102 and 103, observed as follows:—

"As to the third point the argument is this:—that as when the defendant first party purchased their two properties from the mortgagors and remaining two properties were still in the hands of the mortgagors, the purchasers might well have thought that the mortgage-debt would be paid wholly out of the properties still in the hands of the mortgagors; and the plaintiff, a subsequent purchaser, must be taken to be in the shoes of the mortgagors. And if that is so, the sale at the instance of the prior mortgagee should be, as it has been, in the inverse order of sales to the different purchasers, that property being sold in satisfaction of the mortgage decree first, which was purchased from the mortgagors last. We are unable to give effect to this contention. Though, as between the mortgagor and the purchaser from the mortgagor, property in the hands of the mortgagor should be sold first, without giving the mortgagor any claim for contribution, yet, when all the properties have passed to the hands of purchasers for value, there is no sufficient reason for holding that later purchasers should not be entitled to contribution as the earlier ones. It appears to us that the rule best in accord with principles of justice, equity and

(1) 31 C. 95; 8 C. W. N. 30.

good conscience is to make the mortgaged properties in the hands of different purchasers liable to contribute to the mortgage-debt in proportion to their values."

The decision in this case fully governs the present case and that is why I have largely quoted from it. The authorities above mentioned clearly show that, as between purchaser and purchaser, the rule of equity embodied in section 56 of the Transfer of Property Act can have no application.

The next question which I have to decide is, whether the fact that the common charge under the mortgages of Kallu was discharged out of the houses Nos. 2 and 3, gave to the plaintiff the right of contribution against other properties under the circumstances of this case. On this question, also, the argument of Mr. Katju has been two-fold. In the first instance, he has argued that the application of Ganga Pershad to the Insolvency Court to be declared an insolvent was made prior to the auction-sale of the houses Nos. 2 and 3; consequently, the order of adjudication by the Court on the 22nd of July 1911 vested the ownership of the two houses in the Receiver from the date of the petition, that is, the 6th of June 1911, as it related back and took effect from that date, under clause 6 of section 16 of the Provincial Insolvency Act. He, therefore, contends, that the plaintiff never acquired the ownership of the houses Nos. 2 and 3, and is not entitled to claim contribution from the defendant. His second contention is that the houses in question were not sold by the plaintiff in order to discharge the mortgages in favour of Kallu. They were actually sold by the Receiver under the order of the Court and the proceeds of the sale were applied to the satisfaction of the common paramount charge. The first contension ignores the special provision of section 34 of the Provincial Insolvency Act. It cannot be denied that the order of adjudication was made on a date subsequent to the date on which the plaintiff sold the two houses in execution of his simple money-decree and realized the assets. Clause 1 of section 34 provides that, "Where execution of a decree has been issued against the property of a debtor no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets *realized in the course of the execution by sale or otherwise before the date of the order of adjudication.*" The provisions of section 16, clause 6, cannot control the provision of section 34 of the Act in this respect. As noted above, Nanak Pershad had not only attached the houses in execution of his money decree but the execution had proceeded further and the assets had been realized long before the order of adjudication was made. In the case of *Basarmal Awatmal* v. *Khemchand Daryanomal* (2), the learned Judicial Commissioner of Sindh had to construe section 34 of the Provincial Insolvency Act, with reference to facts very much similar to the facts of this case, and the decision in that case fully applies to the circumstances of the present case. I agree in the interpretation put by the learned Judicial Commissioner upon the provisions of section 34 and hold that the ownership of the houses in question did not vest in the Receiver. This view is also supported by the decision in the case of *Sri Chand* v. *Murari Lal* (3).

His second contention under this head is, that as Nanak Pershad, plaintiff, had not availed himself of the permission accorded to him by the Insolvency Court by the order of the 14th of December 1911, to pay off the mortgages of Kallumal by the end of January 1912, and the houses had actually been sold by the Receiver on the 25th of July 1912 it cannot be said that the plaintiff had discharged the common burden and had redeemed the mortgages, so as to have the right of contribution against other properties. This argument ignores the clear provisions of section 82 of the Transfer of Property Act. The section provides: "Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of any contract to the contrary, liable to contribute rateably to the debt secured by the mortgage....."

It cannot be denied, on the facts stated above, that the house No. 1 and the houses Nos. 2 and 3, together with the other houses, had been mortgaged to secure the debt due to Kallumal. No contract to the contrary being either alleged or proved, they must all be held liable to contribute rateably to the debt secured by

(2) [illegible] Ind Cas 413.
(3) 16 Ind. Cas. 183; 10 A. L. J. 252; 34 A. 628.

the mortgages in Kallumal's favour. In connection with this question we ought not, also to lose sight of the provisions of clause 3 of section 34 of the Insolvency Act, according to which a person who in good faith purchases the property of a debtor under a sale in execution, shall in all cases acquire a good title to it against the Receiver. This clause supplies a complete answer to the argument of the appellant that the purchase of the houses Nos. 2 and 3 by the plaintiff in the execution of sale cannot be said to be the realization of assets in the course of an execution by sale. Moreover, I do not think that such a narrow construction should be put upon the provisions of section 34. As found by the lower Appellate Court, there are circumstances in this particular case which go to show that neither the Insolvency Court nor the Receiver ever treated the houses as having vested in the Receiver. The sale by the Receiver of the houses, in order to satisfy the mortgages of Kallumal, therefore, must be taken to have been effected, with the consent, and on behalf, of Nanak Parshad the plaintiff.

Some argument was addressed also on the question of the proportionate amount of money which ought to be contributed by the house No. 1 but, having regard to the agreement of the parties which was recorded in the *robkar* dated the 1st of July 1915, paper No. 320 on the record, this contention, is not open to the appellant. In this view this appeal cannot succeed. The judgment and decree of the lower Appellate Court are right and the appeal must be dismissed. I, accordingly, dismiss it with costs, including in this Court fees on the higher scale.

Mr. *Radha Kant Malaviya*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—In our opinion the decision of the learned Judge of this Court is correct. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

LAHORE HIGH COURT.

FULL BENCH.

LETTERS PATENT APPEAL No. 56 OF 1919.

June 2, 1920.

Present:—Mr. Shadi Lal, Chief Justice, Mr. Justice Chevis, Mr. Justice Scott-Smith, Mr. Justice Broadway and Mr. Justice Wilberforce.

PARMESHRI DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FAKERIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1903), O. II, r. 2—Mortgagor authorising mortgagee to sue either for interest due or for possession in case of default in payment of interest—Suit for interest—Subsequent suit for possession, whether barred.

A mortgagee is not debarred by Order II, rule 2, Civil Procedure Code, from suing for possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of the mortgagor's failure to pay interest at the stipulated time, simply because on the occurrence of a previous default the mortgagee sued only for interest and not for possession. [p. 73, col. 2; p. 75, col. 1.]

Letters Patent Appeal against the order of Mr. Justice Abdul Raoof, dated the 19th November 1919, passed in Civil Appeal No. 1420 of 1919.

FACTS appear from the following judgment of Mr. Justice Abdul Raoof:—

"This second appeal has arisen out of a suit for the recovery of possession as a mortgagee under the following circumstances. On the 17th December 1898 Nagar Mal, father of Faqira, Basanta and Dhana, defendants, executed a mortgage in favour of Nathu Ram, father of the plaintiff, as a security for the sum of Rs. 600 0-0 hypothecating certain lands for the payment of the amount. Under the mortgage the mortgagor was to pay Rs. 40 per annum as interest and, in case of default of payment of interest for one year or any harvest, he was entitled to realise interest by a separate suit or claim possession of the mortgaged lands in lieu of the principal and interest due. Default in payment of interest was made and a suit was brought by the mortgagee in 1906 for recovery of the arrears of interest for three years immediately preceding the suit. A decree was passed for the sum of Rs. 105 on the 18th August 1903. It appears that after paying for some

time the mortgagor again made default in paying interest. Thereupon, the present suit was brought for the recovery of possession over the mortgaged lands in lieu of Rs. 840, namely Rs. 600 for principal and Rs. 240 for the interest. This suit was resisted by the defendants upon two pleas any one of which, if made out, was sufficient to bring about the dismissal of the suit. One was a plea of limitation on the ground that as interest had not been paid for more than 12 years the suit was barred under Article 135, Limitation Act. The other plea was to the effect that as the mortgagees did not choose to claim possession on the first default when they brought their claim for interest their present suit is barred under Order II, rule 2 of the Code of Civil Procedure. Both the Courts below have given effect to both these pleas raised on behalf of the defendant. They have held that the suit is barred by limitation and as well it is barred under Order II, rule 2. Upon this last point there is a consensus of authority in this Court. The following authorities directly cover the point, namely, *Brij Lal* v. *Ram Rattan* (1), *Ganga Ram* v. *Abdul Rahman* (2), *Kishen Narain* v. *Pala Mal* (3), *Barkhurdar* v. *Ohhatta Mal* (4) and *Jhangi* v. *Ramzan* (5). In this state of authorities it is impossible to contend that the present suit can lie. It is needless to go into the question of limitation and I dismiss this appeal with costs."

ORDER OF THE DIVISION BENCH.

SHADI LAL, C. J. AND WILBERFORCE, J. (*March* 10, 1920.)—On the 17th December 1898 Nagar Mal, the father of the defendants, executed a mortgage-deed in favour of the plaintiff's father, hypothecating the land in dispute by way of security for a loan of Rs. 600. The mortgage was without possession, but the mortgagor promised to pay Rs. 40 per annum on account of interest, and, in the event of default in the payment of interest for one year, the mortgagee was given the option of either suing for the interest due to him or recovering possession of the mortgaged property, and thereafter keeping it until the payment of the principal and interest.

It appears that there was a default in the payment of interest, and the mortgagee, consequently, brought, in May 1906, an action for the recovery of interest and obtained a decree for the amount due to him.

The mortgagor again made a default and the plaintiffs have, consequently, brought the present action for possession of the land, and in the alternative for the mortgage-money with interest to be realised by the sale of the property. The Courts below have dismissed the suit as barred by Order II, rule 2, Civil Procedure Code, and it seems that, if the rule enunciated in *Ganga Ram* v. *Abdul Rahman* (2) is a correct exposition of the law on the subject, this appeal must fail.

We have, however, grave doubts as to the correctness of that judgment. It seems to us that when a person is given an option, as in the present case, to sue either for interest or for possession, he is entitled to make his choice, and that he should not be compelled to sue for possession at once. The rule in *Ganga Ram* v. *Abdul Rahman* (2) would compel him to sue for possession on the happening of the first breach of the covenant, and would, in the event of his making his choice in favour of suing for interest alone, deprive him for ever of his right to recover possession and also his debt. In other words, the rule would deprive him of the option conferred by the covenant, and would result in introducing a clause into the contract that he must sue for possession if the mortgagor failed to carry out his stipulation as to the payment of interest. This would be tantamount to reading into the instrument a provision which not only does not exist there, but would run counter to an express stipulation, and we consider that no sound interpretation of the law of procedure should lead to that result.

We consider it unnecessary at this stage to discuss in detail the various reasons which can be urged against the correctness of the rule in *Ganga Ram* v. *Abdul Rahman* (2), or to point out the curious results and hardships which flow from it, and which should, if possible, be avoided. We would however, refer to an analogous case. Suppose,

(1) 17 Ind. Cas. 581; 268 P. W. R. 1912.
(2) 28 P. R. 1907; 140 P. W. R. 1907; 93 P L. R. 1908.
(3) 47 Ind. Cas. 937; 88 P. R. 1918; 167 P. W. R. 1918; 102 P. L. R. 1918.
(4) 48 Ind. Cas. 798; 119 P. R. 1918.
(5) 5 Ind. Cas. 808; 13 P. R. 1910; 20 P. W. R. 1910; 60 P. L. R. 1910.

in a lease there is a clause which provides that, if the tenant makes a default in the payment of rent, the landlord is at liberty either to sue for rent or to bring an action for the ejectment of the tenant; and suppose, in the event of a default, the landlord chooses the alternative of suing for rent only; by a parity of reasoning he would be debarred from bringing an action for ejectment on the happening of a subsequent default. And if a mortgagee cannot subsequently recover interest because his right to sue for principal is barred under Order II, rule 2, Civil Procedure Code, as held in *Kundan Mal* v. *Sardar Allah Dad Khan* (6), it can be urged with equal force that the landlord, thus deprived of his right to sue for ejectment, cannot sue for rent, and he would thus lose his property altogether.

The rule in *Ganga Ram* v. *Abdul Rahman* (2) has been followed by the Chief Court in subsequent cases, *vide*, *Kundan Mal* v. *Sardar Allah Dad Khan* (6) and *Kishen Narain* v. *Pala Mal* (3). There are, however, two prior judgments, namely, *Ram Bhaj* v. *Devia* (7) and *Raman* v. *Wazira* (8), which lay down a contrary rule. The latter case was not referred to in *Ganga Ram* v. *Abdul Rahman* (2), and the former, which contains a learned discussion on the subject, was distinguished on a ground which does not appear to us to be material. Further, the Bombay High Court in *Yashvant Narayan Kamat* v. *Vithal Divakar Parulekar* (9) has held that a suit to recover the principal and interest is not barred under section 43, Civil Procedure Code, corresponding to Order II, rule 2 of the present Code, because the plaintiff had in the previous suit claimed only interest though he was entitled to recover the principal as well.

As at present advised, we prefer the view taken in these three cases that the causes of action in the two suits are distinct and that the second suit is not barred by the rule contained in Order II, rule 2, Civil Procedure Code. As observed by their Lordships of the Privy Council, in *Sankaran Chetty* v. *Palaniappa Chetty* (10), the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise from the same transaction.

We accordingly refer for the decision of a Full Bench the following proposition whether the mortgagee is debarred by Order II, rule 2, from suing for the possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession on mortgagor's failure to pay interest at the stipulated time, because on the occurrence of a previous default the mortgagee sued only for interest and not for possession

(6) 5 Ind. Cas. 821; 19 P. R. 1910; 36 P. W. R. 1910; 167 P. L. R. 1910.
(7) 123 P. R. 1881.
(8) 79 P. R. 1886.
(9) 21 B. 267; 11 Ind. Dec. (N. S.) 181.

(10) 26 Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617; (1914) A. C. 618; 110 L. T. 913; 17 New Law Reports 56; 83 L. J. P. C. 131 (P. C.).

ORDER OF THE FULL BENCH.

Lala *Fakir Chand*, for the Appellants.

Messrs. *Devi Dayal* and *Nihal Chand Mehra*, for the Respondents.

ORDER.—The proposition of law, which has been referred to us for decision, is in the following terms: whether a mortgagee is debarred by Order II, rule 2, Civil Procedure Code, from suing for the possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of the mortgagor's failure to pay interest at the stipulated time, because on the occurrence of a previous default the mortgagee sued only for interest, and not for possession.

The action which has led to this reference was brought on the footing of a mortgage-deed by which the borrower hypothecated his land by way of security for the debt contracted by him. The mortgage was without possession, but the mortgagor promised to pay Rs. 40 per annum on account of interest. The language employed by the writer of the deed is not very felicitous, but the stipulation which has a direct bearing upon the question before us, is to the effect that, in the event of the mortgagor's failure to pay interest for one year, the mortgagee would have the option of either suing for interest then due, or taking possession of the property mortgaged to him and keeping it in lien of the principal and

interest. It is to be observed that this clause, which prescribes the consequences of the mortgagor's default in paying interest, allows the mortgagee to get either interest or possession, but not both.

It is common ground that in 1906 the mortgagor committed a breach of the stipulation as to the payment of interest with the result that the mortgagee chose the alternative of suing for interest and obtained a decree for the amount then due to him. The mortgagor has again made a default, and the mortgagee has now sued for the possession of the mortgaged property. The question arises whether the rule of procedure which finds expression in Order II, rule 2, Civil Procedure Code, operates as a bar to the present action for possession.

Now, that rule requires the plaintiff to include in his suit the whole of the claim which he is entitled to make in respect of the cause of action upon which the suit is brought, and further provides that, if he omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. Now, it is the duty of the defendant, who invokes the rule, to show that the claim for possession, which the plaintiff now makes, ought to have been included in the previous suit. As we read the document, we think that there can be little doubt that the mortgagee could, when he brought the earlier suit, have sued either for interest or for possession, but was not entitled to include in the same suit both the claims. And if, under the terms of the instrument, which regulates the jural relations of the parties, he could not have claimed both the reliefs at one and the same time, then it would be futile to contend that he omitted to sue in respect of, or intentionally relinquished, any portion of the claim which he was then entitled to make.

The plaintiff was entitled to make an election, and, availing himself of the option given to him, he elected to enforce his claim for interest. He could, if he so desired, have sued for possession, but in that suit he could not include the claim for interest. It is clear that the two claims were mutually exclusive, and if we uphold the contention of the defendant, we would have to hold that the plaintiff was bound to include in his previous suit a claim for possession. This view would contravene the terms of the contract entered into by the parties. It would mean one of two things, (*a*) that the mortgagee was entitled to sue for possession as well as interest, a right not conferred upon him by the instrument; or (*b*) that he was bound to sue, at any rate, for possession in the event of a default by the mortgagor; which would deprive him of the option conferred by the covenant. In either case we should be reading into the instrument a provision which not only does not exist there but would run counter to an express stipulation entered into by the parties. It is beyond doubt that no sound interpretation of the law of procedure should lead to such an absurd result.

The object of the rule embodied in Order II, rule 2, is to avoid the splitting of claims and to prevent further litigation. The rule is based upon the salutary doctrine contained in the maxim *nemo debet bis vexari pro una et eadem causa*. We fail to see how a person can complain of being twice vexed in respect of the same cause, when he has himself given his adversary the option of making one claim or the other, but has not conferred upon him the right to make both the claims at the same time.

In this view of the clause, prescribing the penalty for a breach of the stipulation relating to the payment of interest, we are of opinion that the judgment in *Ganga Ram* v. *Abdul Rahman* (2) which has been relied upon by the learned Counsel for the respondent, is not on all fours with the present case. That judgment enunciates the rule that when, under the mortgage-deed, both principal and interest have become due, the mortgagee must sue for both together; otherwise he will be debarred from claiming in a subsequent suit what was not claimed by him in the prior suit. It appears that the mortgagee in that case was entitled to sue not only for interest but also for principal, and it was consequently held that his omission to include in the previous suit his claim for principal debarred him from recovering it in a subsequent suit. The case before us is, to some extent, similar to the cases dealt with in *Ram Bhaj* v. *Devia* (7) and *Badi Bibi Sahibal*

v. *Sami Pillai* (11) in neither of which the contention now raised was acceded to.

In view of the wording of the clause with which we are dealing we are of opinion that the question of the correctness or otherwise of the rule enunciated in *Ganga Ram* v. *Abdul Rahman* (2) does not arise. We accordingly answer the question put to us in the negative.

Answered in the negative.

(11) 18 M. 257; 6 Ind. Dec. (N. S.) 529.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 139 OF 1919.
April 19, 1920.
Present :—Mr. Justice Piggott and
Mr. Justice Walsh.
FIRM SUKHAMAL BANSIDHAR—
PETITIONERS—APPLICANTS
versus
BABU LAL KEDIA & CO.,—OPPOSITE
PARTIES—RESPONDENTS.

Arbitration—Agreement to refer, binding effect of—Contract, provision in, to refer to arbitration—Notice of intention to refer—Full period not given, effect of—Award, enforcement of—Duty of Court.

An agreement to submit to arbitration involves a submission signed by both parties, but an agreement to submit, provided it is an agreement, may be collected from a series of documents, even though connected by parol evidence, and the signature of any document forming part of the agreement is sufficient to bind the party signing to the submission contained in the agreement. [p. 76, col. 2.]

A contract was entered into between a firm trading in cloth at Cawnpore (vendees and a firm of importers at Delhi (vendors) for the sale of cloth goods. The contract was in the form adopted by the Delhi Piece Goods Association, and provided for the submission of disputes to two arbitrators, one to be appointed by each party, it being agreed that if one of the parties on being requested by the other party to nominate an arbitrator failed to do so witnin 20 clear days of the request, the first party would appoint a sole arbitrator. A dispute having arisen the vendors intimated to the vendees their intention to appoint an arbitrator and that gentleman on 5th February gave notice in writing to the vendees to appoint their arbitrator and to attend for a final decision on 25th February failing which a decision would be arrived at by him alone in their absence. The vendees did not appoint an arbitrator, and the arbitrator appointed by the vendors submitted his award on the 25th February:

Held, that as the vendees were entitled to 20 clear days' notice and as the award was made only 19 days from the request to appoint an arbitrator, the failure to give the requisite number of clear days for the appointment was fatal to the appointment and jurisdiction of the vendor's arbitrators as sole arbitrator, and that, consequently, no arbitrator had been lawfully appointed with authority to act alone within the terms of the submission made by the parties, and his award was of no legal effect. [p. 77, col. 2.]

When a Court is asked to enforce an award, it must satisfy itself that the award is enforceable in the same way as a decree would be enforceable, if it were a decree. An award which is either a mere declaration of the respective rights and liabilities of the parties in respect of a particular contract, or is an attempt to pass a sort of order or decree for specific performance in a matter in which no such decree can be passed in law would not be enforceable if it were a decree of Court. [p. 82, col. 1.]

Civil revision against the order of the District Judge, Cawnpore, dated the 11th of September 1919.

Mr. *B. E. O'Conor*, Dr. *S. N. Sen* and Mr. *Damodar Das*, for the Applicants.

Mr. *L. M. Banerjee*, for the Opposite Parties.

JUDGMENT.

WALSH, J.—These four revisions arise out of four orders of the District Judge of Cawnpur dated, each of them, the 11th September 1919 directing (*inter alia*) four awards to be filed. The awards had been made by a sole arbitrator who had been appointed by one of the disputing parties only, to decide disputes which had arisen between two firms, one the present applicants, Sukhmal-Bansidhar, who are traders in cloth in Cawnpur, and the other, Babu Lal Kedia and Co, who are importers in Delhi, apparently with a branch office also in Cawnpur, with reference to four contracts or indents numbered respectively 415, 416, 417 and 418 relating to the sale of cloth goods. The sellers, namely, Babu Lal Kedia are members of an Association in Delhi known as the Delhi Piece Goods Association which, following the example of commercial firms in England and other places, endeavours, as far as possible, to remove from the ordinary law Courts disputes which arise upon purely trade questions and to have them decided by arbitrators or surveyors experienced in the trade, well-known to the traders, who may be taken to be competent to give prompt

and satisfactory decisions on points which arise every day over contracts between traders, and in which the same ready appreciation by ordinary Courts of law, cannot, in the natural course of things, be expected. This Association has adopted a definite form of contract or indent in which provisions regarding arbitration are contained, and which include various additions to or modifications of the Indian Arbitration Act, IX of 1899, and they have also printed on the reverse side of the Indent "General Survey and Arbitration Rules". The construction of a very important provision contained in these rules is involved in the question which now comes before us. On a general reading of these rules it would appear that the intention is that the surveyor, as he is called, should hold meetings with the surveyor or arbitrator of the other side to examine the goods on behalf of the party whom he represents, although it by no means follows from the rules that that is necessarily so; but a general reading of the rules makes it clear that the survey and the arbitration, although these terms are used interchangeably, are two separate and distinct things. It is, perhaps, no business of ours, but it follows from the discussion which has taken place in this case which has been very ably and thoroughly argued on both sides and from the view which we have formed about this rule, that it is desirable that some of the rules of this Association should be amended with a view to greater simplicity in expressing the intention—a very laudable intention of their framers.

It is hardly necessary in these days to repeat that the Courts will not set aside an award on the ground that the arbitrators have gone wrong, or that the finding appears to them to be erroneous or unfair, and, further, for the same reason, that no appeal is allowed against the decision of an umpire or abitrator, no revision against it can be entertained. That view was laid down very clearly by the Privy Council in the leading case of *Ghulam Khan* v. *Muhammad Hassan* (1) and has been consistently followed by the Courts in India.

As the point was not taken or argued before us to-day that we had no jurisdiction in revision for very good reasons, because, if it had been a good point it would only have resulted in the applicants' making a fresh application for extension of time to appeal which would have re-opened the whole question in another form, we are not called upon to decide whether or not an appeal lies from such an order as the one complained of in this case, namely, filing an award under section 11 of the Arbitration Act of 1899. That may be a difficult technical question. Of course, if an appeal lies no revision can be entertained by the express terms of section 115 of the Code of Civil Procedure and upon that question I prefer to keep an open mind, merely assuming that as no objection has been taken and as no appeal has in fact been brought, no appeal in fact lies.

In my opinion, the questions in the case can really be reduced to a small compass. The award in question was admittedly made *ex parte*, although the submission was to two arbitrators, one to be appointed by each party. Only the firm of Babu Lal Kedia appointed an arbitrator. It was contended before the learned Judge, and before us, by the firm Sukhamal-Bansidhar who had refused to take part in the arbitration, that there had never been any submission. Section 4, sub-section (*b*) of the Act, which defines submission, is in terms which correspond to the definition given in the English Act. It provides that submission means "a written agreement to submit differences" We agree with the view taken by Mr. Justice Woodroffe in *Ram Narain Gunga Bissen* v. *Liladhur Tejee* (2), and with the majority of the English cases on this point, particularly, *Caerleon Tinplate Company* v. *Hughes* (3) that that provision involves a submission signed by both parties or their agents. But we agree that the agreement to submit, provided it is an agreement, may be collected from a series of documents even though connected by parol evidence, and signature of any document forming part of the agreement is sufficient to bind the party signing to the submission contained in the agreement. In the face of the documents in this case, namely, the invoices or indents, and the

(1) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 16'; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(2) 31 C. 1237 at p. 1240; 10 C. W. N. 814.

(3) (1891) 60 L. J. Q. B. 640; 65 L. T. 118.

acceptances, the submission is clear and binding upon both parties.

The next point which arises is, that the provisions of clause 15 were not complied with. It is necessary to set out the greater part of this clause in order to a clear understanding of it. And it should be observed that, under the general survey or arbitration rules of the Delhi Piece Goods Association, the buyer and seller have the option of nominating " an European or a native as their surveyor who must be a principal, partner, or representative of a firm in Delhi ; " so that the field from which a selection could be made by a firm in Cawnpur is somewhat limited. The second rule of the general Code provides that one of the surveyors must be a partner or representative of an importing firm which is a member of the Delhi Piece Goods Association. The result of which would be, of course, that if the surveyor first oppointed by one party happened not to be a member of the Association, the obligation would be thrown upon the other party to make his selection of an arbitrator who was a member, otherwise the appointment would not comply with the submission, so that, the choice of the second party would in that event be further restricted. What happened in the cases in question was, that the vendors, namely, Babu Lal Kedia, having intimated by a letter of an earlier date their intention to appoint one Mr. Ratnam, of the firm of Ratnam and Company, their surveyor or arbitrator, that gentleman on the 5th of February gave notice in writing to the other party, the present applicants, to appoint their arbitrator and to attend the survey for a final decision on the 25th of February, failing which a decision would be arrived at by him alone in their absence. The question is, whether that was a good notice and whether, in the events which happened, he was legally the sole arbitrator and had jurisdiction to make the award. The material parts of the clause run as follows :—

" Any claim or dispute arising in connection with this contract must be referred to arbitration in Delhi in accordance with the survey and the arbitration rules of the Delhi Piece Goods Association. When arbitrators or surveyors disagree and do not appoint an umpire, the decision of the arbitrators or surveyors or of the umpire shall be final and binding on both parties. In all other respects the Indian Arbitration Act IX of 1899 shall apply. It is further agreed that if within 20 clear days, and if the 20th day be a Sunday it will not count (that provision is of great assistance in construing this clause as it clearly indicates that the 20th day was regarded as a business day by both parties) after being requested by letter addressed to them at their usual place of business either party fail to appoint an arbitrator or surveyor ready and willing to act, the decision of the arbitrator or surveyor appointed by the other party shall in like manner be binding on both parties. It shall be obligatory on the party raising the dispute to see that a survey takes place within 20 clear days from the date of his letter raising the dispute failing which he or they lose the right to survey ".

We agree that this clause takes the place of the provision contained on the same subject in section 9, sub clause (*b*) of the Arbitration Act, where seven clear days are allowed to the other party to appoint his arbitrator, and in case of default the first party may appoint a sole arbitrator. Clause 15 seems to have been submitted to every conceivable construction in the first Court except what we think is the true one. The party now applying in revision, put his objection in the Court below in a different form but we think there is no doubt as to the meaning of the clause. The party to whom notice is given must be allowed 20 clear days in which to appoint. In this case he admittedly had less. The award was actually made on the 25th of February which was only 19 days from the request to appoint the arbitrator made to Sukhamal-Bansidhar assuming that the letter addressed to them by Babu Lal Kedia of the 5th of February reached them in Cawnpur on the same day. In my opinion, this failure to give the requisite number of clear days for the appointment is fatal to the appointment and jurisdiction of Mr. Ratnam as sole arbitrator. The result is that no arbitrator has been lawfully appointed with authority to act alone within the terms of the submission made by the parties themselves.

It is said, and it seems at some time or

another to have been the view of each party that the award itself must be made within the same 20 clear days. This construction is not a possible one. It makes nonsense of the clause. The arbitration could not take place before the time had expired within which the parties had a right to appoint their arbitrator. If another 20 clear days are intended it is impossible to work it with the 20 days allowed for the appointment. We think that the provision taking away from any party the right to a survey unless (if he is the party raising the dispute) he sees that the survey takes place within 20 days from the time of his raising the dispute, must mean a survey or examination of the goods. This view receives strong confirmation from an earlier provision in the same clause dealing with the case of goods at the port of discharge, where the same language namely, "survey", is used.

It was stoutly contended before us on behalf of Babu Lal Kedia that in this case the period of 20 clear days allowed by the submission no longer operated, because before its expiration Sukhamal had repudiated the submission altogether and absolutely declined to appoint an arbitrator. In other words, the respondents to this application founded themselves upon the well-known principle in contract law of an anticipatory breach, the general principle of which is laid down in language which could not be improved upon and is invariably referred to as the test in the judgmant of Lord Esher in *Johnstone* v. *Milling* (4).

We do not think that this principle is applicable to the case of a submission to arbitration. Rule 15 is, no doubt, part of the contract but it is a rule based upon procedure affecting the status and jurisdiction of the arbitrator. In refusing to appoint, Sukhamal did not, in our opinion, waive, and cannot be held to have waived, his right to appoint within the 20 clear days. The 20 clear days were obviously provided by business men for business people to enable full reflection before taking a final step, and before being bound by the very serious penalty of having the whole of their rights submitted to a person who might be a partisan of their opponent. We think that, in spite of their refusal to appoint during the period, they had a *locus pœnitentiæ* They might in the interval have been better advised; they might have chosen to change their minds and in our view an appointment made at any time up to the end of the 26th of February assuming that they received the notice on the 5th of February, would have been a good appointment, in spite of their previous correspondence. The result is that the award ceases to have any legal effect. There was no arbitrator in the eyes of the law; he could not arbitrate and his award is worthless.

For my part, I think, the notice to appoint was bad on another ground. It called upon the other party to appoint a man to meet the arbitrator already appointed on a fixed date. Apart from the fact that one arbitrator could not make a decision of that kind until he had lawfully become the sole arbitrator, the notice limited the other party to the choice of an arbitrator who could make it convenient to attend on the 25th of February. There is nothing in the provision for calling upon the other party to appoint an aribtrator which enables a party to imopse restrictions upon his freedom of action or to restrict his choice in this way.

It further appears, (but in this matter I think it doubtful whether the question can be raised upon an application for filing an award, it might be necessary for the party objecting to move the Court to set aside the award on the ground of misconduct,) that there does appear to be reason for thinking that this award was not properly obtained because the other party were not given any real opportunity of being heard. I merely mention this matter because it seems to me that the rules of the Association, while endeavouring to carry out a very laudable object, have not clearly kept in view the pitfalls into which parties are liable to fall, unless they walk with circumspection. There seems to have been a confusion of thought between the right to appoint a sole arbitrator which is one thing and entitling him to sit alone without hearing the other side, and so deciding the matter entirely on the evidence laid before him by one side. There was stronger reason for giving the other side an opportunity of being present and presenting their case in the very fact that they had no representative upon the arbitration tribunal. It is

(4) (1886) 16 Q. B. D. 460 at p. 467; 55 L. J. Q. B. 162; 54 L. T. 629; 34 W. R. 238; 50 J. P. 694.

really not necessary to decide any other point and I should not refer to it if it had not been necessarily raised and been involved in questions which arise in a matter which I shall have to refer to in a moment because it has been argued with these four revisions. I refer to the execution case. It seems to me that in any event there is a formidable objection to this award upon the ground that it is not enforceable as an award. I agree with the view expressed in *Ram Narain Gunga Bissen* v. *Liladhur Towjee* (2) following the English case *Bankruptcy Notice, In re* (5), that when the Court is asked to enforce an award, it has to see whether it is enforceable in the same way as a decree would be enforceable if it were a decree. This award is remarkable in itself. Whether it is an illustration of the sort of oversight into which a commercial man may fall even in matters familiar to him when he is in a hurry, or whether it is a warning to an arbitrator that two heads are better than one, does not really matter, but all that the award really does, while deciding against the absent party all objections on the merits, is to direct the contract to be carried out. No Court could execute a decree of this kind in a case of sale of goods. What is to happen if delivery is not made? The award is silent. What is to happen if the money for the goods is not forthcoming? The award is silent! What is to happen if the goods are destroyed by the act of God before the time for complying with the Court's order for execution arrives? Again the award is silent. The respondents seemed to me to suggest at one time that it was the business of the execution Court to supply deficiencies. If that is the argument I entirely reject it. It seems to me that that is doing just what the English Court of appeal, in the case quoted, decided could not be done, namely, turning it into a workable decree when the award had left it unworkable. In my view section 13 was intended to meet such a case and section 13 gives power to the Court to remit to the arbitrator and, as at present advised, I think this power may be exercised either when an application is made to file the award, or when an application is made to enforce the award, or when an application is made to enforce the award, or when an application is made by the resisting party on an objection that the award as filed is not workable. In either of these cases the Court may remit the award for the reconsideration of the arbitrator. If that had been done, a great deal of argument would have been saved but the effect of the order which we are now making will be to achieve much the same result. We hold that this award as it stands is worthless and ought not to be enforced or filed. In my view the learned Judge having before him clear, uncontradicted evidence that the award according to the proper construction of the submission was not a legal document at all, and that the arbitrator as such had no jurisdiction, was bound to refuse to file the award, and, therefore, in my view, assuming that there is no appeal, he has exercised a jurisdiction which he did not possess in filing the award, and the case is brought within the express language of section 115. It is further to be observed according to the decision in *Stone & Hastie, In re* (6), the objection that the arbitrator had no jurisdiction may be taken and decided upon an application to enforce the award. That was decided by the English Court of Appeal upon a provision of the English Arbitration Act which is in precisely similar language.

But there is even now nothing to prevent the parties from going to arbitration. Indeed, somehow or another, the disputes which have arisen between them must be eventually decided, and unless they now mutually agree to have recourse to the Courts, no law Court could entertain a suit in the face of this submission. I think they would be well-advised to start again with fresh notices and it is for this reason that I have expressed my views that the notice given to Sukhamal-Bansidhar was, in various ways, a bad one. The result of that is, that Execution First Appeal No. 399 which has been argued before us together with and as part of this revision, must be allowed and the order in that case necessarily falls to the ground, although I should otherwise have felt great difficulty in dealing with it, it being merely, as I understand, a refusal to grant stay of execution. In my

(5) (1907) 1 K. B. 478; 76 L. J. K. B. 171; 96 L. T. 181; 14 Manson 1; 23 T. L. R. 214.

(6) (1903) 2 K. B. 463; 89 L. T. 353; 72 L J. K. B. 846; 52 W. R. 130; 63 J. P. 44; 19 T. L. R. 654.

view the applicants, although they have succeeded in this application more by the mistakes of their opponents than anything else, have been stupid and obstinate; stupid, in refusing to appoint an arbitrator when they had clearly agreed to do so and when they no doubt could have got a little more time allowed them if that was their real difficulty; obstinate, in persisting throughout that they had never submitted to arbitration when they clearly had done so from the first. On these grounds I think that, notwithstanding that they have succeeded, they ought to pay their own costs in all the cases in both Courts.

PIGGOTT, J.—In dealing, as briefly as possible, with the somewhat complicated matters which have been argued out before us in connection with these applications, I prefer to begin by asking myself what the District Judge ought to have done at each stage in connection with the various applications presented to him. The matter came before him under section 11, clause 2, of the Indian Arbitration Act, No. IX of 1899, on a petition presented by the gentleman who claimed to be the sole arbitrator in this dispute between the parties. Objections were immediately taken by the firm of Sukhamal Bansidhar. The first point raised by those objections was that there had never been a submission binding on the parties, within the meaning of the definition in section 4 of Act No. IX of 1899. That question, if tried out separately, should have resulted in an order holding that there had been a valid submission to arbitration binding upon both parties. Had such a finding been separately recorded, and embodied in a formal order, it is at least possible that Messrs. Sukhamal Bansidhar would have reconsidered their position, at least to the extent of asking the District Judge to remit the award for re-consideration.

The next point was whether, on the terms of the submission by which both parties were bound, the gentleman who presented what he called his award to be filed in Court had or had not been properly and regularly appointed and empowered to act as sole arbitrator. The discussion on this point was complicated in the Court below by the curious interpretation sought to be put on a part of clause 15 in the arbitration agreement between the parties. I take it to be beyond question that this clause must be read as a whole, and if possible so as to avoid any irreconcilable conflict between different portions of it. I agree with Mr. Justice Walsh that this clause, superseding for practical purposes section 9 of the Arbitration Act itself, gave the present applicants a right to demand 20 clear days' notice within which they had a right to appoint an arbitrator to act on their behalf. The whole proceedings of the arbitrator himself and the argument which took place thereon in the Court below, seem to me to have got off the lines, because this important stipulation was ignored and stress was laid on a provision which follows, making it obligatory on the party raising a dispute to see that a "survey" takes place within 20 clear days of his letter raising the dispute. This clause can only be reconciled with the preceding by presuming that the "survey" therein referred to is an actual inspection of the goods, where such inspection is considered by either party to be a necessary preliminary to the settlement of the dispute between them. It cannot, in this particular context, refer to the arbitration itself; because the arbitration could not be completed within 20 days of the beginning of the dispute, after the party seeking arbitration had given the opposite party 20 clear days' notice within which to appoint its own arbitrator. Moreover, the penalty attached to failure to take steps for obtaining a "survey" within 20 days is, that the party so failing loses the right to a survey. It could not have been the intention of the rules that, by mere negligence in asserting a right to claim arbitration, a party not desiring arbitration at all should be allowed to wriggle out of the submission. The question, therefore, as it was actually discussed by the learned District Judge, was complicated by the introduction of irrelevent matters and the argument in his Court seems to have got a great deal off the lines. I agree in substance with what Mr. Justice Walsh has said about this matter. I think the arbitrator appointed by the firm of Babu Lal Kedia and Company, though he may have acted in good faith and have conceived himself bound by the interpretation which he put upon the clause in the agreement

about a "survey" taking place within 20 days, did nevertheless offend against the provisions of the submission to arbitration when he took it upon himself to give the opposite party notice that he would proceed to determine the dispute, as sole arbitrator, on the 25th of February, if they failed to nominate their own arbitrator before that date, and whether or not they chose to enter an appearance before him. Having reached this point, the learned District Judge should have considered whether, under the circumstances, it was possible for him to remit the award for consideration by the gentleman who claimed to be sole arbitrator; whether it was not within his jurisdiction to do what we now suggest should be done, namely, to see that both parties were offered a full and fair opportunity of complying with the terms of the submission and of obtaining an adjudication upon their dispute before an Arbitration Tribunal regularly constituted in accordance with the terms of that submission.

I think, therefore, that the orders which have been passed by the District Judge in this case are not good orders, and that they are not just to the party which has brought the matter before us in revision. I have felt some difficulty in the course of argument as to whether we had jurisdiction to interfere in revision, once we came to the conclusion that there had been a valid submission to arbitration. It is arguable, on the one hand, that the dispute between the parties as to whether or not the terms of the submission had been duly complied with was one which the Legislature intended to leave to the determination of the Court before which it was raised, without any right of appeal or of revision. On the other hand, it seems to me a very arguable point whether the order complained of was not appealable under section 104 clause 1 (*f*) of the Code of Civil Procedure. I am very little impressed with the argument that the Indian Arbitration Act, No. IX of 1899, is a self contained Statute. It undoubtedly is so, in respect of all matters with which it expressly deals; and it is worth noticing that the framers of this Act went out of their way to provide that sections 523 to 526 of the former Code of Civil Procedure, Act No. XIV of 1882, corresponding with paragraphs 20 and 21 and other paragraphs of the 2nd Schedule to the present Civil Procedure Code (Act No. V of 1908), should not apply to arbitrations conducted under the provisions of this Act. They said nothing as to the applicability or otherwise of the sections of the Code of Civil Procedure dealing with appeals. When the present Civil Procedure Code was enacted, nine years after the passing of Act No. IX of 1899, the Legislature had an opportunity of making it clear beyond dispute that the appeal allowed by section 104 clause 1 (*f*) related only to orders passed for filing or refusing to file an award presented to the Court under the circumstances dealt with in the 2nd Schedule, but we find the clause in question worded in the widest possible term. It gives a right of appeal against an order filing an award in an arbitration without the intervention of the Court. Surely, an arbitration under Act No. IX of 1899 is nonetheless an arbitration without the intervention of the Court because it happens to be an arbitration governed by certain special provisions. I quite admit that there is something to be said on the other side, and I mention this matter because it raises a consideration which has materially influenced my decision in the cases now before us. In paragraph 21 of the 2nd Schedule to Act No. V of 1908 it is quite clear that the award is not filed until the Court has made an express order to that effect. On the other hand, section 11 of Act No. IX of 1899, speaks in very general terms of the arbitrators or umpire causing the award to be filed in the Court, and the wording of section 15, which follows, leaves it at least open to the contention that, unless the Court either remits the award for re-consideration to the arbitrator or umpire, or sees reason for setting it aside, the award will be filed, as it were, automatically, without any express order of the Court to that effect, and will become enforceable as if it were a decree by reason of the privisions of section 15 aforesaid. I wish to say, to begin with, that I do not stand committed by the order which we are about to pronounce to any final decision as to whether an appeal would or would not lie from a proceeding of a competent District Court which merely recorded a finding, by way of a declaration, that a certain paper presented to the Court,

on a certain date through a certain agency was a valid award by a properly constituted umpire or arbitrator under the provisions of Act No. IX of 1899. The order before us is one which expressly purports to file the award. Its operative portion is as follows:—

"It is ordered and decreed that the award be filed." The learned District Judge, therefore, in dealing with this case, did not take the alternative view which I have above suggested, but definitely conceived that the award of the sole arbitrator would not be filed and become operative as a decree of the Court unless he passed a formal order directing it to be filed. On this state of things my view is that, if the order of the Court below is a good one, it is an appealable order. If it is not an appealable order, the only reason that can be given for holding it to be not appealable is that it is an order which the Court below was not intended to pass under the provisions of Act No. IX of 1899 and which, therefore, in that view of the case, it could fairly be held that it had no jurisdiction to pass. Taking this view of the matter, I see no adequate reason why I should not concur in the order proposed by Mr. Justice Walsh, which I am quite satisfied meets the justice of the case.

I may add that, in my opinion, the award returned by the sole arbitrator in these matters, even if it were open to no other objection, was one which ought to have been remitted by the District Judge for re consideration As it stands, it is either a mere declaration of the respective rights and liabilities of the parties in respect of a particular contract, or it is an attempt to pass a sort of order or decree for specific performance, in a matter in which no such decree can be passed in law. No doubt, an arbitrator, duly appointed by the parties, may commit errors of law, as well as in the decision of questions of fact, and the parties will be bound by the errors so committed. But the application of that principle to the facts of this case would be most unfortunate, not to the applicants in revision but to the opposite party. In my opinion, this award, as it stands, and as the Court below has directed it to be filed, would not be enforceable at all if it were a decree of Court. More particularly, it would not be enforceable in the way in which the opposite party have sought to enforce it, namely, as if it were a simple money decree ordering the payment of a certain sum of money by one party to the other. For this reason, also, I am well content to concur in the orders proposed by my learned brother.

BY THE COURT.—The order of the Court is, that these applications are allowed; that the order of the learned Judge directing the award to be filed is set aside; that this Court declares the award to be invalid and the order directing a stay of execution is also set aside. Both parties will pay their own costs in both Courts.

Applications allowed.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 58 OF 1920.

May 13, 1920.

Present:—Mr. Shadi Lal, Chief Justice, and Mr. Justice Wilberforce.

GIASU, MINOR, THROUGH TEJA, HIS GRAND-FATHER, AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HAR DIAL—DEFENDANT—RESPONDENT.

Custom—Adoption—Burden of proof—Jats of Gurgaon District—Adoption, whether formal—Presumption—Adopted son, status of—Male lineal descendant—Succession to occupancy rights—Punjab Tenancy Act (XVI of 1887), s. 59.

Where the question of adoption is in dispute, the onus is on the claimant to establish his status as adopted son [p. 83, col .]

Customary adoption of an heir is almost unknown in the districts which formed part of the old Delhi Territory. [p. 84, col.]

Where, therefore, adoption is proved to have taken place among Jats of the Gurgaon District the presumption is that the adoption was a formal one. [p. 84, col. .]

One *T.*, a Jat of the Gurgaon District, having died, plaintiffs-landlords sued for possession of certain occupancy land held by *T.* The defendant resisted the suit on the ground that he was the adopted son of *T.* The adoption of the defendant by *T.* was proved:

Held, that the adoption being a formal one the defendant must be regarded as a male lineal descendant of *T.* within the meaning of section 59 of the Tenancy Act and the landlords had no right to the possession of the land as against him. [p. 84, cols. 1 & 2.]

GIASU v. HAR DIAL.

Letters Patent Appeal against the judgment of Mr. Justice Broadway, passed on the 19th February 1920, in Civil Appeal No. 2112 of 1918.

Lala *Durga Das*, for the Appellants.

Mr. *Nanak Chand*, Pandit, for the Respondent.

JUDGMENT.—The dispute in this case relates to the occupancy rights of one Tirkha, a Jat of the Gurgaon District, who died some time in 1883 or 1884, and the question for determination is, whether the defendant Har Dial, who resists the suit of the landlords, was adopted by Tirkha as his son, and is consequently entitled to succeed to the occupancy rights under section 59 of the Punjab Tenancy Act. Now, it appears that the District Judge endorsed the view of the Trial Court that "the burden of proving that the adoption did not take place" was on the plaintiffs, and he accordingly held that it was "quite clear from the evidence on the file that the plaintiffs had failed to discharge the onus." The learned Judge then proceeded to discuss the evidence adduced by both the parties and reached the conclusion that Har Dial was the adopted son of Tirkha.

There can be no doubt that the onus was clearly on the defendant to establish his status as the adopted son of the deceased Tirkha's, but we are not quite clear as to whether the District Judge, in arriving at his conclusion, was influenced by his erroneous view as to the allocation of the onus. We have accordingly heard the case on the merits, and are of opinion that the defendant Har Dial has succeeded in establishing his adoption by Tirkha.

There is some oral evidence in support of the defendant's allegation, but considering that the adoption took place nearly 40 years ago, it could hardly be expected that witnesses should come forward and give direct evidence on the subject. We, however, find that there were at least three different occasions on which the question of adoption came up for investigation before the Revenue Authorities, and that, practically, all the proprietors of the village, including the *lambardars*, admitted that Har Dial was the adopted son of Tirkha. It appears that Har Dial had been recorded in the revenue papers as the son of his natural father, Shadi, and he, therefore, represented in 1905 that his parentage had been wrongly recorded, and applied to the Revenue Officer that the revenue records should be corrected and that he should be entered as the son of his adoptive father Tirkha. The order passed by the Revenue Officer on the 25th November 1905 and the report of the *patwari* make it absolutely clear that all the *lambardars* and land-owners testified to the adoption, with the result that the application was granted and the entry as to parentage was corrected. The second occasion, when the matter came up for consideration, was in connection with a mutation with respect to the occupancy holding. It is common ground that Tirkha, during his lifetime, had transferrrd his proprietary holding to Har Dial; but it seems that the occupancy holding was on his death mutated in favour of his two widows, and that on the death of one of the widows her share was recorded in the name of the surviving widow, *Musammat* Bijian. In 1906 Har Dial, who was apparently in possession of the land, came forward and applied that the occupancy holding should be recorded in his name in the revenue papers. An inquiry was made into his allegation that he was the adopted son of Tirkha, and the mutation order shows that eight *biswadars*, including some of the plaintiffs, supported his version. But, in view of a compromise made with *Musammat* Bijian, a moiety of the holding was recorded in the name of Har Dial and the rest continued to be recorded in the name of *Musammat* Bijian in lieu of her maintenance. Lastly, the question was again considered when *Musammat* Bijian died about the end of 1906, and the proprietors again admitted the adoption, and consequently mutation was effected in January 1907 in favour of Har Dial in respect of the portion of the occupancy holding which was previously recorded in the name of *Musammat* Bijian.

It is significant that the landlords did not bring the present action until the 16th November 1916, and that, during this period of nearly ten years, they not only allowed Har Dial to remain in undisturbed possession of the land, but recognised his status as occupancy tenant by realising rent from him. This admission by conduct, along with the admissions of his status on the three occasions referred to above, points conclusively to the fact that all the persons in the village regarded Har Dial as the duly adopted son of Tirkha.

ABDULLA *v.* AKHIL CHANDRA BISWAS.

As against the evidence set out above, we have only the two following facts:—The first is that, until 1905, Har Dial was shown in the revenue papers as the son of his natural father. In view of the correction made in that year and of the admissions made by the *lambardars* and the proprietors on that occasion, we are not inclined to attach much importance to the revenue entries prior to the year 1905. The second circumstance is that, Har Dial allowed the widows of the deceased Tirkha to be recorded in the revenue papers as occupancy tenants in lieu of their deceased husband. This circumstance loses much of its force when we remember that Har Dial succeeded in getting a mutation in 1906 in his own favour with respect to one-half of the holding. It must, further, be remembered that the widows were entitled to maintenance and the adopted son did not probably consider it proper to go against their wishes in the matter of mutation with respect to the occupancy holding when he had already got the entire proprietary holding. Be that as it may, we are not prepared to hold that these circumstances are sufficient to rebut the evidence afforded by the admissions of some of the plaintiffs and their long silence and conduct during the ten years preceding the suit. We accordingly hold that Har Dial was duly adopted by Tirkha and must be regarded as his heir.

If, as we hold, Har Dial is the adopted son of Tirkha, then, considering that the deceased belonged to Gurgaon District, the presumption would be that the adoption was a formal one, because the customary appointment of an heir is almost unknown in the districts which formed part of the old Delhi Territory. As pointed out in *Mansa* v. *Surta* (1), (a judgment dealing with an adoption among Jats of the Rohtak District) "in the Rohtak District, in common with other parts of the old Delhi Territory, adoption, when effected, is of a formal nature and not the mere customary appointment of an heir such as is usually met with in the Punjab proper; and the adopted son merges in his new family." That being the case, Har Dial must be regarded, as laid down in *Dani Chand* v. *Musammat Padman* (2), as a male lineal descendant of the deceased Tirkha within the meaning of section 5 of the Tenancy Act, and the landlords have no right to the possession of the land as against him. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 4 Ind. Cas. 853; 69 P. R. 1909; 170 P. W. R. 1909; 16 P. L. R. 1910.

(2) 19 Ind. Cas. 40; 2 P. R. 1913; 30 P. W. R. 1913; 71 P. L. R. 1913.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1486 OF 1917.

May 22, 1919.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Duval.

ABDULLA (MEA)—DEFENDANT—APPELLANT

versus

AKHIL CHANDRA BISWAS, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES NABIN CHANDRA BISWAS, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Suit for ejectment withdrawn without leave to bring fresh suit—Subsequent suit for possession on different ground, whether barred.

The fact that a suit for ejectment on the ground that defendant was a trespasser and had no right whatever to the land and in which the defendant raised the defence that he had a tenancy right in the land and could not be ejected, was withdrawn without liberty to bring a fresh suit in respect of the same subject-matter, does not operate as a bar under Order XXIII, rule 1 of the Civil Procedure Code, to a subsequent suit for possession in which the plaintiff states that he is entitled to possession on the ground that the tenancy of the defendant had been determined by service of notice to quit.

Appeal against the decree of the District Judge, Chittagong, dated the 18th of June 1917, affirming that of the Subordinate Judge, 1st Court, of that district, dated the 25th of April 1916.

Babus *Bepin Behary Ghose, Chandra S. Sen, Khitish Ch. Sen*, for the Appellant.

Mr. *U. N. Sen Gupta*, Babus *Khitish Ch. Chuckerburty, Probodh K. Das*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for ejectment of the defendant from a piece of land (10 cubits by 22 cubits) situated in the town of Chittagong.

The Court of first instance gave a decree to the plaintiff for the western portion of the

land and dismissed his claim with regard to the eastern portion. The decree has been affirmed on appeal.

The defendant has preferred this appeal and the plaintiff has filed a cross-objection.

It appears that a previous suit was instituted by the plaintiff against the defendant for ejectment. It is not clear from the judgment of the lower Court whether the whole of the land now in dispute was in dispute in the previous suit. But it is not very material to go into the question, because the previous suit was brought by the plaintiff for ejectment on the ground that the defendant was a trespasser and that he had no right whatever to the land. In the present suit also, in the first portion of prayer (*Ka*), the plaintiff claims possession on the very same ground, but in the latter portion, he says that he is entitled to possession on the ground that the tenancy of the defendant had been determined by service of notice to quit if the defendant set up any tenancy.

The previous suit was withdrawn by the plaintiff without liberty to bring a fresh suit in respect of the same subject matter. In that suit the defendants raised the defence that they had a tenancy right in the land and could not be ejected. The question was decided in favour of the defendants, but the decision cannot prevent the plaintiff from bringing this suit, because the plaintiff proceed to determine the tenancy which was set up by the defendant in that suit by service of notice to quit and then brought this suit for recovery of possession on that footing. It was not necessary for the Court to decide in the previous suit the exact nature of the defendant's tenancy; in other words, whether the tenants were permanent or not. In this view of the matter, we are unable to hold that the plaintiff is precluded from bringing the suit under Order XXIII, rule 1.

The Courts below have found that the defendant has got a *kaimi* right to a portion of the land in respect of which the plaintiff's claim has been dismissed. With regard to the western portion in respect of which the claim, as stated above, has been decreed, the defendant set up the same title as he did with regard to the eastern portion and it was his case that he and his predecessor-in title were in possession thereof for over 12 years. The Court of first instance found that the defendant purchased in 1903 and that he encroached after his purchase. Apparently, the learned Subordinate Judge was of opinion that the plaintiff was in possession within 12 years of the suit because in his opinion the defendant's encroachment was within that period.

On appeal, it was contended before the learned District Judge on behalf of the defendant that the defendant and his predecessors were in possession for over 12 years. The learned Judge was of opinion that even if the defendant and his predecessors were in possession for more than 12 years, they were so as trespassers by virtue of surreptitious encroachment and that, therefore, limitation would not apply.

We think that the question of surreptitious encroachment does not affect the matter. If the defendant and his predecessors in title encroached upon the land adjoining the lands of their tenancy and held the same for 12 years, they acquired a limited interest in the property by prescription as they did not set up any title adverse to the *maliki* right of the plaintiff. The learned Judge has not come to any finding upon the question whether the defendant and his predecessors-in-title were in possession for 12 years. If they were in such possession, the plaintiff's title to *khas* possession would be barred.

It has been pointed out that the *Dokan Ghar* which is on the disputed land has been on the land since the year 1898 when the cadastral survey took place though it is not mentioned in the Record of Rights. This will be taken into consideration by the lower Appellate Court along with other evidence in the case.

The plaintiff's cross-objection relates to the eastern portion of the land in respect of which his claim has been dismissed by the Courts below.

It is contended before us that the Courts below are wrong in holding that that portion of the claim is barred by the doctrine of *res judicata*.

The previous suit, as stated above, was withdrawn without liberty to bring a fresh suit. The question of *res judicata*, therefore, does not arise: and, had the decision of the Court below rested merely on the ground of *res judicata*, that judgment would have had to be set aside. It appears, however, that both the Courts below have considered the evidence as to the nature of the

defendant's right to the eastern portion of the land and they have come to the conclusion that the defendant had a *kaimi* right. We do not see any reason for disturbing that finding of the Courts below.

The cross objection must, therefore, be disallowed.

The result is, that the decree of the lower Appellate Court, in so far as it relates to the eastern portion of the land, will stand and the case will be remanded to that Court in order that the Court may come to a finding upon the question of limitation so far as the claim for *khas* possession is concerned and then dispose of the claim with regard to the western portion in accordance with the result of that finding.

Costs will abide the result.

Case remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 418 OF 191 .

March 8, 1920.

Present :—Mr. Justice Seshagiri Aiyar.

ARUNACHELLAM CHETTY—DECREE-HOLDER—PETITIONER

versus

SOMASUNDARAM CHETTY, BY HIS AGENT, K. V. LAKSHAMANA AIYER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 72—Rival decree-holders—Rateable distribution—Permission to bid and to set off—Right of other decree-holders, whether affected.

A. and *B.* held decrees against a common judgment-debtor. *B.* obtained permission to bid at the sale of the judgment-debtor's property, and to set off his claim under his decree against the purchase-money. He purchased one item of property but did not deposit the purchase-money, another item was sold to a stranger who deposited the purchase-money. *A.* applied for rateable distribution but his application was disallowed in respect of the purchase by *B.*:

Held, that *A.* was entitled to rateable distribution in respect of both purchases, as the permission to set off granted to *B.* did not affect *A.*'s right to such distribution.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the order, dated 19th December 1918, of the Court of the District Munsif, Nammakkal, in Execution Appeal No. 971 of 1918, in Execution Petition No. 538 of 1918.

FACTS appear from the judgment.

Mr. *K. Sankara Sastri*, for the Petitioner.—The lower Court erred in holding that petitioner was not entitled to rateable distribution. Permission to bid and set off given to a decree-holder does not preclude the rival decree holder from claiming rateable distribution. There is nothing in Order XXI, rule 72, Civil Procedure Code, against the exercise of such a right. In fact the rights of competing decree-holders under section 73 are preserved.

The respondent was not represented.

JUDGMENT.—Petitioner and the counter-petitioner had decrees against a common judgment debtor. Permission was granted by the Court to the counter petitioner to bid at the auction and to set off his claim under the decree against the purchase-money. In pursuance of the permission, counter petitioner purchased, on 28th August 1918, one item of the judgment-debtor's property. On the same date another property was sold to a stranger and he deposited the money on 10th September 1918. Apparently, the counter-petitioner did not deposit the money. Petitioner applied for rateable distribution on 29th August 1918. The lower Court has held that the petitioner is not entitled to rateable distribution in respect of the purchase money payable by the counter-petitioner. I think he is wrong. Under Order XXI, rule 72 permission to bid and to set off are made subject to the rights of decree-holders under section 73. There is nothing before me to show that the permission in the present case was of a different character. In my opinion, the permission to set off does not affect the right of a rival decree holder to rateable distribution. See also *Bijoy Kumar Addya* v. *Rama Nath Barman* (1).

The judgment of the District Munsif, in so far as it disallows rateable distribution, is reversed and the case remitted to him for fresh disposal in the light of the above observations. Costs will abide the result.

M. C. P.

Petition allowed.

(1) 43 Ind. Cas. 715.

MATHURA SAHU *v.* CHANDRADIP SINGH.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES
Nos. 1448, 1449, 1450 AND 1451 OF 1918.
August 12, 1920.

Present:—Mr. Justice Adami,

MATHURA SAHU AND OTHERS—
APPELLANTS
versus
Babu CHANDRADIP SINGH AND OTHERS—
RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 22 (2) —Occupancy holding purchased by co-proprietor—Purchaser, position of—Partition, effect of.

Where an occupancy holding is purchased by a co-proprietor it virtually becomes the *bakasht* land of the co-sharers which the purchasing co-sharer is allowed under section 22 (2) of the Bengal Tenancy Act to keep apart for himself on condition of paying rent to his co-sharers. On a partition among the co-sharers the land is liable to be allotted as *bakasht* to the co-sharer in whose *patti* it is situate and the purchasing co-sharer is not entitled to continue in possession of it. [p. 88, col. 2.]

Appeal from a decision of the Additional District Judge, Shahabad, dated the 27th August 1918, reversing a decision of the Munsif, 3rd Court, Arrah, dated the 27th July 1917.

Messrs. *Rajendra Prasad* and *H. Sahay*, for the Appellants.

Mr. *L. N. Singh*, for Mr. *J. G. P. Singh*, and Mr. *H. P. Sinha*, for the Respondents.

JUDGMENT.—The facts of the case giving rise to these second appeals are shortly as follows:—

The plaintiffs and defendants, who were co-sharer *maliks* at the time, held a mortgage of the four annas share of another co-sharer *malik* of the villages of Semraon and Akhari, and while the mortgage still continued purchased the occupancy holdings of certain tenants comprised in the mortgaged share. In course of time, in 1305, the mortgagor instituted a suit for redemption which resulted in the High Court deciding that the mortgagor was entitled to treat the holdings purchased by the mortgagees as accessions to the mortgaged property, and to obtain possession of them on paying the purchase money. It seems that the purchase-money was not paid and the plaintiffs continued in possession of those holdings. In the Survey and Settlement records the plaintiffs were shown as holding the lands under section 22 (2) of the Bengal Tenancy Act and the *khatian* described the lands as their *bakasht*. After the publication of the Record of Rights there was a partition in 1916, between the co-sharers, and the 9·65 acres of land purchased by the plaintiffs fell into the *patti* allotted to the defendants, who tried to take possession.

Proceedings under section 144, Criminal Procedure Code followed, resulting in an order against the plaintiffs, who then instituted the four suits out of which these second appeals arise. The plaintiffs claimed that they were entitled to retain possession of the lands as occupancy tenants paying rent to the defendants, and sought for confirmation or recovery of possession. The defendants contested the suits on the ground that the lands were *bakasht* and had fallen into their *patti* under the partition.

It appears that in the Settlement Record and in the *batwara* the land in dispute has been recorded as '*bakasht*' and in the *khewat* (Exhibit 5) the plaintiffs are recorded as intermediate tenure holders by virtue of purchase under section 22 (2) of the Bengal Tenancy Act.

The Munsif dismissed the suits, finding that no custom of transferability without the consent of the landlord existed in the villages, and also that the purchases came under section 22 (1) of the Bengal Tenancy Act. He relied on the judgment of the High Court in the previous redemption suit.

On appeal, the learned District Judge held that the occupancy holdings were transferable by custom without the landlord's consent, and that the plaintiffs purchased the holdings as co-sharer *maliks* and not as mortgagees and, therefore, the purchases were controlled by sub-section (2) and not by sub section (1) of section 22 of the Bengal Tenancy Act. It was decided that under the former sub-section the plaintiffs were entitled to continue in possession of the disputed lands as tenants paying rent to the other co-sharers. He held that the suits were not barred by the provisions of the Estates Partition Act, 1897. The plaintiffs' suits were, therefore, decreed.

MATHURA SAHU *v.* CHANDRADIP SINGH.

Before me it is contended that, in the first place, the suits were barred under the provisions of section 119 of the Estates Partition Act; secondly, that the purchased holdings, being accessions to the mortgaged property as decided by the High Court, after their purchase would be accessions to the proprietary right and would not be accessions to any tenancy right: thirdly, that under section 22 (2) of the Bengal Tenancy Act, after purchase by the co-sharer the holdings were divested of any occupancy right and so the plaintiffs could not claim right of occupancy, and lastly, that as the partition of the properties had been allowed by the plaintiffs, who were parties, to proceed on the basis that the lands in dispute were *bakasht* lands, the plaintiffs could not now come forward and claim that the lands were their *raiyati* holdings.

With regard to the first contention it is argued that the plaintiffs' claim is practically to upset the partition order, since in the partition the lands in dispute were reckoned as *bakasht* lands, and the effect of declaring them to be the *raiyati* lands of the plaintiffs would be to disturb the partition. The case of *Gurbuksh Prosad* v. *Kali Prosad Narain Singh* (1) is relied on in contending that, under action 119 of the Estates Partition Act, 1897, the present suit is not maintainable.

The fourth contention of the learned Pleader for to the appellants may be considered here. The Settlement entry showed the lands to be *bakasht* and the partition proceeding followed this entry and yet the plaintiffs took no steps to protest and have the entry corrected. I cannot see that the plaintiffs can now come forward to claim a *raiyati* interest, and thus gain an advantage by upsetting the basis on which partition has been made. It would seem that the object for which section 119 of the Estates Partition Act was enacted would be frustrated if the suit were allowed to succeed.

I am of opinion that, in any case, the appeal must succeed in the second and third contentions. The District Judge has found, and I think rightly, that after the purchases the lands acquired would be governed by section 22 (2) of the Bengal Tenancy Act, but he has not taken into account the effect of the partition. Under that section, the purchasing co sharer is allowed to hold the purchased holding as tenant, but the holding is divested of its occupancy right, it is no longer an occupancy holding and a right of occupancy cannot accrue during the tenancy. The sub section does not tell us exactly what the nature of the tenancy will be except that it will not be an occupancy tenancy: it would seem to be a tenure according to the explanation to the sub-section. The condition laid down in the sub-section allowing the co sharer to be a tenant of the acquired holding is that he shall pay rent to the other co sharers proportionate to their shares. As soon as the estate is partitioned the co-sharers cease to exist, and it is then impossible to carry out the condition. It may be argued that after partition the whole of the rent would fall to the share of the co sharer to whom the *patti* is allotted, but then no account for this was made at the partition and the other co sharers could have good reason to complain as no provision was made to compensate them for the share of the rent which they would lose on partition.

Immediately before the partition, there was no occupancy right in the land, for the purchase had divested it of its character as an occupancy holding, and the right could not be revived by the partition. After the purchase of the holdings they were virtually *bakasat* lands of the co-sharers which the purchasing co-sharer was allowed to keep apart for himself on condition of paying rent to his co sharers, so that they shared in the profits.

On partition, the lands remained *bakasht* and were liable to be allotted as such to the co-sharer in whose *patti* they were situated.

I am of opinion that the plaintiffs were not entitled to retain possession of the lands in suit as occupancy tenants. No claim has been made as to compensation for the purchase money.

On the grounds given above, I allow the appeals and, setting aside the decree of

(1) 32 Ind. Cas. 167; 19 C. W. N. 1322.

the lower Appellate Court, restore that of the Munsif.

The appellants will get costs in all Courts.

Appeals allowed.

LAHORE HIGH COURT.

MATRIMONIAL REFERENCE No. 4 OF 1920.

October 16, 1920.

Present :—Mr. Justice Scott-Smith, Mr. Justice LeRossignol and Mr. Justice Abdul Raoof.

ETHEL MABEL EMILY HARRIS—PETITIONER

versus

Captain C. P. HARRIS, S. AND T. CORPS, BAGHDAD—RESPONDENT.

Divorce Act (IV of 1869), s. 17—Practice—Decree for dissolution of marriage, confirmation of—Notice to respondent, whether necessary.

In proceedings for confirmation of a decree *nisi* for dissolution of marriage it is not necessary that the respondent should be served with a notice thereof.

Hicks v. *Hicks*, 8 C. 756; 4 Ind. Dec. (N. S.) 488, followed.

Case referred by the Political Agent and District Judge, Quetta-Pishin, with his letter No. *nil*, dated January 1920, for confirmation of the decree *nisi* passed by him on the 17th January 1920.

Mr. *Philip Morton*, for the Petitioner.

ORDER.—The decree of the District Judge of Quetta-Pishin for the dissolution of marriage of Ethel Mabel Emily Harris with Captain C. P. Harris, Supply and Transport Corps, is before us for confirmation under section 17 of the Indian Divorce Act. The learned District Judge has held that adultery and cruelty on the part of the respondent have been sufficiently proved by evidence. We have considered the evidence on the record which consists chiefly of the statement of the petitioner and of certain letters written by the respondent to her. Her statement by itself, if believed, is sufficient proof both of adultery and cruelty, and if it be held that corroboration of her statement is necessary, we find it in the letters of the

respondent. The important passages of these letters are detailed in the judgment of the learned District Judge and we need not give them here. The respondent has not been served with a notice of these proceedings, but *Hicks* v. *Hicks* (1) is an authority to the effect that notice is not necessary. We, therefore, confirm the decree for dissolution of marriage passed by the District Judge, Quetta-Pishin, and direct that the petitioner's costs of these proceedings shall be borne by the respondent.

There is also an application by the petitioner that after the decree *nisi* has been confirmed this Court should order the respondent to make provision for the education and maintenance of his infant child and to pay to the petitioner permanent alimony. We cannot deal with this application at present as the respondent has not been served. If the petitioner desires that any further steps be taken, a further application should be made to this Court giving the present address of the respondent so that notice may be served upon him.

Decree confirmed.

(1) 8 C. 756; 4 Ind. Dec. (N. S.) 488.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1674 OF 1917.

May 1, 1919

Present :—Mr. Justice Newbould.

SIBNATH SAHA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MOHESH CHANDRA SAHA—PLAINTIFF—RESPONDENT.

Arbitration—Award not in terms of reference—Award incorporated in decree, effect of—Res judicata *—Partition—Easement of necessity, whether arises.*

The mere fact that an arbitration award is not strictly in accordance with the terms of the reference to arbitration, does not render the decree, in which the award is incorporated, void for want of jurisdiction, and the decree operates as *res judicata* to bar a subsequent suit in respect of the same cause of action.

SIBNATH SAHA *v.* MOHESH CHANDRA.

A right of easement by necessity arising out of a severance by partition arises from a presumed grant, but where the question of the rights of the parties has been definitely settled in a partition suit, no grant can be presumed.

Appeal against the decree of the Officiating Subordinte Judge, 2nd Court, Mymensing, dated the 26th of June 1917, reversing that of the Munsif, 3rd Court, at Kishoregunj, dated the 30th of June 1916.

Babu *Jogesh Chandra Ray*, Babu *Bhagirath Chandra Das*, for Babu *Gopal Chandra Das*, for the Appellants.

Dr. *Dwarkanath Chuckerbutty* (with him Babu *Satish Chandra Chowdhury*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit for a declaration of a right of way. The suit was dismissed by the Munsif and decreed on appeal by the Subordinate Judge and the defendants have preferred a second appeal to this Court.

The plaintiff and the defendants were co-sharers in a homestead and buildings thereon. There was a suit in which the present defendants were the plaintiffs and this joint property was partitioned by arbitrators and the suit decreed in terms of the arbitrator's award. In the reference to the arbitration there is a paragraph (paragraph No. 12) which runs as follows :—

"The passages leading from both houses should be kept intact by keeping them in *ijmali* in proportion to their respective *sahams*."

It is admitted that the pathway over which the right of way is now claimed, was in existence before the partition suit. But in making their award, the arbitrators, though they have reserved an area of a little less than 2 *bighas* as *ijmali* for roads, privy and tanks, did not include this path in the portion reserved.

It appears to me that the appellants are right in their contention that this decision in the partition suit operates as *res judicata* against the plaintiff. It may be that, having regard to the paragraph I have quoted from the *achalnama*, the arbitrators were wrong in not reserving this path also. But the remedy of the plaintiff in the present suit was by an objection to the award. Once the award is incorporated in the decree of the Court, it cannot be said that the decree is void for want of jurisdiction, because, the award was not strictly in accordance with the terms of the *achalnama*. The learned Subordinate Judge has been misled by thinking that the arbitrators in their award ordered that all the existing pathways should remain joint. The award has been read out to me and I find that it contains no such provision. The award expressly states what portions are reserved as *ijmali* and what portions are allotted to the parties in the suit, and the land over which the pathway is claimed was allotted to the present defendants as part of their exclusive property.

Then, again, the learned Subordinate Judge is wrong in saying that "the question of *res judicata* does not arise as there was no wall like the present one and no obstruction on the admitted pathway in suit when the partition suit was tried." The decree in the partition suit having given the defendants a right to the land on which the wall is built, the plaintiff can have no cause of action against them for building a wall on their own land.

It is also suggested that the plaintiff has a right of easement by necessity arising out of the severance by partition. But such easement would arise from a presumed grant and no grant can be presumed when the question of the rights of way of the parties over the land partitioned, has been definitely settled in the partition suit. It is unnecessary to consider the other points taken by the learned Vakil for the appellant in this appeal, namely, that the plaintiff's remedy was by an objection in the execution proceedings and not by a suit, secondly, that the lower Appellate Court has come to no finding as to an arrangement between the parties which was found to have been made by the Court of first instance and, thirdly, that the decision of the lower Appellate Court is bad because there is no finding arrived at as to the width of the road.

The appeal must, therefore, be decreed and the judgment and decree of the lower Appellate Court reversed and the decree of the Munsif dismissing the suit restored.

The appellants will get their costs in this Court and also in the lower Appellate Court.

Appeal decreed.

VENKATACHALAM CHETTY *v.* RAMA MUDALI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 218 OF 1919.

April 15, 1920.

Present:—Sir John Wallis, KT., Chief Justice and Mr. Justice Spencer.

VENKATACHALAM CHETTY—PLAINTIFF—APPELLANT

versus

RAMA MUDALI AND OTHERS—DEFENDANTS NOS. 5 AND 7 AND LEGAL REPRESENTATIVES OF DEFENDANTS NOS. 4 AND 6—RESPONDENTS.

Hindu Law—Widow, re-marriage of, effect of, on rights to former husband's estate—Consent decree, against re-married widow, whether binding on former husband's property.

Under Hindu Law, a widow forfeits her status as a widow by her re-marriage and she also forfeits all rights to her former husband's property which thereupon vests in his next reversioner. [p. 92, col. 1.]

Vilta Tayaramma v. *Chatakondu Sivayya*, 48 Ind. Cas. 50; 41 M. 1078; 35 M. L. J. 317; 24 M. L. T. 183; (1918) M. W. N. 625; 8 L. W. 480, followed.

A re-married Hindu widow is incompetent to enter into a consent decree so as to bind her former husband's estate as she represents that estate only so long as it is vested in her and ceases to represent it when she has divested herself of it. [p. 92, col. 1.]

Second appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 22 of 1918, preferred against the decree of the Court of the Additional District Munsif, Erode, in Original Suit No. 747 of 1916, (Original Suit No. 1988 of 1916 on the file of the Court of the Principal District Munsif, Erode).

This second appeal coming on for hearing on the 26th November 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit, and upon hearing the arguments of Mr. *T. M. Krishnaswami Aiyar*, for the Appellant, and of Mr. *N. P. Narasimha Aiyar*, for the 3rd, 4th and 5th Respondents and the other Respondents not appearing in person or by Pleader, it is ordered that the District Judge of Coimbatore do within two months from the date of the receipt of records submit a finding as to "*Whether Perumal's widow Muthayee was re-married as alleged and at what date*," and that the parties be at liberty to adduce fresh evidence and file objection to the finding within seven days after notice of return of the same shall have been posted up in this Court; and it is further ordered that the respondents do pay to the appellant the costs of the finding proceedings here and in the Court below in any event.

In compliance with the above order, the District Judge of Coimbatore submitted the following

FINDING.—A finding has been called for on the question whether Perumal's widow Muthayee was re-married as alleged and at what date.

Defendants have examined six witnesses (defendant's witnesses Nos. 5 to 10). Plaintiff has examined three (plaintiff's witnesses Nos. 7, 8 and 9).

2. Defendants' case is that Muthayee was re-married in Karthigai 1913. This is sworn to by her father (defendant's witness No. 5) whose evidence I see no reason to disbelieve. There can be no doubt that Muthayee and Kailasa Mudali have been living together for over six years and that they have a son aged about 4. As re-marriage is permitted in their caste, and Kailasa Mudali does not appear to have another wife, there is a strong probability that he and Muthayee are married.

Defendants' witness No. 6 is a Kariyakar of their caste. He states that he celebrated the marriage in Karthigai six or seven years ago. No doubt it was his father's duty to perform the ceremony, but it is clear from the evidence of plaintiff's witness No. 9 that the father used to delegate his duties to his sons. Defendants' witness No. 7 tells the same story but does not know the month in which the marriage took place.

Defendants' witness No. 8 is related to Muthayee. He corroborates defendants' witnesses Nos. 5 and 7 as does defendants' witness No. 9. Defendants' witness No. 10 also speaks to the marriage, but he is engaged in trading with an interested party.

3. It is significant that the other side has not thought fit to examine Muthayee and Kailasa Mudali although they gave evidence for the defence in Original Suit No. 36 of 1915. The evidence of the other witnesses examined is of no value.

Plaintiff's witness No. 7, who denies that there was marriage, admits that Kailasa

Mudali has been keeping Muthayee and that they have a child aged four, plaintiff's witness No. 8 (Muthayee's uncle) admits that she has had a child, but professes not to know who the father is. Plaintiff's witness No. 9 is a Nattu Peria Thanakar of the Mudali caste. He says that, if there was a re-marriage, he should have been present at it. It is, however, clear that, at the time, he was living in another village. He does not deny that Muthayee and Kailasa Mudali are living together and have a child.

4. I accept without hesitation the evidence of the defence witnesses and find that Muthayee re-married in September 1913.

This second appeal coming on for final hearing, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—In this case a mortgage was executed by one Rangammal, who was the aunt of Perumal. It is found that she had no authority to execute the mortgage, that it was not for a necessary purpose, and that it was a collusive transaction. Subsequently, Perumal's widow was sued on this mortgage and in the course of the suit she re married as she was entitled to do by the custom of the caste. After her re marriage she was a party to a consent decree which was also found to have been collusive. The plaintiff in this suit is the purchaser of the mortgaged property in the sale under the consent decree. It has been held in a recent Full Bench case *Vitta Tayaramma* v. *Chatakondu Sivayya* (1) that under the Hindu Law, a widow forfeits her status as a widow by re-marriage and that she forfeits the property which thereupon vests in the next reversioner. A widow represents her husband's estate so long as it is vested in her; but when she has divested herself of it she, in our opinion, ceases to represent the estate and, therefore, she was incompetent to enter into this consent decree.

As regards the claim for Rs. 300 the finding of the Court of first instance, from which the District Judge does not dissent, is that Rangammal's mortgage was in part consideration of the debt of Rs. 300 due by Perumal. We must take it that, even so, it is not shown that it was for a necessary purpose and it is found to be collusive. The real object of the mortgage was to charge the minor's property for a debt of her own. In these circumstances, we do not think that the plaintiff is entitled to any relief on this account.

The appeal must be dismissed with costs. The costs of the finding proceedings in the lower Court will be borne by the respondents.

M. C. P.

Appeal dismissed.

(1) 48 Ind. Cas. 50; 41 M. 1078; 35 M. L. J. 317; 24 M. L. T. 183; (1918) M. W. N. 625; 8 L. W. 480.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1393 OF 1917.

June 29, 1920.

Present :—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

HAIT SINGH—PLAINTIFF—APPELLANT

versus

BEHARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 60—Mortgage—Redemption, suit for—Tender of mortgage-money before suit, whether necessary.

All that section 60 of the Transfer of Property Act means is that there is an inherent right in the mortgagor to require the mortgagee to deliver the mortgage-deed, etc., when the mortgagor pays the amount due at a proper time and place. It does not necessarily mean that before a suit for redemption can be instituted the amount must be paid or tendered. In other words his right to claim redemption on payment of the mortgage-money exists, although he has not yet made any tender, provided the mortgage-money has become payable. Where the mortgage-money is stated to have been satisfied out of the usufruct, a tender would obviously be out of question [p. 93, col. 2.]

Second Appeal from the decision of the District Judge, Agra, reversing a decree of the Subordinate Judge.

Messrs. *M. L. Agarwala* and *Baleshwari Prasad*, for the Appellant.

Messrs *T. A. Bradley*, *Surendra Nath Sen* and *Narain Prasad Asthana*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for redemption. It appears that on the 17th of November 1860 one Pirthi Singh made a mortgage of the property in dispute in this case in favour of one Nand Kishore and Gulab Singh. The mortgage-deed provided that the mortgagee was to remain in possession and was to pay Rs. 40 a year to the mortgagor and appropriate the balance of the profits in lieu of interest. The mortgage was not to be redeemed within 25 years. Subsequent to this, Pirthi Singh died and two of his sons and his widow, acting as guardian of his third minor son, executed a fresh mortgage deed of the whole property in favour of defendants Nos. 1 to 7, under which the previous mortgage-deed was redeemed and it was provided that, instead of Rs. 40 a year, only Rs. 25 should be paid to the mortgagor and the balance of the profits was to be appropriated by the mortgagee. On the 29th of March 1886 Ishri, the minor son having attained majority, transferred to the present plaintiff his one-third share in the property previously mortgaged. The plaintiff sued for redemption, alleging that the mortgage-deed of 1880 was not binding on him that the whole of the mortgage-money had been satisfied out of the usufruct of the mortgaged property, that he was entitled to recover possession of the property without payment of any amount and that, in fact, he was entitled to Rs. 475 as mesne profits. In the alternative the plaintiff said that if the Court held the mortgage of the 23rd of November 1880 to be binding on the plaintiff he should be given a decree for redemption of the mortgaged property on payment of the amount due from him. In paragraph 8 of the plaint the plaintiff based his cause of action on the date of the denial made by the defendants-mortgagees. Various pleas were taken in the written statement, one of which was to the effect that there having been no tender of the amount due on the mortgage before the suit, the suit was premature and not maintainable. The learned Subordinate Judge who tried the case ultimately decreed the suit directing that the amount of Rs. 1,689-14-, found to be due from the plaintiff to the defendants should be deposited in Court by the end of Baisakh following and that the plaintiff would be entitled to take possession in the next Jeth. The defendants appealed to the District Judge. The District Judge has allowed the appeal and dismissed the suit on the sole ground that there having been no previous tender of the mortgage-money due by the plaintiff before the institution of the suit, the suit was premature. He has not disposed of any other points raised in the appeal. The plaintiff comes up in second appeal to this Court and on his behalf it is contended that the view of the learned District Judge is not correct.

The right of the mortgagor to redeem is recognised by section 60 of the Transfer of Property Act. It says: "At any time after the principal money has become payable the mortgagor has a right on payment or tender at a proper time and place of the mortgage-money to require the mortgagee to deliver the mortgage deed, etc." As we read the section all that it means is that there is an inherent right in the mortgagor to require the mortgagee to deliver the mortgage-deed, etc, when the mortgagor pays the amount due at a proper time and place. It does not necessarily mean that before a suit for redemption can be instituted the amount must be paid or tendered. In other words, his right to claim redemption on payment of the mortgage-money exists, although he has not yet made any tender provided the mortgage money has become payable. Where the mortgage money is stated to have been satisfied out of the usufruct, a tender would obviously be out of question. In the case of *Bansi* v. *Girdhar Lal* (1), which is the earliest case on the point, it was held that in the case of a mortgage-deed of an agricultural land in which there was a condition that there would be no redemption without a payment in the month of Jeth, the plaintiff having failed to prove any offer or tender in the month of Jeth had failed to show that he had a cause of action to bring his suit for redemption. In a subsequent case of *Narsingha Singh* v. *Achhaibar Singh* (2) a Division Bench of this Court held that, in spite of a provision in the mortgage-deed that the mortgage was redeemable in Jeth, the conditional decree passed by the District Judge to the effect that on payment of the mortgage-debt possession was to be given to the

(1) A. W. N. (1894) 143.
(2) 22 Ind. Cas. 539; 11 A. L. J. 1004; 36 A. 36.

plaintiff in Jeth following was a proper decree in the case. The Bench distinguished the case of *Bansi* v. *Girdhar Lal* (1) by saying that in that case the plaintiff had failed to prove that he had made any offer or tender at any time before the suit, whereas in the case under consideration "the plaintiffs did make a tender of the amount they believed to be due under the mortgage of which they had purchased the equity of redemption." In the subsequent case of *Muhammad Ali* v. *Baldeo Pande* (3), on which great reliance is placed by the learned Advocate for the respondents, a Division Bench of this Court, following the case of *Bansi* v. *Girdhar Lal* (1), on second appeal dismissed the plaintiff's suit for redemption on the ground that a tender of the mort gage-money had not been made previous to the suit. It was there laid down that section 60 of the Transfer of Property Act clearly shows "that the right to recover possession does not arise until the mortgagor has at proper time and place paid or tendered the mortgege-money." The learned Judge went on to say that this rule is based on principles of justice, equity and good conscience, and "it seems, even as a matter of business or common sense, that a mortgagor has no right to institute a suit for redemption unless and until he has tendered to the mortgagee the debt due to the latter or, at least, the amount which he considers to be due to the latter." The case of *Mewa Ram Singh* v. *Ganga Ram* (4) is very similar to the present case. In that case the mortgage-deed provided that there should be redemption only in the month of Jeth. No tender, however, had been made by the mortgagor before the institution of the suit but the plaintiff came into Court on the allegation that the mortgage had been satisfied by the usufruct of the property long before the suit. It was, however, found that the amount of the mortgage-deed had not been satisfied and that some amount was actually due from the plaintiff. A Division Bench of this Court held that the suit could not be dismissed on the mere ground that there had been no previous tender because the plaintiff's case had been that the mortgage-deed had been satisfied out of the usufruct of the property before the suit. The latest case is that of *Muhammad Mushtaq Ali Khan* v. *Bankey Lal* (5). In that case the mortgagors admitted that a sum of Rs. 17,000 was still due from them. They had sent a notice to the mortgagors before the suit offering to pay that amount and asking for redemption; but the mortgagees sent no reply. There had, however, been no actual tender of the amount which the mortgagors themselves admitted to be due. The learned Subordinate Judge, held that, inasmuch as the mortgagors themselves admitted that a sum of Rs. 17,000 was due from them, it was necessary for them to make the tender before bringing a suit for redemption. The High Court on appeal confirmed the decree of the learned Subordinate Judge.

In the present case, however, the plaintiff's case was that the second mortgage-deed of 1880 was not binding on him, that the amount due under the mortgage-deed of 1860 had been paid out of the usufruct of the property, and that, therefore, he was entitled to a decree for possession of the property without payment of any amount at all. That being his case, it is difficult to see how he could have made a tender of any amount at all. The plaintiff considered that no amount was due from him and, therefore, even if the rule of law were that he must tender to the mortgagee the debt due to the latter, "or at least the amount which he considers to be due to the latter," it is clear that the suit cannot fail on this technical ground.

In a case where complicated questions of settlement of account arise, it is very difficult to see how a mortgagor can, beforehand, fix upon an exact sum which would be payable by him. If he tenders an amount in excess of the amount actually due he suffers loss and he cannot tender the exact amount unless that amount has been ascertained. There may be disputes between the mortgagor and the mortgagee as to the actual amount due, and if the law were to require a previous tender, in many cases mortgagors may find it impossible to redeem their mortgages. Again, if it be conceded that a mortgagor is bound to tender only the amount which he considers to be due to the mortgagee, then, it would enable the

(3) 34 Ind. Cas. 183; 14 A. L. J. 55; 38 A. 148.
(4) 52 Ind. Cas. 229; 17 A. L. J. 910.

(5) 55 Ind. Cas. 991; 18 A. L. J. 440; 42 A. 420.

mortgagor to tender a grossly insufficient amount alleging that he considered that to be the amount due. This would facilitate an easy evasion of the rule. In the absence of any authority to the contrary, we would have been disposed to hold that there are three remedies open to the mortgagor ;

(1) he may either deposit money under section 83 and claim redemption in that way ; or

(2) he may tender the amount privately to the mortgagee and recover the mortgaged property from him ; and

(3) he may institute a suit for redemption and ask the Court to pass a decree in his favour for possession of the property on condition of his depositing in Court the amount found to be due at a time fixed by the Court.

He can avail himself of any of these three remedies and it is difficult to see why the mortgagor should be compelled to resort to any particular one of these. Of course, where there has been a previous legal tender of the mortgage-money interest ceases to run from the date of the tender and the mortgagor is also entitled to the profits. Whereas, in the absence of any tender a mortgagee can claim interest or profits as well as costs.

However, in the present case, as we have already remarked, the plaintiff's case was that no amount was due from him at all. He could not, therefore, have made any tender. He, however, did in the alternative offer to pay the amount which the Court might find to be due. In our opinion, therefore, the view taken by the learned District Judge, under the circumstances of this case, was not correct. The suit cannot be dismissed on the mere ground that it was premature. There is in fact nothing to prevent the Court from passing a decree that, on payment of the amount due by the plaintiff, he should get possession of the mortgaged property in the next Jeth. We may also note that the plaintiff's case was that he actually demanded accounts and surplus mesne profits. If he had made such a demand in Jeth, and the demand had been refused, that may also give him a cause of action for his suit for accounts. We accordingly allow the appeal, set aside the decree of the Court below and remand the case for disposal of the remaining issues according to law. The appellant will get costs of this appeal.

Appeal allowed,

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 264 OF 1918.

January 5, 1920.

Present :—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

JUGMOHAN PRADHANI—DECREE-HOLDER —APPELLANT

versus

INDRA CHANDRA CHORARIA AND OTHERS—JUDGMENT-DEBTORS— RESPONDENTS.

Mortgage-decree—Insolvency of mortgagor—Decree-holder consenting party to composition scheme sanctioned by Insolvency Court—Execution Court, whether can go behind order of Insolvency Court.

Where the holder of a mortgage-decree agiainst an insolvent is a consenting party to a composition sanctioned by the Insolvency Court, then, unless the proceedings of the Insolvency Court are set aside, the execution Court, dealing with an application for execution of the mortgage-decree, cannot go behind the order passed in those proceedings. [p. 98, col. 1.]

Appeal against the order of the Subordinate Judge, Goalpara, dated the 5th of August 1918.

FACTS.—The facts of this case are given in the following order of the Subordinate Judge of Goalpara, dated the 5th August 1918:—

The judgment-debtor's objections to the continuance of the present execution proceeding are based on two contentions,—

(1) that the decree holder is not entitled to proceed in view of a composition which was sanctioned interparties in an insolvency proceeding in which the judgment-debtor was the petitioner;

(2) that in any case the decree-holder is not entitled to recover a larger sum than the amount set forth in that sanctioned scheme of composition, and that, in any case, he cannot recover even this sum until the 12th October 1918, which is the date fixed by the Insolvency Court for the payment of the sum due to the present decree holder under the sanctioned scheme of composition.

Decree-holder's counter objection is based on the allegation that his decree being a mortgage decree for a secured debt, cannot be affected by the proceedings of the Insolvency Court, and that, in any case, the alleged composition is no composition as far as the decree holder is concerned, and that the orders of the Insolvency Court were

ultra vires and are null and void as far as he is concerned.

The proceedings of the Insolvency Court of which the record has been called for and of whose orders certified copies have been filed, show clearly that on the 17th March 1917 the Court approved of the proposed composition and the requisite scheme was drawn up over the presiding officer's signature giving effect to this composition, on the basis of a payment of seven annas in the rupee. The record shows clearly that the Court's approval and the sanctioned scheme covered, among others, the claim which the present decree-holder is seeking to execute.

It has been contended on behalf of the decree-holder that, inasmuch as on the 3rd October 1917, (*i. e.*, six months after the approval of the scheme of composition by the Insolvency Court) the insolvent petitioner asked the Court for permission to withdraw his "insolvency" application, which permission the Court granted; this withdrawal and the Court's consequent order had the effect of annulling entirely all previous orders, including the previously sanctioned composition scheme. This contention I am unable to accept. The insolvent's application shows clearly that his request to be allowed to withdraw his application to be adjudicated "insolvent" was conditioned by his acknowledgment of his liabilities as included in the sanctioned composition scheme, and by the arrangements which he had made for their re-payment. It is also clear from the subsequent history of this proceeding, that the Insolvency Court's order of 6th October 1917 was restricted to the granting of insolvent petitioner's request to be allowed to withdraw his application to be adjudicated "insolvent," and that it did not affect in any way the carrying into effect of the sanctioned scheme of composition, which was in fact the very basis of his application. In any case, this Court, sitting as an execution Court, has no authority to sit in judgment or revision on the proceedings of an Insolvency Court. Section 46 of the Provincial Insolvency Act provides remedies for parties to an insolvency proceedings whose interests are affected by any order of the Insolvency Court. The present decree-holder-petitioner was a party to the insolvency proceeding, and as he did not apparently avail himself of the remedy provided by section 46 of the Insolvency Act, he cannot now come forward in an execution proceeding and plead that the orders of the Insolvency Court, against which he did not appeal, are null and void so far as his interests are concerned. The scheme of composition which was sanctioned in the insolvency proceeding has not been set aside or modified by any Appellate or Revisional Court, and as it was clearly a final order within the meaning of section 41 of the Evidence Act, I cannot but admit its relevancy in the present proceeding. Another argument which has been put forward on behalf of the decree-holder is that, even allowing that the order of the Insolvency Court of the 17th March 1917 sanctioning the composition may be still in force, the scheme which was subsequently prepared over the Court's signature cannot be considered to be valid, inasmuch as it makes no separate provision for the secured debts, though the Court in its order of the 17th March 1917 had directed the secured creditors should have preference. To this plea the obvious re-joinder is that, if any creditor was of opinion that the sanctioned schedule did not comply with the previously given sanction of the Court, it was open to him to take measures either by way of appeal or revision to have it set aside or modified under section 46 of the Act. This, the decree-holder did not do and he must, therefore, be held to be bound by the sanctioned schedule. It has been contended on behalf of the decree-holder that, in view of the terms of the Insolvency Court's order of 17th March 1917, it was not the intention of the Court that any secured debt should be included in the schedule to be prepared. The concluding portion of the Insolvency Court's order of the above date shews clearly that this contention is absurd, as, under this order, the Court permitted the sale of the Gouripur property which was the actual property mortgaged in respect of the present debt for which the decree-holder now seeks to execute his decree.

It is not disputed that decree-holder's Pleader was one of the Pleaders referred to in the Court's order of 17th March 1917, as having withdrawn their objections to the proposed composition, and this is further established by the fact that decree-holder's Pleader on that same day filed a petition

praying that an unsecured debt of the decree-holder should be included in the schedule to be drawn up for rateable distribution. Unfortunately, the withdrawal of their objections to the scheme of composition by the creditor's Pleaders was apparenly made verbally and was not confirmed by any written petition or application and, as the Insolvency Court's order is not very explicit, it has now been subjected to several constructions.

The insolvent petitioner's proposed scheme of composition with his creditors had consisted of two parts. In the first part, or schedule, he submitted a list of creditors with whom he claimed to have concluded arrangements for the liquidation of his liabilities by the payment of certain fixed agreed sums, while in the second part, or schedule, he submitted a list of creditors with whom he had concluded no such agreements and whose claims he proposed to satisfy by the payment of annas seven in the rupee. The present decree-holder's name is number three in the first schedule, and he, in company with other creditors, both secured and unsecured, had filed a petition of objection denying that he had agreed to the proposed composition. It is now alleged on behalf of the judgment-debtor (then the insolvent petitioner), that the verbal agreement of 17th March 1917, the substance of which was recorded by the Insolvency Court, was an agreement of acceptance of Schedule A of the insolvent petitioner's proposed composition in respect of those creditors who had filed no objection thereto and of acceptance of the proposal under Schedule B to pay seven annas in the rupee to those creditors who had come to no agreement with the insolvent petitioner or who had repudiated the agreement ascribed to them under Schedule A. As I have noted above, it is extremely unfortunate that the parties did not explain explicitly to the presiding officer of the insolvency the exact nature of the agreement which was arrived at on 17th March 1917, and that they did not supplement their verbal application by a written petition setting forth its terms. In any case, however, it must be presumed from the conduct of the parties that the interpretation which the Insolvency Court placed upon this agreement of 17th March 1917 in its preparation of the requisite schedule under section 24, was the correct one. This schedule was apparently prepared during the month of April and signed and hung up in the Insolvency Court on the 2nd May 1917 on the return of the presiding officer from tour. Neither the present decree-holder nor any other of the creditors whose claims were affected by the composition set forth in the said schedule, took any step, under section 46, to have the above mentioned schedule set aside or modified. Under section 27 (7) this composition became binding on all the creditors entered in the said schedule so far as relates to any debt entered therein, and the present decree holder is, in my opinion, estopped in the present execution proceeding from raising any objection thereto.

The decretal amount for which the decree-holder now seeks execution, is clearly included in the aforesaid sanctioned schedule of the Insolvency Court, and I must, therefore, hold that the present application, which is inconsistent with, and a violation of, the scheme of composition duly sanctioned by the Insolvency Court, cannot be maintained in its present form and that it is in any case premature.

Babus *D. N. Chuckerburtty* and *Kali Kinkar Chuckerbutty*, for the Appellant.—My decree being a mortgage decree for a secured debt cannot be affected by the proceedings of the Insolvency Court. The order of the Insolvency Court affecting my security was without jurisdiction. The execution Court was bound to levy execution for the whole amount of the mortgage-decree. With regard to the amount due under the mortgage-decree I was not a party to the scheme of composition sanctioned by the Insolvency Court. If it could be shown that I was a consenting party to the composition scheme with regard to the amount due under the mortgage-decree, then, of course, I have no care.

Mr. *B. Chuckerbutty*, (with him Babus *Sarat Chandra Roy Chowdhury* and *Jnanendra Mohan Das*), for the Respondents.—The point is a very short one. It was for my learned friend to satisfy the execution Court that he never consented to the composition scheme. The order of the Insolvency Court was there. The execution Court cannot go behind the order of the Insolvency Court If my friend had any objection to the order of the Insolvency

Court sanctioning the composition scheme, his remedy lay in getting the order set aside under section 46 of the Insolvency Act. The order of the Insolvency Court has not been set aside or modified by any Appellate or Revisional Court. It was clearly a final order behind which the execution Court could not go.

JUDGMENT.—The appellant was, no doubt, a secured creditor and his rights could not be affected by the composition unless he was a consenting party to it. The only question, therefore, before this Court is, whether he was a consenting party.

It has been pressed before us that the fact that the question of the satisfaction of the decree was being fought out between the judgment-debtors and the decree-holder for several years goes to show that the latter was not a consenting party to the composition. But the adjustment of the decree, which was the subject-matter of decision in the previous proceedings which came up to this Court, was an agreement set up by the judgment debtor under which the decree is said to have been adjusted and it was quite different from the composition which we have to consider in this proceeding.

The learned Subordinate Judge points out that one of the Pleaders who withdrew the objections to the composition proposed, provided payment was made in cash, included the Pleader for the decree-holder before us. The order of the 17th March 1917 shows that the scheme of composition was approved by the Court, that the Gouripur property which was in mortgage to the appellant-decree-holder was directed to be sold within one month and that a schedule was prepared under that order and signed and hung up in Court on the 2nd May 1917. The appellant had, in addition to the mortgage-decree, a secured debt on a mortgage-bond; and also an unsecured debt. Having regard to these facts and other circumstances stated in the order-sheet, the learned Subordinate Judge came to the conclusion that the decree-holder was a consenting party to the composition. In these circumstances, unless the proceedings of the Insolvency Court are set aside, we do not see how the execution Court, in the absence of evidence to show that the decree-holder was not a consenting party to the proceedings, go behind the order passed in these proceedings.

The result is that the appeal is dismissed with costs two gold *mohurs*.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 100 OF 1918.

April 29, 1920.

Present:—Sir John Wallis, KT., Chief Justice, Justice Sir William Ayling, KT., and Mr. Justice Coutts-Trotter.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF GODAVARI—DEFENDANT—APPELLANT

versus

Sree Rajah VADREVU RANGANAYAKAMMA, ZEMINDARANI OF VEGAYAMMAPETA ESTATE (DEAD)—PLAINTIFF AND CLAIMS ADDED BY THE COURT, IN PLACE OF THE DECEASED—RESPONDENTS.

Limitation Act (XVI of 1908), Sch. I, Art. 16—Water cess, illegal levy of, from ryots*—Suit by Zemindar to recover amount so levied, whether maintainable—Limitation.*

Held, (by a majority) that where the Government levy statutory water cess from the *ryots* of a Zemindar and not from the Zemindar from whom it ought to have been levied, if leviable at all, in a case where the Statute does not authorise the levy, and the Zemindar remits the amount to the *ryots* out of the rents payable by them, the Zemindar is entitled to sue to recover from the Government the amount so illegally collected, but such suit must be brought within the period of limitation prescribed by Article 16 of Schedule I to the Limitation Act, and the plaintiff will only be entitled to recover payments made within one year before suit. [p. 108, col. 2; p. 109, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Abdul Rahim in Appeal No. 113 1917, preferred against the decree of the Court of the Temporary Subordinate Judge, Cocanada, in Original Suit No. 31 of 1916 (Original Suit No. 85 of 1914, on the file of the Court of the Subordinate Judge, Cocanada).

SECRETARY OF STATE FOR INDIA v. ZAMINDARANI OF VEGAYAMMAPETA ESTATE.

FACTS appear from the following judgment of :—

ABDUR RAHIM, J.—(*October* 24, 1918).—The first respondent, the Zamindarini of Vegayammapeta, was the plaintiff in the suit. She sued the Secretary of State for India to recover Rs. 55,142-1-3 with interest which the latter had levied from the ryots of some of her villages as water cess.

There were two pleas in defence, namely, that the ryots who actually paid the cess, and not the plaintiff, have a cause of action against the Government and that the suit was barred by limitation. It would appear that the Government first attempted to levy water cess with respect to these lands in 1904 and the Zemindarini from whom the cess was levied for Fasli 1314 instituted a suit, Original Suit No. 23 of 1905, denying the right claimed by the Government. The Court of first instance decided in favour of the Government, but the High Court in appeal reversed that judgment on the 19th March 1914, holding that the lands were Mamool, wet, and not Merakapallam, that is dry land newly converted into wet, as claimed by the Government. Between the institution of the suit and the decision of the High Court the Government, however, went on recovering cess for each Fasli, not from the Zemindarini direct but from the ryots.

It had been ruled by this Court in *Kottilinga Settu Royer* v. *Sahasranama Aiyar* (1) that, under the provisions of the Revenue Recovery Act II of 1864, the Zemindar was primarily liable to the Government for any cess recoverable as revenue although the tenants and other persons interested in the land might pay the arrears and protect the land from attachment under the summary process authorized by the Madras Act II of 1864. In consequence of this ruling, section 4 of the Madras Act II of 1913 was passed amending the Madras Irrigation Cess Act, VII of 1865, to the effect that the cess shall be leviable in accordance with such rules as the Government may prescribe in that behalf either from the land-holder or from the ryot or in shares from both at the option of the Government. It is further laid down, subject to certain limitations, that any sum collected from the land holder between the 17th January 1911, the date of the above-mentioned decision, and the commencement of the Amending Act, might be recovered by him from the ryot. The Government as provided in Act II of 1913 issued a notification containing rules as to the levy of cess with respect to the villages in question in this suit—the rules provided that the cess shall be payable by the ryot. The suit in which Appeal No. 402 of 1917 arises was instituted with respect to the cess paid after the notification and the other suits relate to payments made before that date.

As regards the plaintiff's right of action, though I felt considerable doubt at one stage of the hearing, I am pursuaded on further consideration that once the nature of the plaintiff's claim is properly realised her right to maintain the suit must be upheld. The plaintiff, Zemindarini, is entitled, by virtue of the engagement with the Government at the time of the Permanent Settlement, to a supply of water by the Government for the cultivation of the lands in suit as Mamool, wet, lands, free of water-tax. It has been so ruled by the High Court in the previous suit between the parties and is not disputed. Because of such supply guaranteed by the Government, the Zemindarini, on the other hand, is entitled to receive from the ryots certain payments on the basis of the land being Mamool, wet. If the ryots were not supplied with water they would be liable to rents at lower rates on the footing of the land being Merakapallam, *i. e.*, dry land; in other words, the difference between the two rates is the amount which the Zemindar receives from the ryots for the value of the water which the latter obtain from the Zemindar for the purpose of cultivating the land as Mamool, wet. Once the Government breaks its engagement with the Zemindar to supply water for wet cultivation the Zemindar must necessarily lose, as a direct consequence of the action of the Government, the rates which he has been receiving from the ryots for Mamool, wet, cultivation on such basis. The result is the same if the Government realises from the ryot under coercive process the amount which he would have otherwise paid to the Zemirdar for supplying the water which,

(1) 9 Ind. Cas. 643; 34 M. 520; (1911) 1 M. W. N. 257 9 M. L. T. 367; 21 M L. J. 662.

under engagement with the Zemindar, it was bound to supply without any charge whatever. In the recent judgment of the Privy Council in the *Urlam case*, *Kandukuri Balasurya Prosadha Row* v. *Secretary of State* (2) their Lordships observe: "It follows that each Zemindar could (subject as aforesaid) legally authorise his ryots to use water to the use of which he was himself entitled for the growth of second crops on their holdings or for increasing the area of land within their boundary for the time being under wet cultivation. In taking advantage of such authorization the ryots would be entitled to rely on the engagements with the Government arising out of the Permanent Settlement to the same extent as the Zemindar himself." There has been a great deal of discussion at the Bar as to what is the proper form of action in such a case as the present, whether it would be for money had and received for plaintiff's use, or for damages for breach of contract, or for damages arising out of tort. This question has an important bearing on the plea of limitation and is also relevant as a test of the right of the Zemindarini to maintain the suit.

I do not think this is a case of tort as contemplated in Article 36 of the Limitation Act, which provides for compensation for any malfeasance independent of contract and not specially provided for. Here the liability of the Government rests on contract founded on the engagement arising out of the Permanent Settlement. It seems to me that it was open to the plaintiff to lay the action as one for compensation for breach of contract, or for money had and received for plaintiff's use. The first is covered by Article 115, which provides a limit of three years from the date when the contract was broken or, where there are successive breaches, as is the case here, when the breach in respect of which the suit was instituted occurred. The limitation provided for an action for money had and received is three years from the date when the money was received. An action for money had and received may be maintained where the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which render the receipt, a receipt by the defendant for the use of the plaintiff. There are numerous examples given in the English text books and reports of such actions; for example suits for money obtained by duress, undue influence, or under the influence of fraud, or mistake of fact, or money paid for a consideration which fails, or money received by an agent from his principal and which has not been applied as directed before the termination of the agency, are all covered by this English form of action. It has been held that, when, the Indian Legislature, in Article 62 of the Limitation Act, speaks of suits for money had and received for the plaintiff's use it had in view that form of action as known to the English Law of Pleading. It is an action of a very general scope and evidently covers suits which are specifically dealt with in some of the other Articles of the Limitation Act, for instance, Article 97, which relates to suits to recover money paid upon an existing consideration which fails. It is stated by Lord Mansfield, C. J., in *Moses* v. *Macpherlan* (3), as cited in *Mahomed Wahib* v. *Mahomed Ameer* (4), "this form of action lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied) or extortion or oppression or an undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances; in other words, this form of action would be maintainable in cases in which the defendant at the time of receipt, in fact or by presumption or fiction of law, receives the money to the use of the plaintiffs." Mr. Justice Mookerjee in the above case also cites a number of Indian cases where this form of action has been recognised.

In the present case the exact amount levied by the Government from the ryots is what the ryots were under an obligation to pay to the Zemindar. The argument

(2) 41 Ind. Cas. 93; 40 M. 886; 33 M. L. J. 144; 22 M. L. T. 76; 15 A. L. J. 697; 21 C. W. N. 1089; (1917) M. W. N. 536; 19 Bom. L. R. 751; 6 L. W. 340; 2 P. L. W. 260, 26 C. L. J. 290; 44 I. A. 166 (P. C.).

(3) (1760) 2 Burr 1005; 1 W. Bl. 219; 97 E. R. 676.
(4) 32 C. 627; 1 C. L. J. 167.

of Mr. Ramesam is that the character of the payment levied by the Government is different from that payable by the Zemindar. This is true only in a very superficial sense. What the Government has actually received from the ryots and what the ryots would otherwise have paid to the Zemindar is really the value of the water supplied for the irregation of the Zemindari lands as Mamool, wet. In the one case it is called cess and in the other rent. That cannot make any difference as to the plaintiff's right to this money which is exactly what was payable to her by the ryots, but which the Government has received wrongfully from the latter by means of coercive process.

The learned Advocate-General for the respondent relies on a number of rulings, according to which he contends that her cause of action to recover the amount sued for arose on the date on which the judgment of the Subordinate Judge laying down that the Government was justified in levying the cess treating the lands as Merakapallam was reversed by the High Court, and that, so long as the judgment of the Subordinate Judge in favour of the Government had force, the plaintiff could not by any action recover from the Government any money which it might choose to levy either from her or from her ryots. One of the leading cases of this class is the ruling of the Privy Council in *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (5) where, on the sale of a Patnai Taluq in Bengal under certain Regulation being set aside and the Patnidar who had been dispossessed restored with mesne profits to be paid by the purchaser during the time they were out of possession, the Zamindar's suit against the Patnidars to recover the arrears of rent which had accrued before and during the time they were out of possession was held to be not barred inasmuch as the cause of action accrued at the date of the decree reversing the auction sale. Their Lordships regarded it as perfectly clear that the cause of action accrued at the time at which the sale having been set aside the obligation to pay rent revived.

The next leading case on the subject is *Bassu Kuar* v. *Dhum Singh* (6) the facts of which were las follows :—In contemplation of a sale of land by a debtor to his creditor, it was agreed that the book-debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit brought by the intending vendor for specific performance was dismissed on the ground that no effectual agreement had been made. It was held that this decree brought about a new state of things and imposed a new obligation on the debtor who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree being the date of the failure of an existing consideration within the meaning of Article 97. In *Udit Narain Misr* v. *Muhammad Minnatulla* (7) the principle of this decision was applied by the Allahabad High Court to a case in which the defendants, against whom a decree for foreclosure was outstanding, agreed to sell certain immoveable property to the plaintiff and the plaintiff paid into Court as part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell, nor did they return to the plaintiff the money which he paid on their behalf. The plaintiff thereupon sued the defendants claiming in the alternative either a decree for specific performance to sell or a refund of the money paid by him as part of the consideration for the sale agreed upon. It was held that the plaintiff's alternative claim for a refund on failure of consideration was governed by Article 97 of the Limitation Act of 1877 and was not barred, inasmuch as limitation only began to run from the date of the High Court's decree declaring the agreement to sell to be unenforceable. In the appeal to the Privy Council their Lordships confirmed

(5) 12 M. I. A. 244; 2 B. L. R. P. C. 10; 11 W. R. P. C. 5; 2 Sar. P. C. J. 424; 2 Suth. P. C. J. 178; 20 E. R. 331.

(6) 11 A. 47; 15 I. A. 211; 5 Sar. P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec. (N. S.) 458.

(7) 25 A. 618; A. W. N. (1903) 117.

the judgment of the High Court as quite correct. *Jamna Das* v. *Najm-un nissa Bibi* (8) is another case in which the ruling in *Bassu Kuar* v. *Dhum Singh* (6) was applied. No doubt those were all cases under Article 97 of the old Act, but the principle deducible from them is that, where the rights of the parties has been subjected to the determination by the Court, it is from the date of the determination of such rights that limitation should be computed; and, to repeat the language of the Privy Council in *Bassu Kuar* v *Dhum Singh* (6), the decree in such cases brings about a new state of things and imposes a new obligation on the party against whom the cause is finally decided. Another illustration of the same principle is to be found in *Rangayya Appa Rao* v. *Bobba Sriramulu* (9) and this case, which is also a decision of the Judicial Committee of the Privy Council, is nearer to the present. In a suit for arrears of rent, the period of limitation was held to run from the date when the final decree determining the rent was passed and not from the close of the Fasli year for which the rent was paid. In *Rajagopalan* v. *Kasivasi Somasundara Thambiran* (10) this Court applied the principle of the ruling in *Bassu Kuar* v. *Dhum Singh* (6) to a case in which the facts were as follows :—*A.*, trustee of a temple, exchanged certain temple lands with *B.* and obtained certain lands from *B.* in exchange. *C.* brought a suit against *A.* to recover the lands obtained by *A.* in exchange from *B.* and possession was decreed in favour of *C.*, and *A.* was deprived of possession in execution of the decree on 18th December 1890. *A.* preferred appeals successively to the District Court and to the High Court and the decree was confirmed on second appeal on the 23rd February 1892. On the 22nd February 1904, *A.*'s successor brought a suit against *B.* to recover the lands got by *B.* from *A.* It was held that the dispossession of plaintiffs which entitled him to bring a suit under section 119 of the Transfer of Property Act must be held to have taken place only when the decree for possession against him was confirmed on second appeal by the High Court.

In another case their Lordships of the Privy Council would seem to have upheld a proposition of even broader scope than those laid down in the above rulings. In *Lakhan Chunder Sen* v. *Madhusudan Sen* (11) it was held by the learned Judges of the Calcutta High Court, relying on the decisions in *Ranee Surno Moyee Shooshee* v. *Mokhee Burmonia* (5) and *Bassu Kuar* v. *Dhum Singh* (6) that the plaintiff's rights in that case must be taken to have been suspended between the date of the decree of the Court of trial in a previous suit in favour of the plaintiffs (who in that litigation were arrayed as defendants) and the date of the reversal of that decree by the Appellate Court, and the Judicial Committee approved of this decision.

Here, so long as the judgment of the Subordinate Judge in Original Suit No. 23 of 1905 was in force, the plaintiff could not successfully recover the money levied by the Government for water cess; and, as observed by their Lordships of the Privy Council in *Bassu Kuar* v. *Dhum Singh* (6), "it would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain limitation under peril of losing his property if he does not." Under Article 115 the period of limitation runs from the date of the breach in respect of which the suit was instituted. So long as the Government had a decree in its favour which held that there was no such contract between the parties at all, it could not be said that there was a breach of any contract for which the plaintiff could obtain compensation. Under Article 62 time runs from the date when the money is received, which clearly means, received for the plaintiff's use. Until the judgment of the High Court in the suit of 1905 declared the plaintiff's right, the plaintiff could not claim that the money was received for her use. The money realised by the Secretary of State from the ryots became the money for the plaintiff's use only when it was found that the lands were Mamool, wet, and the Government was, therefore, not entitled to levy cess in respect of them.

(8) 28 A. 466; 3 A. L. J. 228; A. W. N. (1906) 88.
(9) 27 M. 143; 8 C. W. N. 162; 14 M. L. J. 1; 6 Bom. L. R. 241; 3 I. A. 17; 8 Sar. P. C. J. 617.
(10) 30 M. 316; 17 M. L. J. 149.
(11) 35 C. 209; 7 C. L. J. 79; 3 M. L. T. 90; 12 C. W. N. 326.

As the appellant has failed on both the points the appeals will be dismissed with costs.

OLDFIELD, J.—(*October* 24, 1918).—The plaintiff, originally a Zamindarini, now her successor, owns land described as Mamool Pallam, that is, lands entitled to irrigation from Government channels free of charge. In 1904, as a result of what is referred to as a settlement, Government held that the land was not entitled to free irrigation and in Fasli 1314 imposed a charge for water. Plaintiff at once began legal proceedings, claiming a general declaration and injunction and re payment of the water rate, which had been paid for Fasli 1314. In subsequent years she paid nothing; and water was supplied to the land in consideration of payment by the ryots, who were actually cultivating it. They made these payments to Government direct, although, as Exhibit G. series shows and no one now denies, they held the land under plaintiff as wet; that is, as land for which she was bound to supply water, obtaining it from the Government channels, which, it is not disputed, were the only accessible source, whether gratuitously or not being immaterial. If arrangements had been made in accordance with the relations between the plaintiff and the ryots, the latter would, as before, have paid for the water, which the former would have obtained for them from Government on payment of the charge newly imposed. Instead, those relations were abandoned to the extent that the ryots paid plaintiff only for unirrigated or dry land and themselves obtained the water on payment from Government. But they recognised plaintiff's claim to the extent that they submitted to the insertion in Exhibit Q. serier, the yearly Muchilikas executed by them in Faslis 1315 6 7 (and one of them in Q. 400 in Fasli 1318) of a clause, assigning to plaintiff their right to recover the water rate paid to Government in case it turned out to be recoverable, thus at no expense to themselves attempting to safeguard plaintiff's right to wet assessment, if it should turn out that the land was Mamool Pallam. Plaintiff, on 19th March 1914, obtained the High Court's decision that it was so and then sued to recover the amounts thus paid to Government by the ryots. The lower Court has decreed them and these are appeals against its decrees. Appeal Suit No. 402 of 1917 relating to the payment for Fasli 1324 and Appeal Suit No. 113 to those for other Faslis. The appeals are argued on two grounds, that (1) plaintiff has no cause of action; (2) if there is one, the suits are out of time. The contentions as regards the former are that the suits would lie whether described as (1) for damages, or (2) for money had and received by Government, for plaintiff's use, or (3) as regards the payments covered by Exhibit Q series for the amounts re-payable to the ryots, who had assigned their claims thereby.

Firstly, there is the contention that plaintiff, owing to the mistaken action of Government, could not realise the full normal income from the land, because she could realise only at dry rates and that Government must compensate her for this loss, the compensation being measured by the difference between dry and wet rates, that is, the amount of the water rate. Something has been said as to the immediate liability to Government for water rate, when it could be legally charged; and there is no doubt with reference to *Kottilinga Setta Royar* v. *Sahasranama Aiyar* (1) that, until Act II of 1913 became law, plaintiff, as the Zemindar, was liable and not the ryots. But that point is not of importance. For, if plaintiff had received wet rate from the ryots and passed on part of it as water rate to Government, the result would have been the same as that actually reached by the procedure employed, by which plaintiff only received dry rate and the ryots paid Government for the water. The fact is that, whatever arrangement had been made regarding the immediate responsibility for the payment to the Government, plaintiff would have been damnified, because the water she was entitled to would have been cut off, if no payment had been made, and immediately or ultimately she would have been deprived of its value. In these circumstances, it must held that the suits as for damages are sustainable.

The question is, then, whether they are in time with reference, at present, not to the general argument relied on to which I return, but to particular Articles of Schedule I of the Limitation Act. Those referred to are Nos. 36 and 115 and the question as between them is, whether the tortious act of Government in levying

water rate involved a breach of contract. It is contended that it did so, because the claim was contrary to the Permanent Settlement, in which a contract was em bodied. As observed in the judgment in plaintiff's favour, in Appeal Suit No. 35 of 1909, "the full extent claimed by plaintiff was classed as wet at the Permanent Settlement. It follows that she is entitled to free irrigation thereupon." That the Permanent Settlement created a contractual relation is, in my opinion, clear. Plaintiff's Sanad is not before us. But it is not disputed that it is in the usual form; and, although it may be expressed as a grant, it will not the less fulfil the essentials of a contract in virtue of the obligation to pay Peishcush on which the tenure is conditional and for which it presumably provides. In these circumstances, I would apply Article 115 and hold that the suits are in time in respect of payments made after 8th September 1911, that is, within three years before the date of the plaint in Appeal Suit No. 40.

I have had the advantage of reading my learned brother's observations on petitioner's claim as for money had and received; and I entertain some doubt whether the scope of the action so described is wide enough to cover the claim before us. I should also, if necessary, hold against plaintiff's right of action with reference to Exhibit Q. series, because there is no evidence that the payments covered by it were made under coercion and if, as I think, they are not recoverable by the ryots from Government, plaintiff cannot recover them as the ryots' assignee. But it is not necessary for me to deal with these aspects of the case at length, because whether the claim is regarded as one for money had and received or (as regards part of it) as based on Exhibit Q. series, no greater amount can be recoverable and no longer time will be available for suing than if it be regarded as a claim for damages, to which Article 115 must be applied. I would accordingly hold that the claim is barred except as regard the three last payments in question in Appeal Suit No. 113 and as regards Appeal Suit No. 402.

Plaintiff, however, argues further that any detailed consideration of the Articles applicable to her claim under its different aspects is unnecessary, because, whatever its character, time began to run and the cause of action arose on a date within six months of the presentation of his first plaint, 19th March 1914, when the illegality of the imposition of a charge for water was established by this Court's judgment and his right to sue was ascertained. It is difficult to formulate any general principle as underlying this contention, which would not be obviously open to objection and would not be irreconcileable with plaintiff's own conduct in suing to recover the payment made for Fasil 1314 in the suit, in which that judgment was given, since, if the cause of action for one payment arose before the judgment, so also would that for others. Generally, however, it appears necessary for plaintiff to establish at least that the running of time is suspended, so long as any pending proceeding in which any matter essential to the determination of the claim is in issue, remains undecided. This principle is novel and would be far-reaching and it is not suggested that it is implied in any particular provision of the Limitation Act. Of the authorities relied on as supporting it, *Rangayya Appa Rao* v. *Bobba Sriramulu* (9) no doubt treated the cause of action for rent for a series of years as arising only when the proper rate of rent had been ascertained by the final judgment in separate proceedings; but those proceedings were before the Collector under Madras Act VIII of 1865, and, until they ended, the rate of rent was uncertain, and no arrear could be said to have become due; whereas, here, the amount which the plaintiff was entitled to claim, whether as damages or otherwise, was known when it was paid. There are, next, cases, such as *Bassu Kuar* v. *Dhum Singh* (6), *Udit Narain Misr* v. *Muhammad Minnatulla* (7), *Amma Bibi* v. *Udit Narain Misra* (12) and *Jamna Das* v. *Najm-un-nissa Bibi* (8), in which the plaintiff suing to recover money which had passed in a transaction designed to effect a transfer of land, was allowed the time taken in obtaining a decision that such transaction was unsustainable. They were all based on an alleged contractual relation and, as observed in the last cited, were covered by section 65, Indian Contract Act, and Article 97, Schedule I, Indian

(12) 1 Ind Cas. 890; 31 A. 68; 11 Bom L. R. 525; 19 M. L. J. 295; 6 M. L. T. 89; 9 C. L. J. 512; 36 I. A. 44 (P. C.).

Limitation Act, the distinction from the case before us being that in them the previous judgment which negatived the claim for land, was the cause of action for the claim for money; whilst, here, the only importance of the previous judgment is as an adjudication of an issue arising in connection with claims, which could have been made before it and would have been equally valid, if it had never been given.

There are, next, two decisions of the Privy Council, the effect of which appears most clearly in the reference to them in *Lakhan Chunder Sen* v. *Madhusudan Sen* (11) that judgment being accepted in general terms as correct by the Privy Council in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (13). In that case, certain persons had, as defendants in a suit for the division of the property of an intestate, obtained a decree for a share which was set aside on appeal, because they should themselves have sued; and when they did so later, it was held that they were entitled to exclude from the time available to them the period during which the decree in their favour had been in force, *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (5) and *Prannath Roy Chowdry* v. *Rookea Begum* (14) being referred to and also the recognition by Lord Eldon in *Fulteney* v. *Warren* (15), of the principle that Courts "should relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought." In the first of the two cases cited, the plaintiff was suing for arrears of rent, which she had realized once by sale of the tenure and had to refund on the sale being set aside; during the period she had the arrears, she could not sue for them and, as Sir R. P. Collier explained in *Huro Pershad Roy* v. *Gopal Das* (16), she was on that account entitled to exclude that period, when it afterwards was necessary for her to sue. In the second it was held, with reference to Bengal Regulation III of 1793, section 14, that the pendency of litigation as to the ownership of an equity of redemption between persons claiming as representatives of the mortgagor was good and sufficient cause for delay in instituting proceedings for foreclosure until its conclusion. This decision is not of assistance to plaintiff and was, in any case, given with reference to a special law; but the two others are authority only for the position that a plaintiff need not sue so long as it would be useless for him to do so, because, through no fault of his own, he believed that he had already all that he could claim. The distinction between such cases and the one before us can be illustrated directly by reference to *Hurro Kumar Ghose* v. *Kali Krishna Thakur* (17) where the plaintiff was not allowed to rely on a declaratory decree as the cause of action for arrears of rent, the facts being expressly distinguished from those in *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (5) because he could have sued for the latter without waiting for the former, as the plaintiff could have done here and as, with reference to one year, he actually did.

Of the last and, perhaps, the strongest group of cases relied on, *Shama Pershad Roy Choudhery* v. *Hurro Pershad Roy Chowdhery* (18) decided that a suit lay for restitution of money paid as interest under a decree passed in conformity with a previous judgment in other proceedings which had since been superseded on appeal. This goes no way in support of plaintiff's contention. But statedly in accordance with the majority of a Full Bench of the Calcutta High Court held in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19) that money paid under a decree for rent at an enhanced rate, passed in accordance with a subsisting decree granting an enhancement, could be recovered, when the last mentioned decree had been reversed in appeal; and in *Kali Churn Dutt* v. *Jogesh Chunder Dutt* (20) the date of such reversal was held to be the date on which the cause of action for the suit to recover arose. This, at first sight, is no doubt in plaintiff's favour. But, even if *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19) be accepted as good law, (and with all due deference it may be doubted whether it

(13) 33 Ind. Cas. 452; 43 C. 660; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10; 20 C. W. N. 522 P. C.

(14) 7 M. I. A. 323; 4 W. R. P. C. 37; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 694; 19 E. R. 331.

(15) (1891) 6 Ves. 73 at p. 92; 31 E. R. 944; 5 R. R. 226.

(16) 9 C. 255 at p. 259; 12 C. L. R. 129; 9 I. A. 8; 6 Ind. Jur. 546; 4 Sar. P. C. J. 363; 4 Ind Dec. (N.S.) 820.

(17) 17 C. 251; 8 Ind. Dec. (N. S.) 705.

(18) 10 M. I. A. 203 at pp. 211, 212; 3 W. R. P. C. 11; 2 Suth. P. C. J. 103; 19 E. R. 948.

(19) 5 C. 30; 1 C. L. R. 5; 1 Ind. Dec. (N. S.) 611.

(20) 2 C. L. R. 354.

follows from *Shama Purshad Roy Chowdhery's case* (18)] the foundation of both is plaintiff's right to restitution of payments, which he himself had made in consequence of the previous erroneous judgment, and the present case must be distinguished, because, so far as the plaintiff's claim is to recover damages it rests on no right to restitution and would in fact be equally sustainable, if no payments had been made by any one, and, so far as it is to recover the amount of actual payments, none were made by him or on his behalf. It may be added, as regards the payments covered by Exhibit Q. series, for which plaintiff sues as assignee of the ryots, that, consistently with the previous reference to their position, they cannot be regarded as having made any of their payments in discharge of any legal obligation based on the erroneous judgment against plaintiff and that they in fact made some of them before it was given. Authority in favour of plaintiff's contention failing, I would reject it, respectfully observing in doing so, that the argument from inconvenience appears to have received excessive attention in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19) since the provision of the former Code, corresponding with section 10 of the present, is not referred to in the judgments of the majority of the Court and it would have been open to the plaintiff there, as it was to the plaintiff before us, to have any suits in respect of subsequent years adjourned until a final decision as to his rights had been obtained.

In accordance with the foregoing, I would allow Appeal Suit No. 113 of 1917 as regards the Faslis prior to Fasli 1321, dismissing the suit in respect of them. Parties to pay and receive proportionate costs throughout. Appeal Suit No. 402 of 1917 must be dismissed with costs.

BY THE COURT.—Under section 98 of Code of Civil Procedure, the appeals are dismissed with costs.

This Letters Patent appeal came on for hearing on the 4th and 5th of March 1920.

The Government Pleader (Mr. *V. Ramasam*), for the appellant.—The suit is not maintainable. The plaintiff has no cause of action. The illegal levy of water cess was from the ryots and not from the Zamindarini, the plaintiff. The arrangement between the Zemindar and the ryots for remission of rent does not affect the Government who was no party to it. The ryots, if so advised, could have sued Government for restitution. The suit cannot be regarded as one for breach of an implied contract by the Government with the Zemindar as per the terms of the Permanent Settlement. Such a claim for damages would be too remote. The remission of rent corresponding to the water cess was voluntary on the part of the plaintiff. There was no compulsion on her to forego it. It was quite open to her to realize the full rent due by the ryots. There is no express or implied agreement by the plaintiff to indemnify the ryots The suit itself is not framed as one for damages, nor has the Sanad been put in evidence. In the Zemindar's suit for arrears of rent the ryots could not plead a set-off of the amounts paid by them to Government.

The suit is barred under Article 16 of the Limitation Act. If any, the plaintiff could only recover the amount collected by Government within a year preceding the date of suit.

Mr. *A. Krishnaswamy Aiyar*, for the respondents.—There was a good cause of action for the plaintiff's suit. Pattas and Muchilikas were exchanged between the plaintiff and her ryots for Faslis 1315 to 1318, wherein remission of rents corresponding to the water cess levied from the ryots was made by the plaintiff. Those Muchilikas may be treated as transfers to the plaintiff of the actionable claim of the ryots to recover the amounts illegally levied by Government. Even for the succeeding Faslis the arrangement was the same, though by reason of the passing of the Estates Land Act, Pattas and Muchilikas were dispensed with. Such an arrangement enured for the plaintiff to give her a cause of action. The loss caused to the plaintiff by preventing her from collecting the usual rent from the ryots owing to the action of Government undoubtedly gave plaintiff a cause of action.

The action is also sustainable as for damages for breach of an implied contract by Governments to supply water to the Zemindar free of water tax.

The money paid to Government was virtually the plaintiff's money and the person whose money was illegally taken was entitled to sue.

In any event the payment by the ryots can be treated as made agents of the Zamindarini, the plaintiff by virtue of the arrangement between them. On that basis the action could be sustained.

As to limitation, the plaintiff had her cause of action on the reversal of the decree in her prior suit by the High Court. So long as the appeal was pending any suit she might institute would not have been decreed. This follows from the principle of the ruling in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19).

JUDGMENT.

WALLIS, C. J.—This is a suit brought by the holder of a permanently settled estate to recover water cess, alleged to have been illegally collected from her ryots from Fasli 1315 to Fasli 1323 (1905 to 1913). As regards Fasli 1314, there was then in force an arrangement between Government and the Zemindars that the Zemindars should collect the water cess on behalf of Government from the ryots and pay it over to Government subject to a deduction of ten per cent. for collection. Pursuant to this arrangement, Government made the demand for Fasli 1314. In this case on the Zemindarini who paid it, and on 3rd July 1905 instituted Original Suit No. 23 of 1905 for recovery of the money so paid and a declaration that the levy was illegal. Her suit was dismissed by the Subordinate Judge but was ultimately decreed by this Court on 19th March 1914 in Appeal Suit No. 35 of 1908. No question was raised in that suit as to the Zemindarini's right to recover, if the cess had been wrongly levied. The arrangement for the collection of water-cess by the Zemindars having been determined, Government collected the cess for Fasli 1315 and following Faslis from the ryots direct, and the Zemindarini, after obtaining a decree in Appeal Suit No. 35 of 1908, instituted the present suit to recover back the water-cess levied from the ryots for Fasil 1315 and the following Faslis. The Subordinate Judge decreed the suit. The learned Judges, Abdur Rahim, and Oldfield, JJ., who heard the appeal, differed as to the extent to which the claim was barred, and the whole case has been re-argued before us on appeal from the prevailing judgment of Abdur Rahim, J.

Act VII of 1865 imposes a statutory water cess, for the use of water for irrigation, from a Government source, upon holders of permanently settled estates and other land-holders, but contains an exemption in favour of the former class to the extent to which they are entitled, by virtue of engagements with the Government, to irrigation free of separate charge. Land-holders were said to engage with the Government for the payment of land revenue, and it is well-settled that the Sannads granted to the holders of permanently settled estates are engagements within the meaning of the Act. It was decided in the plaintiff's appeal in the former suit that the facts of the present case brought it within the exemption, and it is not now questioned that the levy from the ryots of water-cess for Fasli 1315 and the following Faslis was wrongful. Further, even if Government had been entitled to levy water-cess, the person directly liable was the Zemindarini and not the ryots as held in *Kottilinga Settu Royar* v. *Sahasranama Aiyar* (1). Here, neither the land-holder nor the ryots were liable to pay the cess, and the ryots, by paying it, could not acquire any right of recourse against the land holder under the Revenue Recovery Act, or otherwise. Their remedy was to sue the Government to recover back the money levied from them under duress as money had and received to their use, and such a suit would have been governed by the general Article 62 applicable to this form of action, if the Legislature had not prescribed a special Article, Article 16, with a shorter period of limitation, for this particular class of suits.

Having regard to the fact that the plaintiff arranged with the ryots that the water-cess should be paid by them and deducted from their rent and that the plaintiff should be entitled to it if recovered back from Government, an arrangement which was embodied in the great majority of the Pattas and Muchilikas which were exchanged between the Zemindarini and the ryots for Faslis 1315 to 1318, it has been contended before us that these Muchilikas may be treated as transfers in writing by the ryots to the Zemindarini of the ryots' actionable claims to recover back the money illegally levied from them.

This contention may be accepted, subject to the question of limitation with which I will deal separately, but as regards the period subsequent to 1908, there are no Muchilikas which could be regarded as transfers in writing satisfying the provisions of section 130

of the Transfer of Property Act, as the practice of exchanging Pattas and Muchilikas was discontinued after the coming into force of the Madras Estates Land Act of 1908.

Coming now to the causes of action alleged in the plaint, the plaintiff's case, as stated in paragraphs 11 to 13, was that it was arranged between the Zemindarini and the ryots that the ryots were to deduct the water-cess claimed by Government from the wet rate of rent payable by the ryots to the Zemindarini and pay it to Government on her behalf. It is not alleged that Government made any direct demand upon the Zemindarini, or was a party to the arrangement between the Zemindarini and the ryots by which the water cess demanded of them was to be regarded as paid by them on account of the Zemindarini. If the Government had demanded payment of the water-cess from the Zemindarini, she might of course have arranged with the ryots to pay it on her behalf, but I do not find any evidence of such a demand. Government had, for a long time, been employing Zemindars to collect water-cess from the Zemindari ryots on their behalf for a remuneration of ten per cent. of the collections, and when they abandoned this system, they made the demand on the ryots and not on the Zemindarini. In these circumstances, I do not see how the Zemindarini can claim to recover back the money as illegally levied from her which it was not. The fact that if water cess had been payable they might have called on the Zemindarini to pay it seems to me immaterial.

In paragraph 15 of the plaint the cause of action is stated to be the loss caused to the plaintiff by disentitling and preventing the plaintiff from collecting the usual wet rates of assessment from the ryots. The action of the Government in levying an illegal cess from the ryots did not relieve them from their obligation to pay their existing rents to the Zemindarini, or give them any recourse against her as she cannot be held to have entered into any contract to indemnify them against illegal demands by Government. Their remedy for such demands was not against her but against the Government. This cause of action, therefore, is not made out.

Paragraph 16 of the plaint, as I understand it, alleges that by illegal collection of the cess Government caused loss to the plaintiff by preventing the Zemindarini from adding the amount of the water cess to the rent in the course of her usual increments of Cist as she would otherwise have done. This illegal demand from the ryots and its enforcement may have affected the letting value of the land, but putting forward an unfounded claim to a charge on another man's land, is not an actionable wrong, unless it be done maliciously and occasions special damage when it amounts to actionable slander of title. No such cause of action has been relied on in the argument. It is not alleged that the action of Government was malicious and there is no pretence for saying that it was not a *bona fide* claim of right which is not an actionable wrong.

I have now dealt with all the causes of action alleged in the plaint. The learned Judges who heard the appeal have treated the suit as one for damages for a breach by Government of an implied contract arising out of the permanent Sannad to supply water to the Zemindarini free of water tax, and have held that, in so far as the suit is not barred, the plaintiff is entitled to recover by way of damages the cess levied from the ryots. This is not the case laid in the plaint nor has the Sannad been put in evidence. The usual Sannad, as interpreted by the Privy Council in *Kandukuri Balasurya Prasadha Row* v. *Secretary of State* (2) no doubt entitles the plaintiff to the use of the water in question for irrigation subject only to the payment of the Peishcush, or permanently settled land revenue. In the present case, the Government have neither interfered with the supply of water nor made any demand for land revenue or otherwise from the plaintiff. What they have done is to levy from the ryots statutory water cess in a case where the Statute does not authorize the levy, and to levy it not from the Zemindarini from whom it ought to have been levied if leviable at all, but from the ryots. Having regard to the fact that the levy from the ryots was not protested by the Statute, it may have been open to the plaintiff to treat it as a breach of the contract in the permanent Sannad, if the Sannad can be read as containing an implied contract not to make any such demand on the ryots. This, however, is a suit by

the plaintiff to recover from the Government the water cess actually paid to them by the ryots, and not a suit for damages caused to the plaintiff by reason of Government having made an illegal demand on the plaintiff's ryots contrary to an implied contract to be gathered from the terms of the permanent Sannad. The damages in such a suit would be the loss actually resulting to the plaintiff from the demand on the ryots and not the amount of the cess levied from them by Government. The suit is not framed as one to recover damages from breach of such an implied contract, nor has the plaintiff given any evidence of the damages she would have sustained if she had left the ryots to pay the Government demand and sue to recover it back. In these circumstances, I do not think we are called on to deal with the case on that footing.

There only remains the question of limitation, as regards the actionable claims of the ryots which may be regarded as having been transferred to the plaintiff by the Muchilikas executed by the ryots in the plaintiff's favour down to the year 1908. *Prima facie*, those claims are all barred under Article 16, but it has been contended before us that they are not barred because the plaintiff's own suit, Original Suit No. 23 of 1905, which raised the question of the Government's right to levy the cess was pending, or under appeal, when the water-cess now in suit was levied. The fact that when a cause of action arose the plaintiff or some body else had a suit pending which raised the same question does not exempt him from the operation of the Limitation Act, nor does the decree in that suit give him a fresh cause of action with a fresh starting point. In the recent Full Bench case, Sir Abdul Rahim, Officiating Chief Justice, on further consideration, had not adhered to the opinion expressed in the judgment under appeal that the plaintiff was not bound to sue on her present cause of action until the decree of the Subordinate Judge dismissing the suit with reference to the previous Fasli had been reversed, because till then she could not have sued successfully. In the argument before us, Mr. A. Krishnaswami for the plaintiff relied strongly on the decision of the majority of the Full] Bench in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19). All that was decided there was that a tenant, on the reversal of a decree ordering him to pay rent at a certain rate, was entitled to recover the excess rent paid by him under subsequent decrees passed on the basis of the first decree while it was under appeal, although he had not preferred separate appeals against such decrees. It is said to follow logically that when, in the case of a recurring cause of action, a plaintiff has failed in his first suit and has appealed against the decree dismissing his suit he is entitled to wait until the appeal has been disposed of finally before suing in respect of the subsequent cause of action. It is immaterial whether this conclusion follows logically or not, because it is opposed to the express provisions of the Limitation Act as to the institution of suits within the prescribed periods. On the other side the decision of the majority of the Full Bench in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19), which was recently followed by me in *Bommadevara Venkata Narasimha Naidu* v. *Rani Venkatappayya* (21) as laying down a rule of practical convenience in the circumstances of this country, has been attacked as infringing the rule in *Marritt* v. *Hampton* (22). As to this, I will only say now that I do not think this objection is necessarily fatal. The exceptions which Lord Mansfield was anxious to engraft upon that rule in *Moses* v. *Macpherlan* (3) may not have been accepted in England, but the conditions of Indian litigation are exceptional, and the hardship of requiring the unsuccessful party in the first suit to go on defending subsequent suits and appealing from the decrees passed in them year after year for the sole purpose of complying with *Marriot* v. *Hampton* (22) while the main suit pursues its slow way through three Courts in India to the Privy Council is undoubtedly great. In the case of rent suits which are filed in batches, these appeals may have to be filed annually in hundreds. Such a state of the law is far from ideal, at any rate for the litigant, and I think that, in deciding as they did, the majority of the Full Bench were actuated by this consideration as well as by the fact that in *Shama Purshad Roy*

(21) 54 Ind. Cas. 647; 37 M. L. J. 591.
(22) (1797) 2 Sm. L. C. (6th Ed.) 375 (11th Edition 421); 7 T. R. 269; 2 Esp. 546; 4 R. R. 439; 101 E. R. 969.

Chowdhery v. *Hurro Purshad Roy Chowdhery* (18), the Privy Council had held that, in the circumstances of that case, a suit would lie to recover back money paid under a decree, against which no appeal had been preferred, where in the later suit the Court had merely followed the judgment in the main suit which was then under appeal and was afterwards reversed.

I think the plaintiff's suit fails and that the appeal should be allowed *in toto* and the suit dismissed with costs throughout, whereas my learned brothers consider that she is entitled to the cess for one year. Our decree, of course, is only decisive of the legal merits of the case. I observe that the only evidence given for the defence was to the effect that the ryots were claiming that the refund should be made to them notwithstanding the fact that the amount of the cess levied from them by Government was deducted from the rent payable by them to the Zemindarini so that the loss really fell on her. If this was an obstacle to a refund being made to the Zemindarini or her representative, it may be removed by the decision of the Court that the ryots' claims are clearly barred.

AYLING, J.—I have had the advantage of perusing the judgments of my Lord, the Chief Justice, and my learned brother Coutts-Trotter, J., and feel it unnecessary to say much. As regards the maintainability of the suit, I agree with the latter that, if treated as a suit for damages, it must fail for remoteness: but that it is maintainable on the basis that the payments of water-cess to Government were made by the ryots under arrangement with the Zemindarini, and as her agents. On this footing, plaintiff is entitled to sue to recover from Government these sums which are now admitted to have been illegally collected; but such a suit will be governed by Article 16 of the Limitation Act, and plaintiff will only be able to recover payments made within a year before suit.

The main argument before us has been over the question whether the suit should be treated as one of a special nature analogous to that which was under consideration of the Privy Council in *Shama Purshad Roy Chowdhery* v. *Hurro Purshad Roy Chowdhery* (18) I feel no doubt that it should not. The peculiar circumstances of that case were clearly and exhaustively explained in the judgment of Garth, C. J., in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19), with which I respectfully and entirely agree. If the payments by the ryots in the present case had been made under decrees of Courts, it could not be said that those decrees had been "superseded", to use the unusual term employed by Turner, L J., in his judgment in *Shama Purshad Roy Chowdhery* v. *Hurro Purshad Roy Chowdhery* (18), by the decree of this Court in Appeal Suit No. 35 of 1908. No suit for their recovery would, therefore, lie merely by virtue of the latter judgment. If it had, it might be contended (whether correctly or not, I do not say), that the benefit of the doctrine should not be confined only to persons who had paid money under decrees, but extended to those who had paid under protest without waiting to be sued. But it is impossible to extend an inapplicable doctrine, and, apart from *Shama Purshad Roy Chowdhery* v. *Hurro Purshad Roy Chowdhery* (18), no authority has been quoted for holding that the declaration in this Court's judgment in Appeal Suit No. 35 of 1908 gave plaintiff a fresh right to sue to recover sums previously paid. I agree in the order proposed by Coutts-Trotter, J.

COUTTS-TROTTER, J.—The plaintiff in this suit is the Zemindarini of Vegayammapeta and she sued the Secretary of State for India to recover a sum of Rs. 55,142-1-3 together with interest being the sum the Government has levied from the ryots in her villages as water-cess.

It appears that in 1904 Government carried out a revision of the register of Mamool, wet, land and as a result declared certain lands to be liable to water cess on which it had never been levied before. The Zamindarini instituted a suit, Original Suit No. 23 of 1905, in the Subordinate Judge's Court of Cocanada denying the right of Government to levy the new cess and claiming to recover the amount paid by her under protest for the preceding year. The Court of first instance decided the suit in favour of Government, but in 1914 the High Court reversed that decision and decided that Government had no right to demand the cess, and that the Zemindarini was entitled to free water for the use of

her ryots on the footing of the land being Mamool, wet. In the years that intervened between the decision of the Subordinate Judge in favour of Government and the final reversal by the High Court in March 1914, the water-cess was paid on demand by the ryots to Government, and it is not disputed by the learned Government Pleader that those payments may be taken as having been made under protest. The question is, whether the Zamindarini can get them back.

The legal position with regard to the collection of cess in Zemindari lands appears to be free from doubt. The liability to pay it to Government primarily rests on the Zemindar, but the Government can elect to collect it direct from the ryots as they did in this case and can ultimately enforce its claim by attachment of the land and its crops. The Zemindar can, and does charge his ryots in computing their rents for the water which he gets supplied free from Government and that is part of the benefit which was conferred, and was intended to be conferred, upon him by the Permanent Settlement. What was done in this case was that, the Zemindarini remitted to her ryots from their rents the sums which they had been compelled to pay to Government by way of water cess under threat of attachment. In the earlier years the arrangement is embodied in the Muchilikas. Some are very explicit, as for instance Exhibit Q. 400 where the ryot says: "As the water-tax that I have been separately paying on your behalf to the Government is included in your Ciet, only you yourself may receive and I shall have no concern with the refund of the said amount that may be made in case that the 'Mamul wet' suit which you are conducting is decided in your favour." But the earlier ones, of which Exhibit Q. itself may be taken as a sample, really amount to the same thing. "As the Government has ruled that this land is Merakapallam land (*i. e.*, land on which water-cess is leviable) the water-tax payable on this land is deducted and this Muchilika is executed for the aforesaid Ciet of Rs. 29-14-10 (the balance after deducting the cess from the previous rent). You are disputing that this land is only Mamool, wet, but not Meraka dry wet (on which Ciet would be payable). If the said land is settled as Mamool, wet, and a refund of the *thiruvi jasti*, (*i. e.*, newly levied Ciet) is made, it is agreed that you can receive from the Government the amount of water tax under your reduced Ciet."

The first answer of Government to the suit is that the plaintiff has no cause of action whatsoever. It is argued that as the money was levied from the ryots, the wrong done by Government, if any, is wrong done to the ryot and can create no cause of action in the Zemindarini. One suggested cause of action is this, that the illegal levying of water-cess on these lands was a breach on the part of Government of the contract entered into with the Zemindarini and embodied in the Permanent Settlement, that, owing to that breach, she was compelled to forego a corresponding amount of rent from her ryots, and that that is the damage she suffered. This argument appears to me to break down on the ground of remoteness of the damage alleged. I fail to see, however reasonable and praiseworthy was the step taken by the Zemindarini in relief of her ryots, how it was a step which she was in any way legally compellable to take and it seems to me that if she had sued the ryots for the full rent without any deduction of the cess it would have been no answer for the ryots to plead that Government had illegally exacted cess from them. I do not think that the matter would be mended if it was proved, as it is not, that the action of the Government rendered the ryots absolutely unable to pay the full rent to their landlord. The fact that a wrongdoer takes away my debtor's money and thereby renders him unable to discharge my debt can surely not create a cause of action in me against the wrongdoer.

But I think that there is a cause of action in the Zemindarini of a different nature and its existence depends on the interpretation of the arrangement between the Zemindarini and her ryots, evidenced by the Muchilikas, Exhibit Q. series. Those documents must clearly mean one of two things; either that the ryots assigned to the Zemindarini their cause of action against the Government for the levy of

the illegal tax, or that the ryots agreed to discharge the illegal tax as the agent of the Zemindarini and that the payments to Government are to be treated as her payments which, of course, would leave her free to exercise such rights as she might possess to recover them. The first construction is not pressed, because the Muchilikas only cover three years and the assignment of a cause of action requires writing by the Transfer of Property Act. In my opinion, the second is the true construction of the Muchilikas and the true effect of the arrangement come to, and I think that the payments made to Government in respect of the illegal Cist can be properly treated as payments made by the Zemindarini through her various ryots acting as her agents in that behalf. It is quite true that, after the first three Faslis, the Muchilikas came to an end as owing to the provisions of the Madras Estates Land Act (Mad. Act I of 1908) the annual exchange of Pattas and Muchilikas was dispensed with. But payment of cess by the ryots continued, and, in accordance with well known principles, I think it clearly must be held that the payments were continued on the terms of the same arrangement as was embodied in the Muchilikas of the preceding years. Indeed, this seems to be expressly provided by section 52 (3) of the Estates Land Act. With great respect to the contrary opinion of the Chief Justice, I do not see how the fact that Government was no party to any tripartite agreement as to how the payments of cess were to be regarded can alter their character. If I pay a debt, or elect to pay under protest a sum which is demanded from me, how can my creditor demand to be consulted as to whether I shall pay it myself or by my agent? So long as he gets his money, it is immaterial to him from whose actual hand he receives it: he would refuse a tender from one who purported to be my agent at his peril; and if I could prove that in fact the tenderer was my agent, it would not save him to prove that he had not assented to the relation. I was at one time impressed by the argument that, as this was an illegal exaction, it could only be recovered by those whose money had actually been taken, and that it was, therefore, immaterial to consider whose payment it would have been in the eye of the law, had it been legal. But I think that that argument is unsound. The ultimate remedy in Government's hands is by attachment of the land and its produce, and the power given by the Act to sue either the Zemindar or the ryot is merely machinery for carrying out conveniently what is, in its essence, a right over the land itself. I think that it was competent to those interested in the land to agree among themselves as to which of them should be deemed to bear the incidence of the exaction which they all contended to be illegal. I am, therefore, of opinion that the Zemindarini had a good cause of action against the Government for the return of the money wrongly taken from the ryots. What precise label an English lawyer would affix to that cause of action, whether he would call it money had and received to the use of the plaintiff, or money paid on a consideration which failed, or money extorted by duress, is really not material to consider. A right of action to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue is expressly recognised by Article 16 of the Limitation Act.

This brings me to the second point in the case. It is argued on behalf of Government that under Article 16 of the Limitation Act the period of limitation is one year and that the Zemindarini's right to recover is limited to the cess paid in the year, immediately preceding the institution of the suit. If this be so, it would be fatal to all but a fraction of her claim which covers the whole period from 1906 to 1914. The plaintiff relies on a decision of the Privy Council, followed in the Indian High Courts, as establishing the principle that on the reversal by the High Court of the judgment of the Subordinate Judge's Court of Cocanada in Original Suit No. 23 of 1905, a new cause of action was created in the plaintiff to sue for the recovery of all moneys paid by her to Government in the intervening years in which *ex necessitate rei* she paid the cess, doubtless under protest, but instituted no suit for the return of the money. The position sought to be established is this. If *A.* brings a suit against *B.* which the first Court decides in *B.*'s favour, if *A.* then in succeed-

ing years brings other suits against *B.* raising exactly the same question or questions of right but in respect of fresh sums of money which suits also are all decided in *B.*'s favour, if then finally the original suit on appeal is ultimately decided in favour of *A.*, he becomes as from that moment entitled to institute proceedings to recover the moneys he unsuccessfully sued for in the intervening suits, though he has not appealed against, much less procured the reversal of those intervening decisions. Conversely, if moneys are recovered by the plaintiff in a series of suits of which the first is finally decided adversely to the plaintiff the defendant would have a fresh cause of action when the appellate judgment was promulgated to recover back the moneys which he had been compelled to pay under the intervening judgments though he had not appealed from them or got them set aside. It is then said that it is a necessary and logical corollary to hold that the same principle must apply where there is no intervening litigation but the payments have been made or forgone in acquiescence in the original judgment of the Court of first instance and a similar cause of action would arise for payment or recovery of them, as from the date of the final determination in the suit.

The first of these propositions is one of so startling a nature to an English lawyer, and of such far reaching effect, that I think that it deserves most careful scrutiny. The foundation of it all is sought in the decision of the Privy Council in *Shama Purshad Roy Chowdhery* v. *Hurro Purshad Roy Chowdhery* (18).

The facts of that case have been most carefully analysed and scrutinized in the Indian Courts, on at least two occasions, by Garth, C. J., in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19), and by my Lord in *Bommadevara Venkata Narasimha Naidu* v. *Rani Venkatappayya* (21), so that it is unnecessary to go over the same ground again. The key to its explanation appears to me to lie in the fact that the decision of the final Court of Appeal in the first suit, which of course related back to the date of the institution of that suit, on the face of it, provided for the adjustment of all claims between the parties both present and future. In particular, as pointed out by Garth, C. J., in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19), the order in the first suit in the Privy Council declared that very interest which was the subject-matter of the later suits not to be recoverable. The order, thus, in a very real sense, "superseded"—to use the language of the judgment—any subsequent decrees of the lower Courts which purported to go on adjusting rights which had already been finally adjusted; it did not and did not pretend to repeal them; it could only do so in an appeal in such suits to itself. But it treated them as mere nullities, sham fights over matters which, as it turned out, were predetermined beforehand. On this view, there is nothing in *Shama Purshad Roy Chowdhery* v. *Hurro Purshad Roy Chowdhery* (18), to challenge the doctrine which has been regarded as final with the exception of some dicta of Lord Mansfield, at least since the decision in *Marriot* v. *Hampton* (22), *viz.*, that a decree while unreversed is conclusive of the rights of the parties as to the subject-matter with which it deals. If *Shama Purshad Roy Chowdhery* v. *Hurro Purshad Roy Chowdhery* (18) modifies it, in my opinion it does so only in this respect, that it lays down that if the final determination of the first suit not merely settled the legal principles which should regulate the rights of the parties, but actually resolved their whole dispute present and future, any subsequent litigation, is litigation devoid of a subject-matter, and the decrees and judgments in such litigation can, as from the pronouncement of the final order in the first suit, be regarded as creating no right in the successful party to retain anything he recovered in them, because he had already recovered anything that was due to him by the final adjustment of his rights in the original action. Such subsequent decrees being "superseded," and declared to be otiose, it is obvious that he could not in conscience be allowed to retain the fruits of them, and so in effect get his money twice over. I see no analogy between this doctrine and the present case. The original suit brought by the Zamindarini, Original Suit No. 23 of 1905, was for recovery from Government of one

CHANDANMAL HAMBIRMAL v. BHASKAR WAMAN.

year's water-cess; the High Court finally decided that she was entitled to recover it. That was the entire scope and extent of their decision. Next year, another year's water-cess was demanded. It was paid; but it might have been resisted on different grounds to those on which the previous suit had been defended; it might, *e.g.*, have been alleged and proved in a suit that the water supply had totally failed for the year. Could anyone assert, then, that the determination of the Court of first instance in the earlier case would have "superseded" the decision in the second case? The only way to bring the case within what I believe to be the legitimate scope of the decision in *Shama Purshad Roy Chowdhery* v. *Hurro Purshad Roy Chowdhery* (18) would be to posit that the Appellate Court's decree in the first suit had settled the rights of the parties not only in principle but in actual working out of the figures for the ensuing years—a thing, of course, practically impossible.

I am, therefore, of opinion that the doctrine supposed to be enshrined in *Shama Purshad Roy Chowdhery* v. *Hurro Purshad Roy Chowdhery* (18) is not really to be found there; that the decisions of the majority of Court in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19) was wrong, and that the dissenting judgments of Garth, C. J., and Jackson, J., were right. It has been suggested that, without going that length, a distinction might be made inasmuch as this is not a case of money recovered under a judgment or a series of judgments as in the other cases, but of money paid voluntarily, under protest no doubt, but without legal process. It is, of course, a distinction in fact but, logically, it seems to me impossible to say that a man should be able to recover money which he has paid under an actual decision on the facts relating to the particular payment, but unable to recover money which he paid without waiting for a decree against him—on the face of it, an *a fortiori* case, if he has any right to recover it at all. I prefer the more direct course, especially as I think that a vital and salutary legal principle is involved and is unequivocally raised in this case; and I feel, therefore, constrained to say that I think that *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (19) and *Bommadevara Venkata Narasimha Naidu* v. *Rani Venkatappayya* (21) were wrongly decided.

I hold, therefore, that the Zemindarini is entitled to recover the cess paid by her ryots in the year prior to the institution of the suit, but for that year alone.

BY THE COURT.—The judgment of the Court will be that the plaintiff is entitled to recover cess for Fasli 1323 Rs. 4,807-7-9 with subsequent interest at 6 per cent. on Rs. 4,671-3-9 from date of suit until payment. Parties will pay and receive proportionate costs throughout.

M. C. P.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 724 OF 1918.

October 14, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

CHANDANMAL HAMBIRMAL HUNDEKARI—APPELLANT

versus

BHASKAR WAMAN DESHPANDE—RESPONDENT.

Rajinama *and* kabuliyat, *whether constitute transfer—Bombay Land Revenue Code (Act V of 1879), s.* 74.

Before it can be held that a *rajinama* and *kabuliyat* really do evidence a transfer of ownership, there must be either evidence or indications furnished by lapse of time and possession and so forth, that there was in fact an intention to transfer ownership. A *rajinama* and *kabuliyat* do not by any means completely take the place of a sale-deed. They only serve as documentary evidence of transfer if that transfer can properly be inferred from the totality of facts proved. [p. 116, col. 1.]

Second appeal from the decision of the District Judge, Ahmednagar, in Appeal No. 19 of 1917.

Mr. *D. C. Virkar*, for the Appellant.

Mr. *A. G. Desai*, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The property in suit in 1884 belonged to one Chinkabai. She mortgaged it to the plaintiff's father in 1884. In 1894 she executed a *rajinama* in favour of her son Madhavrao giving notice under section 74 of the Bombay Land Revenue Code of 1879 that she had relinquish-

ed the occupancy of certain survey numbers mentioned therein, and asked for the necessary mutation of names to be made in the records. At the same time, Madhavrao executed a *kabuliyat* addressed to the *Mamlatdar*, and the properties were transferred in the Government records in the name of Madhavrao. In 1903 Madhavrao mortgaged to the 1st defendant. The plaintiff brought a suit on his mortgage in 1910 and got a decree for sale in 1911. He purchased in 1915. The 1st defendant got a consent decree against Madhavrao in 1908 and purchased under that decree in 1912. The evidence adduced at the trial convinced the Trial Judge that the transfer of the property to the name of Madhavrao in 1894 was merely for the convenience of Chinkabai, and he found it was recognised between Madhavrao and Chinkabai that Madhavrao was merely managing the property for her. He finds on issue No. 3 as follows: "I have, therefore, to find that Madhavrao never professed to be in possession and Vahivat as owner and that Chinkabai did not absolutely relinquish her proprietory right in favour of Madhavrao by the change of *khata* to his name. The purpose of the change of *khata* seems to be to facilitate the management of the property by Madhavrao. Beyond this evidence there is absolutely no evidence for the defendant to prove that Madhavrao was the owner of the lands. My finding, therefore, on the 3rd issue is in the negative."

Now, in second appeal it has been argued that the execution of the *rajinama* and *kabuliyat* in 1894 must necessarily by themselves amount to a transfer of the property by Chinkabai to Madhavrao. But none of the authorities cited is in favour of so unlimited an assertion. The question in issue was, whether such documents required registration, and all that the cases cited can show is that it was decided that these documents did not require registration, and could amount to evidence of transfer of the property to which they related. But the Courts have never gone so far as to hold that the execution of these documents must necessarily amount to a transfer which could not be rebutted by any evidence regarding the manner in which the parties concerned dealt with the property. Each case must necessarily depend upon its own facts, and in one case the Court might be satisfied that the parties who executed a *rajinama* and *kabuliyat* intended that the property should be transferred, and in another case, as in this, the Court might find from the evidence that the execution of these documents was merely for the convenience of the parties, especially, as in this case, where the party transferring the *khata* was a woman. I think we must be bound by the findings of fact in the Trial Court that it was not intended by these documents executed in 1894 to transfer the property from Chinkabai to Madhavrao. It follows, therefore, that the property stood in the name of Madhavrao, merely for the convenience of Chinkabai, and Chinkabai was well-acquainted with that fact. Therefore, Madhavrao had no title, and the plaintiff's mortgage was the only mortgage of the property, so that the plaintiff who had purchased in execution is entitled to the property as against Madhavrao's mortgagee. Therefore, the appeal in my opinion should be dismissed with costs.

HEATON, J.—In this case it is admitted that the appellants must fail, unless it is shown that in the year 1894 there was a transfer of ownership of the land in suit by Chinkabai, the then owner, to her son Madhavrao. It is found, as a matter of fact, by both the lower Courts, that there was no transfer of ownership, and that finding must be accepted by us unless, as a matter of law, the existence in the year 1894 of a *rajinama* and *kabuliyat* under section 74 of the Bombay Land Revenue Code necessarily constitute a transfer of ownership. It is argued by the appellants that they do. The value of *rajinama* and *kabuliyat* is a matter which has often engaged my attention, and I see I have delivered several opinions on the point which appear in the Bombay Law Reporter. One of the latest, if not the latest, appears in *Narso Ramaji* v. *Nagava Ishvarappa* (1). For many years it seems to have been the opinion in this Court that it was difficult to establish a transfer of the kind here asserted, without a sale-deed; although even then there were indications that the existence of a *rajinama* ahd *kabuliyat* might possibly be a substitute for sale-deed as

(1) 45 Ind. Cas. 492; 20 Bom. L. R. 358; 42 B. 359.

documentary evidence of a transfer. In recent years it has, I think, become established that you can have a transfer of agricultural lands without a sale deed and that a *rajinama* and *kabuliyat* may, in certain cases, be, for substantial purposes, as good evidence of a transfer as a sale deed itself. But of course before you can hold that a *rajinama* and *kabuliyat* really do evidence a transfer of ownership, there must be either evidence or indications furnished by lapse of time and possession and so forth, that there was in fact an intention to transfer ownership. A *rajinama* and *kabuliyat* do not by any means completely take the place of a sale deed. They only serve as documentary evidence of transfer if that transfer can properly be inferred from the totality of facts proved; and these must, usually at any rate, comprise a good deal more than the *rajinama* and *kabuliyat* themselves. In this case there is evidence from which both the lower Courts have drawn a conclusion that there was no intention to transfer ownership. It was quite within their powers to arrive at that conclusion. It seems to me, therefore, that their finding that there was no transfer of ownership in 1894 is conclusive, and that the argument urged by the appellants that a *rajinama* and *kabuliyat* necessarily compel the inference, as a matter of law, that there was a transfer of ownership is without good foundation. I, therefore, agree that the appeal should be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 349 OF 1918.

July 29, 1920.

Present:—Justice Sir P. C. Banerji, KT., Mr. Justice Piggott and Mr. Justice Walsh.

SHEODAN KURMI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALKARAN KURMI—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Separation without actual partition—Suit for joint possession, whether maintainable—Appeal, second—Point of law, whether can be raised for the first time.

Where there has been a separation of a Hindu joint family, but not a division by metes and bounds, a suit for joint possession by one member of the family, who has been excluded from possession, is maintainable if he was in joint possession before his exclusion, and he is entitled to be restored to the possession which he held before he was interfered with. [p. 117, col. 1.]

A Court of second appeal is not bound to entertain a question of law raised for the first time in second appeal, this can only be done by the permission of the Court, *i.e.*, the Court may take the point of itself, or, if persuaded that for some good cause a vital point has been overlooked in the proceedings in the Court below, it may permit the point to be argued. [p. 117, col. 2.]

Second appeal against the decree of the Subordinate Judge, Jaunpur, dated the 14th of December 1917.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.

BANERJI, J.—This appeal arises out of a suit in which the plaintiff claimed joint possession, to the extent of a third share, of certain plots of cultivatory land. The plaintiff set forth a pedigree under which he alleged that he had a third share in the holding. He also alleged that the family was joint, that they were in joint possession of the holding until seven years ago when a separation of the family took place, but that the lands remained joint. By this, manifestly, he means that the lands were not divided by metes and bounds. He goes on further to allege that the defendants, who are the owners of the remaining two-thirds share, have excluded him from the profits of his one-third share and he accordingly claimed joint possession in respect of a third share. The defence was that the plaintiff did not belong to the family at all, that he was not entitled to any portion of the disputed property, and that he had never been in possession. Both the Courts below have found that the land in dispute belongs to the plaintiff and the defendants, that each set of parties represents a third branch of the family, and that thus the plaintiff is entitled to a third share. The lower Appellate Court believed the statement of one of the defendants who deposed that, at the end of each year, the profits arising from the land used to be divided. The claim accordingly was decreed. Three off

the defendants who represent one branch of the family have preferred this appeal and Mr. Haribans Sahai on their behalf put forward two pleas in the memorandum of appeal. The first was that the suit as brought was not maintainable. He has now to concede that a suit for joint possession could be maintained if the plaintiff was in joint possession before his exclusion from possession, and that he was entitled to be restored to the possession which he held before he was interfered with by the defendants. He, however, urges that it must be assumed that there has not been a separation of the family, that, therefore, a decree for joint possession of a third share could not be granted. This is his second plea. In my opinion, according to the findings of the learned Judge, there has been a separation of the family, although not a division by metes and bounds. As I have already stated, the learned Judge has believed the statement of one of the defendants that the produce of the land used to be divided at the end of the year between the different co-sharers. This means that the produce used to be divided in defined shares. Therefore, there was a disruption of the joint family, although there was no division by metes and bounds. The parties agreed upon taking defined shares and according to these shares they divided the profits. Furthermore, the objection taken in this appeal seems to me to be wholly groundless, inasmuch as according to the pedigree filed by the plaintiff which has been found by the Court below to be correct, the plaintiff has a one-third share and it cannot be alleged that he does not own that share. No question, therefore, for decision by the Full Bench arises in the case and I deem it unnecessary to discuss it. I would dismiss the appeal with costs.

PIGGOTT, J.—I concur, but take the liberty of adding a few words regarding the aspect of the case which has led to its reference to a Full Bench. The memorandum of appeal to this Court does raise a question of law which had not been raised in the pleadings, or in argument in either of the Courts below. It is not clearly stated in this memorandum of appeal that the claim should have been dismissed because, on the facts stated by the plaintiffs themselves they had no cause of action. Such a plea would, be in my opinion, upon the face of it unsustainable, but I do not think that it was taken. Apart from questions of jurisdiction or of limitation which a Court is always bound to consider, it is only a plea which goes to the root of the case, in this sense that if it be well-founded the plaint itself discloses no cause of action, that this Court is bound to entertain in second appeal. Over and beyond this, the Court has a wide discretion. In the present case, as soon as the nature of the point taken had been explained to the Court, it would have been obvious that, at most, even if the plea succeeded, the result would have been a slight modification in the decree. Even such modification would, in my opinion, have had no practical effect, because the finding that the plaintiffs were entitled to a one-third share would have remained and would have operated as *res judicata* in any subsequent litigation. This Court, therefore, would have been fully warranted in holding that this was not a plea which should be entertained in second appeal.

WALSH, J.—I entirely agree. I am not particularly surprised at the result. In my experience, a point which is deliberately not taken until the eleventh hour and is then taken in the final Court, is generally a bad one. I had my suspicion that this was the nature of the point on this occasion, but I do not see on what principle Courts of Appeal should be compelled to listen to long arguments on bad points which have been deliberately kept in reserve for the final Court. For the very reason that such points, althohgh there may be exceptions to the rule, are generally irrelevant, an Appellate Court ought to be compelled to listen to them for the first time. In my opinion, the real principle which has always been followed certainly in English Courts and in most High Courts in India is that the cases in which a point, whether it goes to the root of the cause of action or is merely a subsidiary point, can be taken after all the evidence has been concluded and one Court of appeal has also determined the suit are very rare indeed, and in my opinion it should only be done by the permission of the Court hearing the appeal, *i.e.*, the Court hearing the appeal may take the point itself, or, if persuaded that for some good cause a vital point has been overlooked in the proceedings of the Court below, it may permit the point to be argued. It cannot, however,

in my opinion, be compelled as a matter of right at the instance of the appellant to listen to a point so raised. In this particular case I am bound to say that I think the appellants' Vakil ought to have known that the point was clear, and ought not to have raised it.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 425 AND 426 OF 1918.

February 9, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

MAHADEV NARAYAN DATAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SADASHIV KESHAV LIMAYE AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 26, 28—Defence, whether barred—Revenue sale—Purchaser, suit by, to recover possession—Sale, validity of, whether can be questioned—Defendant found not liable to assessment—Purchaser for value without notice, doctrine of, whether applicable to revenue sales.

The law of limitation does not put a bar of time to any defence in any case whatever, except where a suit falls under section 26 or section 28 of the Limitation Act. [p. 118, col. 2.]

When a decree is passed against a defendant in a civil suit and his property is put up for sale in execution proceedings and he does not ask for a stay of execution, the purchaser at the execution sale acquires a good title although it may happen that, eventually, the decree against the defendant is set aside on appeal. But there is a great distinction between sales in execution of Civil Court decrees and sales by the Revenue Courts for arrears of assessment. In the latter case, if it is found that, as a matter of fact, the defendant in the revenue proceedings was entitled to hold his lands free of assessment, any sale which took place on the footing that he was bound to pay assessment would be invalid and the purchaser in such a sale would not get a good title except by adverse possession. [p. 119, col. 1.]

The doctrine of a purchaser for value without notice does not apply to sales held by Revenue Courts. [p. 120, col. 2.]

Second appeals from the decision of the District Judge, Thana, in Appeals Nos. 294 of 1917, and 229 of 1916, affirming the decrees passed by the Subordinate Judge at Pen, in Civil Suits Nos. 81 of 1916 and 172 of 1915.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

S. A. No. 426 OF 1918.

MACLEOD, C. J.—In this case the plaintiffs sued to recover possession of the suit property together with Rs. 109.9 6 as damages and costs. In the Trail Court the plaintiffs succeeded. An appeal by the defendants to the District Judge was dismissed.

The plaintiffs claimed title through their vendors, who were the purchasers at a revenue sale on the 27th of May 1904, which was confirmed on the 6th of August 1904. The defendants remained in possession. They resisted the plaintiffs' claim to possession on the ground that the sale was invalid.

The first question is, whether the defendants can raise this defence, since they did not file a suit to set aside the sale within one year under Article 12A of the Indian Limitation Act. That question was decided in favour of the defendant in *Venkatachalapathi Ayyar* v. *Robert Fischer* (1). The reasoning appears to be that the Limitation Act applies only to the limitation of suits, and it is only when a suit comes within section 26 or 28 of the Act that a defence is barred, otherwise the defendant, who would be barred if he was raising the same question as a plaintiff, is not barred from raising that question when he is a defendant. It seems well recognized that, unless the suit falls within section 26 or 28 of the Indian Limitation Act, there is no bar of limitation to a defence. The plaintiff suing for possession has to prove his title. He sets up as his title a sale of 1904. The defendants reply "The sale was invalid. It is true that if we file a suit now to set aside that sale it would be time-barred. But there is nothing in the Limitation Act which prevents us from raising that defence in a suit by a plaintiff for possession of the property which was sold, when the question arises whe-

(1) 30 M. 444; 17 M. L. J. 294.

ther the sale in 1904 was a good sale as against the defendants." There was a sale by the Revenue Court under the provisions of the Land Revenue Code for arrears of revenue. At that time proceedings were pending in the suit brought by the defendants against their landlord for a declaration that the lands they held were held by them free of assessment. They had lost in the lower Courts and an appeal was pending in the High Court. After the date of the sale, but before the sale was confirmed, the High Court set aside the decree of the lower Court and remanded the case for further inquiry, and eventually in 1905 passed a decree in favour of the defendants. The result was that it was held that the defendants held the lands free of assessment and it would follow that they would be entitled to recover any arrears of assessment which the plaintiff had recovered in the revenue suit. In my opinion, it follows that the sale to recover arrears of assessment, when as a matter of fact the land was free of assessment, would be invalid as against the judgment-debtor in those proceedings.

But it has been argued in favour of the plaintiffs that they are purchasers without notice, and, therefore, their title is good as against the judgment-debtor. That argument is sought to be supported on the analogy of a sale in execution of a decree in a Civil Court. No doubt, when a decree is passed against a defendant in a civil suit and his property is put up for sale in execution proceedings and he does not ask for a stay of execution, the purchaser at the execution sale acquires a good title, although it may happen that eventually the decree against the defendant is set aside on appeal. It appears to me that there is a very great distinction between sales in execution of a Civil Court decrees and sales by the Revenue Courts for arrears of assessment. I think that if it were found, as it has been found in this case, that, as a matter of fact, the defendant in the revenue proceedings was entitled to hold his lands free of assessment, any sale which took place on the footing that he was bound to pay assessment would be invalid and that the purchaser in such a sale would not acquire a good title except by adverse possession. In this case the purchaser did not even get possession. The judgment-debtor remained in possession of the property, and ten years after the sale the vendor who had bought the property for Rs. 8, subject to various mortgages, sold to the present plaintiffs. In my opinion, the defendants were entitled to raise the question whether or not the sale in 1904 was valid, and, on the facts of this case, I think that they succeeded in showing that the sale was invalid.

The result must be that the appeal succeeds, the decree of the lower Appellate Court must be reversed and the plaintiffs' suit dismissed with costs throughout.

S. A. No. 425 of 1918.

MACLEOD, C. J.—In this case the plaintiffs sue for cancellation of the sale of the same property. But, in my opinion, Article 12A of the Indian Limitation Act applied, and they ought to have filed the suit to set aside the sale within one year. This appeal, therefore, must be dismissed with costs.

HEATON, J.—I concur in the decision in both matters. As regards pleading in defence an allegation which could not be urged were the defendant a plaintiff, it seems to me that the law as set out in the Limitation Act is fairly clear. The Limitation Act deals with the bar of time in the case of suits and applications. In general, it does not profess anywhere either in the Act itself or in the Schedule to deal with defences. Therefore, I do not think that our law of limitation puts a bar of time to any defence in any case whatever except where it appears from the express words of the Act that such a thing is intended. Such an intention is apparent in the words of sections 26 and 28. The case we are dealing with is not, however, of the class covered by these two sections. So, the law of limitation does not in any way deprive the defendant of his right to put the plaintiff to prove that the sale was a valid sale; provided of course that the defendant establishes facts which appear to show that the sale was invalid.

That the sale would have been set aside had a suit been brought for the purpose within twelve months I cannot myself

doubt. The owner of the property, who is the plaintiff in one suit and defendant in the other, had brought a suit for the purpose of having it declared that he was not liable to pay *dhara*, and that suit had been heard in the first Court and in the Court of first appeal when the land now in suit was sold. That sale was authorised by a decision of the Revenue Court that *dhara* was in arrears. But when the second appeal was decided it was held that no *dhara* was payable, so there would not have been any arrears. To explain a little more fully: the owner was sued for *dhara* in the *Mamlatdar's* Court and an order for payment was made and on his failure to pay his property was sold. That is to say, it was held that *dhara* was payable. But this was in an order which assumed as determined a question which, as a matter of fact, had not been determined; at least it remained to be finally determined by this Court in second appeal.

It may be that, in those circumstances, the Collector had no authority whatever to sell the property except subject to the condition that the sale would not hold good if the decision of this Court was to the effect, as ultimately it was, that *dhara* was not payable. Or, it may be that though the sale might be held, it could only properly have been confirmed subject to such a condition. However, it was held and it was confirmed quite regardless of the possibility that the whole foundation, the whole justification, of the sale might afterwards be removed by an order of this Court, and such order was in fact eventually made. It seems to me that if sales of this kind are ever to be set aside, we have here overwhelming reason why this particular sale should be held to have been a bad and not a binding sale; or, rather, one that would not have been upheld had a suit been brought in time to set it aside. I find it difficult myself to imagine stronger reasons for setting aside a sale than are here disclosed. That the sale on its merits, therefore, was bad and not good seems to me to be beyond question. In the case of *Balkishen Das* v. *Simpson* (2) their Lordships of the Privy Council dealt with a sale which had been made by a Collector on the supposition that arrears of revenue were due, when in fact they were not. They unhesitatingly set aside the sale in those circumstances, which do not seem to me to be really appreciably stronger than those which exist in the present case. The appropriate result would appear to be the same in both cases, namely, that the Collector had really no right to sell the property although he thought he had.

But it has been urged that, although the sale was bad, yet as the land was sold to a stranger who paid the auction price for it and had no notice of any defect of title, therefore, the property cannot be taken away from such purchaser, however bad the sale may have been. If the sale had been a Civil Court sale, it appears, on the strength of the case of *Shivlal Bhagvan* v. *Shambhuprasad* (3), that it would be so. But sales held by Civil Courts made after enquiry and after the fulfilment of all the required formalities are in a very different position from sales by Revenue Authorities. In the former case you have a Court of Justice at work with its impartiality and its care. In the other you have fiscal authorities at work, and experience and common knowledge tell us that you certainly cannot expect and do not get the same qualities of impartiality and so forth in fiscal authorities as you are entitled to expect and ordinarily to obtain from the Civil Courts. So to apply to sales by fiscal authorities precisely the same law which it is proper to apply to sales by Civil Courts would seem to me to be a very gross legal extravagance.

I feel no doubt whatever that this principle of a purchaser for value without notice cannot apply to the facts of this case. That principle, to begin with, is based on this idea that circumstances occasionally arise in which a stranger who has paid money for property has a better right to that property in equity than has the true owner. This, of course, is rather a startling proposition to any one who is disposed to regard the true owner of property as the person undoubtedly entitled to it. The underlying idea is that the true owner loses

(2) 26 I. A. 151; 2 C. 833 (P. C.); 2 C. W. N. 513; 7 Sar. P. C. J. 363; 13 Ind. Dec. (N. S.) 543.

(3) 20 B 435; 7 Bom. L. R. 585.

his rights, not by parting with them but owing to some carelessness or negligence on his part or on the part of those acting for him. In this particular case we have the true owner fighting vigorously, assiduously and consistently for what he deems to be his right. There is nothing in the nature of negligence or carelessness on his part, and to deprive him of his property by the application of a principle (or a rule as I prefer to call it) relating to a purchaser for value without notice would, to my mind, be a very great injustice.

That is all I wish to say for myself in this case. I concur in the orders proposed.

Orders accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 214-B OF 1919.

June 29, 1920.

Present :—Mr. Mittra, A. J. C.

NARAYAN—DEFENDANT No. 1—APPELLANT

versus

WAMAN—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 60—Appropriation of payment—Amount deposited for special purpose, whether can be appropriated—Mortgage suit—Interest —Damdupat, *rule of, applicability of.*

An amount deposited with a creditor for a special purpose cannot be regarded as a re-payment which the debtor can subsequently claim to have appropriated towards any other debt. [p 122, col. 1.]

In a mortgage suit where interest is calculated at the contractual rate up to the date of the *dies datus*, the decree is subject to the rule of *damdupat* up to that date. [p. 122, col. 2.]

Appeal from the decree passed by the Additional District Judge, Amraoti, in Civil Appeal No. 179 of 1918, dated the 19th June 1919.

Mr. *Atmaram Bhagwant*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—This second appeal and Second Appeal No. 215 B of 1919 will be disposed of by this judgment. The lower Appellate Court has also dealt with the two suits (Suits Nos. 122 and 167 of 1917) in the same judgment. The parties to both suits are the same. Suit No. 122 of 1917 is based upon a mortgage for Rs. 1,500 dated the 8th September 1914. The mortgage is payable by three instalments, the first of which became due on the 1st April 1915, being an instalment of Rs. 500. Suit No. 167 is based upon a bond for Rs. 500, dated the 18th July 1915 and a promissory note for Rs. 100, dated the 18th May 1917. The plaintiff has been successful in both suits and the contentions raised by the defendants have been overruled by both the Courts below.

The first point argued before me is a question of appropriation of certain payments. It is common ground that at the end of Sambat 1970, that is, after the 25th October 1914 only Rs. 100 was due from the defendants. On the 25th October 1914 a sum of Rs. 57-8-0 was advanced. No further advances were made to the debtors till the 2nd May 1915. In the meanwhile they have paid.

Rs. 100 on 10th May 1915.
" 150 on 20th March 1915.
" 225 on 25th March 1915.
" 75 on 28th March 1915.
" 50 on 2nd April 1915.
" 200 on 12th April 1915.

The only amount due at that time was the first instalment of Rs 500 under the mortgage deed. It is, therefore, argued that as they owed only Rs. 157-8-0 on the *khata* and repaid Rs 800, the amount due under the first instalment of the mortgage should be deemed to have been repaid, and the appropriation made by the plaintiff is not authorised by law. It is perfectly clear that a creditor is not entitled to appropriate a payment to a debt which is not due. The argument, except for the special facts of the case, would be unanswerable. The evidence given on the part of the plaintiff has been accepted by the Courts below. The plaintiff's Munim (P. W. No. 1) says: "These credits were shown in the *khata* of 1971 on the express understanding that the debtor would draw them out as he needed". To the same effect is evidence of the plaintiff himself as a witness. He says that the defendants had their business of selling oranges and they used to credit

whetever money they got by the sale at his shop and take money as they liked. It appears that the money would be required for the purposes of the orange business about May and the defendants seem to have been drawing this amount from the 2nd May. Both the Courts, therefore, have correctly held that the amount deposited for a special purpose cannot be regarded as a re-payment which the debtors at a subsequent date may claim to appropriate to any other debt.

It is contended that the account books of the plaintiff are not regularly kept within the meaning of the ruling of this Court in *Mukundram* v. *Dayaram* (1). I do not think that ruling applies. The *pacca rokar* is balanced in the usual way but the *kachi rokar* which is a book he need not have kept is also balanced in the blank space at the top. The entries are made from day to day and the totalling may not take place every day. But this would not make it any the less an account-book within the meaning of section 34 of the Indian Evidence Act.

As regards the rate of interest, the promissory rate of interest agreed in the mortgage-deed was Rs. 1-4 per cent. per mensem. The bond provides for payment of 2 per cent. in case of default from the date of bond. The lower Courts have granted 2 per cent. simple interest from the date of default. I cannot say that there is any thing illegal in this. They have held that the clause was penal so far as there was an intention to give retrospective effect to the higher rate of interest, but this has not been given effect to, and the award of interest at the higher rate is permitted by law, and I cannot interfere with the exercise of their discretion.

It has not been explained why it was necessary to frame an issue with regard to a promissory note for Rs. 700 which was not in suit.

As regards the advances which the appellants deny, they have been proved and fromal proof is certainly on the record. Whether the witnesses should be believed or not is not for me to decide.

In the lower Appellate Court it was urged that the amount decreed has been in excess of the amount allowed by the rule of *dam dupat*. This argument has not been given effect by the learned Additional District Judge. I think the practice has hitherto been laid down at page 508 of Doctor Rashbehary Ghose's Law of Mortgage, 4th Edition. In Dr. Gour's Hindu Code, page 619, it is stated that in a mortgage suit where interest is calculated at the contractual rate up to the date of the *dies datus* the decree is subject to the rule of *dam dupat* up to that date. The principle amount of the mortgage was Rs. 1,500 and the decree should be, therefore, for only Rs. 3,000 and not 3,691. The appeal succeeds to the extent of Rs. 691.

As I have modified the decree, I extend time for payment to the 3rd January 1921. On the decretal amount including costs I allow interest at the rate of 9 per cent. per annum, calculated from the date of the preliminary decree by way of compensation. The decree of the lower Court is modified by altering the decretal amount from Rs. 3,691 to Rs. 3,000. The appellant will get one fifth of the costs of this second appeal from the respondent and will pay his costs to the extent of four-fifths, the order of the lower Court regarding costs not being modified.

Appeal partly allowed.

(1) 23 Ind. Cas. 893; 10 N. L. R. 44.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 239 OF 1918.

February 9, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice and Mr. Justice Heaton.

DAYAL KHUSHAL—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Bombay Revenue Jurisdiction Act (X of 1876), s. 11—Collector, order made by, directing removal of encroachment on public road—Appeal, failure to prefer—Suit to set aside order, whether maintainable.

A Collector made an order directing the plaintiff to remove an alleged encroachment on a public road. The plaintiff preferred no appeal against this order but more than two months after the order was made he brought a suit in the Civil Court to get the order set aside:

Held, that the suit was barred by the provisions of section 11 of the Bombay Revenue Jurisdiction Act.

Appeal from the decision of the District Judge, Surat, in Civil Suit No. 10 of 1917.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

HEATON, J.—This is a suit which the plaintiff brought for the reversal of an order passed by the Collector of Surat directing the plaintiff to remove an alleged encroachment on a public road, and for an injunction against the defendant to suspend the said order pending the suit. When the suit came on for hearing before the District Judge of Surat, he held that it was barred by section 11 of the Bombay Revenue Jurisdiction Act, because the plaintiff had not presented all the appeals allowed by law in the matter. In fact, he had not presented any appeal. The Collector's order was made on the 6th of February 1917, and, on the 21st of April, *i.e.*, nearly two and a half months later, the Collector followed up his order by intimation that, unless the plaintiff filed a suit, the order would be given practical effect to by removing the encroachment. Thereupon the plaintiff did file this suit. Moreover, it would seem that the plaintiff never, either before filing the suit or afterwards, made any appeal to the Commissioner either against the Collector's first order or his later intimation. There is, it is said, no evidence on the record as to whether an appeal was or was not presented to the Commissioner, but it must have been admitted in the lower Court that no appeal had been presented, or the suit could not have been dismissed under section 11 of the Bombay Revenue Jurisdiction Act.

On the facts so far stated, the suit was quite plainly, and as I think rightly, dismissed. But it is argued that the principle of the case of *Secretary of State* v. *Gajanan Krishna* (1) applies here, that is to say, it is said that if a plaintiff brings a suit for an injunction, he is not bound by the provisions of section 80 of the Civil Procedure Code, and by analogy, therefore, he is not bound by the provisions of section 11 of the Bombay Revenue Jurisdiction Act. I was myself a party to the decision to which I have referred, and I see that there is a judgment of mine in the case. I am afraid the principle that was in my mind in giving that judgment has been very greatly misapprehended. It is true that I still think that if the only remedy which a party has, is to obtain an injunction from a Civil Court and if the circumstances are such that if the injunction is not obtained, the mischief sought to be avioded will inevitably be done; then the Court will be justified in accepting the suit even without the previous notice required by section 80 of the Code. Because, on the assumptions I am making, if that were not done, the suitor would be left without any effective remedy whatever. The Civil Procedure Code, which contains our law as to how suits are to be presented, cannot intend that its provisions should be so applied as to deprive a suitor of the only remedy by which a wrong to him can be prevented. That, however, is a principle which has no application here. The remedy provided by the law was an appeal to the Commissioner against the order of the Collector. That order was dated the 6th of February. More than two months elapsed without the plaintiff taking any action whatever by way of appeal. When the further intimation from the Collector arrived he had still a fortnight within which he could appeal to the Commissioner and obtain an order staying the removal of the alleged encroachment. But, instead of adopting this method which was the method of redress indicated to him by the law, and a perfectly effectual method of redress, he came to the Civil Court. I think, therefore, that when we examine the facts of this case, it is found that section 11 of the Bombay Revenue Jurisdiction Act does apply, that this is not a case in which the only remedy that the plaintiff had was an immediate application to the Court for an injunction, and consequently that the suit was rightly dismissed.

I think the appeal must be dismissed with costs.

MACLEOD, C. J.—I concur.

Appeal dismissed.

(1) 10 Ind. Cas. 639; 35 B. 362; 13 Bom. L. R. 273.

SUJAN DEVI v. JAGIRI MAL.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 334 OF 1916.

October 13, 1920.

Present :—Mr. Justice Leslie Jones and Mr. Justice Wilberforce.

Musammat SUJAN DEVI—PLAINTIFF—APPELLANT

versus

JAGIRI MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—*Inheritance*—*Female heirs*—*Brother's daughter, whether* bandhu—*Suit for declaration that alleged adoption never took place*—*Evidence of knowledge*—*Burden of proof*—*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 118.

Under the Hindu Law the only females entitled to inherit are the widow, the daughter, the mother, the father's mother and the father's father's mother. [p. 125, col. 1.]

A brother's daughter is not a *bandhu* with rights of inheritance. [p. 124, col. 1.]

Gauri Sahai v. *Rukko*, 3 A. 45; 5 Ind. Jur. 486; 2 Ind. Dec. (N. S.) 21; *Jagat Narain* v. *Sheo Das*, 5 A. 311; A. W. N. (1883) 51; 3 Ind. Dec. (N. S.) 344, *Nanhi* v. *Gauri Shankar*, 28 A. 187; 2 A. L. J. 654; A. W. N. (1905) 242, *Jagan Nath* v. *Champa*, 28 A. 307; 3 A. L. J. 87; A. W. N. (1906) 13, *Jogdmba Koer* v. *Secretary of State for India*, 16 C. 367 at p. 370; 13 Ind. Jur. 385; 8 Ind. Dec. (N. S.) 242; *Bibi Sodhan* v. *Harsa Singh*, 34 Ind. Cas. 585; 51 P. R. 1916; 138 P. W. R. 1916; 155 P. L. R. 1916, ollowed.

Nanak Gir v. *Kishen Kaur*, 53 Ind. Cas. 815; 161 P. R. 1919, not followed.

Where in a suit for a declaration that a certain alleged adoption never took place the plaintiff has given *prima facie* evidence of his want of knowledge of the fact of adoption, it is for the defendant to show in the clearest possible way that the fact of the alleged adoption must have come to the plaintiff's knowledge at a particular date when limitation began to run under Article 128 of Schedule I to the Limitation Act. [p. 124, col. 2]

First appeal from the decree of the Senior Subordinate Judge, Sialkot, dated the 29th October 1915.

Messrs. *Roshan Lal* and *C. L. Mathur*, for the Appellant.

Bakhshi *Tek Chand* and Lala *Tirath Ram*, for the Respondents.

JUDGMENT.—The following pedigree table will illustrate the case:—

FAQIR BAKHSH

Mani Ram = *Musammat* Malan (widow) Defendant No. 2.

Jawala Singh

Musammat Sujan Devi (daughter), plaintiff.

Jagiri Mal (alleged adopted son) Defendant No. 1,

Musammat Sujan Devi sued for a declaration that Jagiri Mal had not been adopted by Mani Ram or by his widow with her husband's authority. The Subordinate Judge dismissed the suit on the ground that plaintiff was aware of the alleged adoption more than six years before the institution of the suit which was accordingly barred under Article 118 of the Limitation Act.

The plaintiff has appealed. We have heard arguments on the merits and we should not be prepared to maintain the finding of the lower Court on this point. When Mani Ram died his widow, who obtained mutation for herself in 1902, proclaimed to the world that Jagiri Mal had not been adopted and though in the following year she executed a deed of gift in which she recited the fact of adoption, there was no deed which purported to be one of adoption, and it has been admitted by her that in a case heard in the Munsif's Court at Daska she again denied that Jagiri Mal had been adopted. The natural result of these denials would be to put *Musammat* Sujan Devi off her guard, and, in view of them, we consider that when she had given *prima facie* evidence of her want of knowledge, it was for the defendants to show in the clearest possible way that the fact of the alleged adoption must have come to her knowledge afterwards. We are not impressed by the evidence of her visits to her paternal home when she was about to give birth to children, and the statement of *Musammat* Gian Devi on which the Subordinate Judge has particularly relied, because she was called by the plaintiff, loses most of its weight when it is realised that she is the wife of Jagiri Mal.

Counsel for the defendants-respondents has, however, contended that the decision must be maintained on another ground, *viz*., that, according to Hindu Law by which the parties are admittedly governed, a brother's daughter is not a *bandhu* with rights of inheritance. He has cited many authorities on this point, *e. g.*, Mulla's Hindu Law, 3rd Edition, page 68; Ghose's Principles of Hindu Law, Volume 1, 3rd Edition, page 15; Rama Krishna's Hindu Law, Volume II, page 180 and Mayne's Hindu Law, 8th Edition, paragraphs 538, 539. The opinions of these commentators are based on numerous judgments of which the earliest appears to

be one of the Suddar Dewany Adawlat mentioned in *Gauri Sahai* v. *Rukko* (1). This judgment was also approved in *Jagat Narain* v. *Sheo Das* (2) and *Nanhi* v. *Gauri Shankar* (3), also in *Jagan Nath* v. *Champa* (4). The leading Calcutta case is *Jogdamba Koer* v. *Secretary of State for India* (5). These authorities have been followed in *Bibi Sodhan* v. *Harsa Singh* (6), a single Bench judgment. They are all to the same effect that the only females entitled to inherit are the widow, the daughter, the mother, the father's mother and the father's father's mother. From the above authorities it is clear that the Bengal and Benares Schools of Hindu Law do not recognise any other female as an heir. As against these authorities the learned Counsel for the appellant has placed his reliance on *Nanak Gir* v. *Kishen Kaur* (7) and the judgments cited therein. In that judgment it was held by a Division Bench of this Court that a sister is a *bandhu* with rights of inheritance, and reference is made to another judgdment of this Court, *Multani Chand* v. *Lalu Mal* (8). That decision was merely to the effect that sister's grandson is a *bandhu*, and it is of no assistance to us in this case. The learned Judges also referred to *Raghunath Kuari* v. *Sunnan Mir* (9). This judgment, however, of the Allahabad High Court has been expressly dissented from in the two judgments in I. L. R. 23 Allahabad. The two Madras judgments are certainly authorities in favour of the appellant, but on this question the Madras and Bombay High Courts have differed from the Bengal and Benares Schools and are not authorities for the Punjab. Counsel for the respondents has also pointed out to us that *Nanak Gir* v. *Kishen Kaur* (7) is not even an authority for this Court, inasmuch as it has been dissented from in two subsequent judgments, *viz.*, *Shambhu Nath* v. *Ralli* (10) and Civil Appeal No. 2928 of 1918, in the latter of which it is stated that the head-note of 161 P. R. of 1919 is misleading and that it was never intended to lay down the rule so broadly as it is there stated. We, therefore, must uphold the contention of Counsel for respondents that the plaintiff in this case had no *locus standi* to sue.

In these circumstances, we dismiss the appeal with costs. Counsel for the respondent has made no reference to the third and fourth grounds of cross-objections.

Appeal dismissed.

(1) 3 A. 45; 5 Ind. Jur. 486; 2 Ind. Dec. (N. S.) 21.
(2) 5 A. 311; A. W. N. (1883) 51; 3 Ind. Dec. (N. S.) 344.
(3) 28 A. 187; 2 A. L. J. 654; A. W. N. (1905) 242.
(4) 28 A. 307; 3 A. L. J. 87; A. W. N. (1906) 13.
(5) 16 C. 367 at p. 370; 13 Ind. Jur. 385; 8 Ind. Dec. (N. S.) 242.
(6) 34 Ind. Cas. 585; 51 P. R. 1916; 138 P. W. R. 1916; 155 P. L. R. 1916.
(7) 53 Ind. Cas. 815; 161 P. R. 1919.
(8) 180 P. R. 1889.
(9) 20 A. 191; A. W. N. (1898) 13; 9 Ind. Dec. (N. S.) 484.
(10) 52 Ind. Cas. 591; 25 P. W. R. 1919.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 27 OF 1919.

February 1, 1920.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

ANNAYA MADVALAYA—PLAINTIFF—APPELLANT

versus

SIDAYA MURGAYYA SALGAR—DEFENDANT—RESPONDENT.

Hindu Law—Succession—Paternal uncle's grandson, whether preferential heir as against sister's son.

Under Hindu Law a paternal uncle's grandson is a *gotraja sapinda*, and is, therefore, a nearer heir than a sister's son, who is only a *bandhu*.

Second appeal from the decision of the District Judge, Sholapur, in Appeal No. 69 of 1917, confirming the decree passed by the Additional First Class Subordinate Judge at Sholapur, in Civil Suit No. 626 of 1915.

Mr. *B. G. Rao*, for the Appellant.

Mr. *G. P. Murdeshwar*, for the Respondent.

JUDGMENT.—The only question in this appeal is whether the plaintiff, who is the sister's son of Virbhadrappa, is a nearer heir than the defendant, who is great-grandson of Virbhadrappa's paternal uncle. When the succession fell in at the death of Virbhadrappa's mother Nilawa, the defendant's father was alive, and there can be no doubt that

the defendant's father, who was a *gotraja sapinda*, was the nearer heir than the sister's son who would only rank as a *bandhu*. The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1891 OF 1917.

March 26, 1920.

Present :—Justice Sir N. R. Chaterjee, KT, and Mr. Justice Newbould.

DASARATHI CHATTERJEE AND OTHERS —DEFENDANTS—APPELLANTS

versus

ASIT MOHAN GHOSH MAULIK *Shebait* OF GOD RADHA GOBINDA DEB THAKUR—PLAINTIFF—RESPONDENT.

Religious endowment—Contract with shebait *of* thakur, *whether terminates on death of* shebait—*Limitation Act (IX of* 1908), *Sch. I, Art.* 132, *applicability of, to suit for accounts by* shebait *against Tahsildar.*

Contracts in respect of dedicated property entered into by the *shebait* of a *thakur*, not in his personal capacity but as *shebait*, do not terminate on the death of such *shebait*. [p. 127, col. 2.]

The period of limitation contained in Article 132, Schedule I, to the Limitation Act applies to a suit brought by the *shebait* of a *thakur* against the Tahsildar of the *debutter* properties of the *thakur*, for accounts, based on a security bond executed by the latter in favour of the predecessor of the plaintiff. [p. 127, col. 2; p. 128, col. 1.]

Appeal against the decree of the District Judge, Murshidabad, dated the 22nd of June 1917, reversing that of the Munsif, 2nd Court, at Kandi, dated the 12th of May 1916.

Babu *Jatindra Lal Banerjee*, for the Appellants.

Babu *Bhudhar Haldar*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for accounts against an agent.

It appears that the defendant No. 1 and the predecessor of the defendant No. 2 were appointed Tahsildars of the *debutter* properties of a certain *thakur* in 1287 when the plaintiff's father, Radha Raman, was the *shebait* of the *thakur*.

The Tahsildars executed a security bond in Bhadro 1287 in favour of the *thakur* represented by its *shebait* Radha Raman, hypothecating certain immoveable properties for the due performance of their duties as *gomasta*. They acted as Tahsildars till Choitra 1316 when one of them died and the other, the defendant No. 1, worked till Sraban 1318 when he was dismissed. The plaintiff's father died in Bhadro 1310 when the plaintiff succeeded as *shebait* of the *thakur*.

The present suit was instituted on the 14th May 1915 against the defendants for accounts from 1311 to 1317. The Court of first instance held that the agency terminated on the death of the plaintiff's father in Bhadro 1310 and, therefore, a new agency was created, and that the suit was governed not by Article 132, but by Article 89 of the Limitation Act. That Court accordingly held that the suit was barred by limitation. On appeal, the learned District Judge held that the death of the Radha Raman did not terminate the agency, and the suit was, therefore, in time under Article 132 of the Limitation Act. The defendants have appealed to this Court.

It is well settled that Article 132 applies where the suit is not merely for accounts but is one to enforce in the plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his accounts. See *Hafezuddin Mandal* v. *Jadu Nath Saha* (1) and *Madhusudan Sen* v. *Rakhal Chandra Das* (2), where the case of *Jogesh Chandra* v. *Benode Lal Roy* (3), was dissented from; and *Troilokhya Nath Mandal* v. *Abinas Chandra Roy* (4). That proposition is not disputed before us on behalf of the appellants, but what is contended on their behalf is that the agency terminated on the death of plaintiff's father, Radha Raman, in Bhadro 1310 and the plaintiff, therefore, cannot sue upon the hypothecation bond. Reliance was placed upon certain observations of the Judicial Committee in the case of *Jagadindra Nath*

(1) 35 C. 298; 12 C. W. N. 820; 7 C. L. J. 279.
(2) 30 Ind. Cas. 697; 43 C. 248; 19 C. W. N. 1070; 22 C. L. J. 552.
(3) 5 Ind. Cas. 59; 14 C. W. N. 122.
(4) 24 Ind. Cas. 18; 21 C. L. J. 459.

Roy v. *Hemanta Kumari Debi* (5). Their Lordships observed: "There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character,.....But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the *shebait*. And this carries with the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait*, not in the idol." It is contended that the agency terminated on the death of the *shebait* Radha Raman, and the present *shebait*, the plaintiff, has no right to sue upon the hypothecation bond. But the case of *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (5), does not support the above contention. In that case the *shebait* was a minor when he was dispossessed, and the suit for recovery of possession was instituted within three years of his attaining majority. The question was whether a *shebait* of a *thakur* was entitled to the benefit of the provisions of section 7 of the Limitation Act. The High Court held that the proprietary right being in the *thakur*, the *shebait* was not entitled to such benefit. The Judicial Committee pointed out that, although a *thakur* may be regarded as a juridical person capable as such of holding property, the possession and management of the dedicated property belongs to the *shebait*. and the right of suit being necessarily vested in the *shebait*, he was entitled to the benefit of the provisions of section 7 of the Limitation Act. Their Lordships did not lay down that contracts in respect of the dedicated property entered into by the *shebait* of a *thakur* terminate on the death of such *shebait*. In the case of *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (6), the Judicial Committe, with reference to the rights of a *shebait* observed: "Where land is dedicated to the religious services of an idol, the rents of the land constitute in legal contemplation the property of the idol and the *shebait* has not the legal property, but only title of a manager of a religious endowment," and in *Prosunno Kumari Debya* v. *Golab Chand Baboo* (7), their Lordships observed as follows:—"It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must, in the nature of things, be entrusted to some person as *shebait*, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain them". And, later on, with reference to the position of a former *shebait* and the succeeding *shebaits*, they say that the "succeeding *shebaits* in fact form a continuing representation of the idol's property."

In the case of *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (5), their Lordships did not lay down any rule contrary to that laid down in the above cases; and all that was said was that the possession and management of the dedicated property are vested in the *shebait*, and the right of suit being therefore in the *shebait*, he was entitled to bring the suit within three years of his attaining majority, as he was a minor when the dispossession took place. It does not follow that all contracts with the *shebait* of a *thakur* cease to be operative on the death of the particular *shebait*, where the contract is not one with the *shebait* personally.

Having regard to the fact that the position of a *shebait* is that of a manager of a religious endowment, and to the observations in *Prosunno Kumari Debya's case* (7), *viz.*, that "succeeding *shebaits* in fact form a continuing representation of the idol's property," we hold that the contract entered into between the Tahsildars and Radha

(5) 32 C. 129 at p. 140; 31 I. A. 203; 8 C. W. N. 509; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698.

(6) 13 M. I. A. 270 at p. 273; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

(7) 2 I. A. 145; 14 B. L. R. 450 (P. C.); 3 Sar. P. C. J. 449; 23 W. R. 258; 3 Suth. P. C. J. 102.

CHANDRABHAGA *v.* HARSUKHDAS.

Raman, the former *shebait*, did not terminate on his death, but can be sued upon by the present *shebait*. The hypothecation bond, as stated above, was not executed in favour of Radha Raman in his personal capacity, but as *shebait* of the *thakur*. We are accordingly of opinion that the present *shebait* can sue to enforce that bond.

We do not think the position of the Tahsildars is that of sub-agents or that the sub-agency terminated on the death of the *shebait*, Radha Raman, as contended on behalf of the appellants.

We have already said that Article 132 of the Limitation Act applies to the case. That being so, the suit is not barred by limitation. The appeal is accordingly dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 198 B OF 1919.

June 17, 1920.

Present:—Mr. Macnair, A. J. C.

CHANDRABHAGA—DEFENDANT No. 1—APPLICANT

versus

HARSUKHDAS AND OTHERS—PLAINTIFFS Nos. 1 AND 2—DEFENDANT No. 2—NON-APPLICANTS.

Contract Act (IX of 1872), s. 69—Probate—Decree against assets—Payment by executor—Probate revoked—Suit to recover amount paid, maintainability of.

Plaintiffs obtained Probate of a Will, and afterwards admitted a claim against the deceased, and a decree was passed against the assets of the deceased in their hands, and they made payment. The Probate was subsequently revoked, whereupon they brought the present suit to recover the sum paid by them stating that no immoveable property of the deceased was in their hands:

Held, that the suit must fail as the plaintiffs were not interested in making payment of the amount due under the decree in order to protect the assets of the deceased, and they, consequently, were not justified in making the payment.

Civil revision of the judgment in Small Cause Suit No. 70 of 1919, passed by the Judge, Small Cause Court, Morsi, dated the 7th August 1919.

Mr. *G. V. Deshmukh*, for the Applicant.

Messrs. *M. R. Bobde* and *V. N. Bapat*, for the Non-Applicant.

JUDGMENT.—The plaintiffs had obtained Probate of a Will executed by the deceased Ramchandra. After they had obtained Probate, they admitted a claim against Ramchandra and a decree was passed against the assets of the deceased in their hands. The execution was taken out and the plaintiffs made payment. Subsequently, the Probate was revoked by the High Court. The plaintiffs now sue to recover the amount paid by them from the defendants.

The cases cited by the learned Small Cause Court Judge and the cases cited by the respondents' Counsel are all cases in which payment was made to avert an imminent danger. Failure to pay land revenue is, ordinarily, followed by summary procedure. The plaintiffs state that no immoveable property belonging to the deceased was in their hands. In the circumstances, I do not think they were justified in making the payment. They could have waited until some property had actually been attached. If they had pleaded they were in possession of moveable property the case might have been different. As it is, they have failed to make out that the payment was a genuine payment made without haste in order to protect the assets of the deceased. I, therefore, hold that the plaintiffs were not interested in making payment of the amount due under the decree. The learned Judge is mistaken in law as he considers that payment of a sum due is payment by a person interested whether the estate is in danger or not. The judgment of the lower Court is reversed and the claim is dismissed. The respondents Nos. 1 and 2 must bear costs in both Courts. No separate Pleader's fee for respondent No. 3.

Application allowed.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 134 OF 1920.

August 24, 1920.

Present:—Mr. Justice Shah and Mr. Justice Crump.

G. S. FERNANDEZ—ACCUSED.

versus

EMPEROR—PROSECUTOR

Criminal Procedure Code (Act V of 1898), s. 342, applicability of, to trials by Presidency Magistrate—Examination of accused, necessity of.

A Presidency Magistrate trying an accused person for an offence punishable under section 352 of the Penal Code is bound, before convicting, to examine the accused person in the manner prescribed by section 342 of the Criminal Procedure Code, and an omission to do so, is an illegality which vitiates the proceedings. [p. 131, col. 1; p. 132, col. 2.]

Criminal application from an order passed by the Second Presidency Magistrate, Bombay.

Mr. *Binning* (with him Mr. *A. G. Desai*), for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—In this application it has been urged on behalf of the applicant that, after the witnesses for the prosecution were examined, the accused was not asked to explain the evidence against him as required by section 342 of the Code of Criminal Procedure. The offence charged was punishable under section 352, Indian Penal Code, and the procedure applicable to the case was that provided for the trial of summons cases. The trial was held by the Second Presidency Magistrate. On behalf of the Crown it is urged that the words of section 342 are controlled by the words 'if the Magistrate thinks fit' used in section 245 and 'if any' in section 370, clause (*f*) of the Code, and that the Magistrate was not bound to question the accused as required by section 342 in the trial of a summons case before convicting the accused.

We called for a report from the learned Magistrate as to whether the accused was in fact questioned at the close of the prosecution case under section 342. We have received a report on that point and the learned Magistrate has also submitted a supplementary report as to the practice followed in such cases by the Presidency Magistrates and as to the grounds upon which the practice is based.

In view of the report and the record of the case, it may be taken as a fact that the accused was not asked any questions after the prosecution witnesses were examined as required by section 342 of the Code. We have, therefore, to consider whether it was obligatory upon the Trial Magistrate in this case to question the accused generally and, if so, what is the effect of the omission upon the present case.

These questions must be considered with reference to the provisions of the Code, and it is clear that we cannot allow considerations of convenience and practice to control the plain meaning of the words used in a Statute. If the interpretation involves any inconvenience or departure from any practice which may be found to be suited to any class of cases, it would be for the Legislature to consider the matter.

The words of section 342 are clear. The material words are these: "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court...shall...question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." The section occurs in the Chapter relating to general provisions as to inquiries and trials: and there can be no doubt and it is not disputed that it applies to the Presidency Magistrates as much as to other Courts. The purpose of the provision is clear, and a general provision of this character, applicable to all Courts and to all inquiries and trials under the Code, ought to be given effect to unless there are clear words to render it inapplicable to any particular case or class of cases.

The provisions mainly relied upon by the Government Pleader as limiting the operation of these words are to be found in the Chapter relating to the trial of summons cases. It is urged that the provisions of that Chapter leave it to the discretion of the Magistrate to question the accused after the witnesses for the prosecution are examined. Sections 242 and 245 are relied upon as having that effect. It seems to me that, when the provisions are examined carefully, they do not involve any such limitation. Section 242 requires that the accused shall be questioned at the beginning on the particulars of the offence, of which

he is accused and that it shall not be necessary to frame a formal charge. Section 244 provides that if the accused does not admit that he has committed the offence, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take such evidence he produces in his defence. Section 245 provides that, upon taking the evidence referred to in section 244, and such further evidence (if any) as the Magistrate may of his own motion cause to be produced and (if he thinks fit) examining the accused, the Magistrate may acquit or convict the accused. It is clear that section 244 requires the Magistrate to hear the accused and to record the evidence which he adduces in his defence after the prosecution evidence is recorded. This is quite consistent with the provisions of section 342, and does not suggest any inference against the application of the provisions of section 342 to the trial of summons cases. Section 245 contains the words 'if he thinks fit'; but, having due regard to the context, it appears to me that the words are used with reference to the further examination of the accused which may become necessary or desirable in virtue of the evidence which the Court may call of its own motion. When we have a general provision as to the necessity of questioning an accused person to enable him to explain the evidence against him after the witnesses for the prosecution are examined, the other provisions in the Code should be read, as far as possible, so as to avoid an inconsistency. A particular provision may control or limit a general provision, but the intention to limit the operation of the general provision must be clear. The words 'if he thinks fit' do not, in my opinion, control or modify the provisions of section 342, but are capable of being read—and should be read—as serving a sufficient purpose, consistently with the provisions of section 342. The suggestion made by Mr. Binning that the words 'if he thinks fit' are used in section 245, as it may not be necessary for the Magistrate to examine the accused if he is to be acquitted, may afford a further explanation of the use of the words without indicating any limitation upon the provisions of section 342. On a consideration of the provisions of this Chapter, I am unable to hold that the Magistrates are relieved in the trial of summons cases from the obligation of questioning the accused generally under section 242 to enable him to explain the evidence against him after the witnesses for the prosecution are examined.

The provisions of section 370, clause (*f*), do not suggest any inference to the contrary. The words 'if any' do not in any sense control the words of section 342. It has been held by this Court, and it is conceded in the argument, that, in spite of these words, it is obligatory upon the Presidency Magistrates to examine an accused person under section 342 in the trial of warrant cases. The words 'if any' are used in section 289 of the Code; and, in spite of these words, the relaxation of the rule contained in section 342 is not allowed in the trials by Sessions Courts: see *Emperor* v. *Savalya* (1), *Emperor* v. *Raju Ahilaji* (2) and *Basapa Ningapa* v. *Emperor* (3). The purpose of section 370 is to state the particulars to be recorded by the Presidency Magistrates instead of a judgment as provided in section 367 and not to lay down whether an accused person shall be questioned or not in a particular case or class of cases. I do not think that the words 'if any' used in clause (*f*) of that section can be properly used as modifying the provisions of section 342 as regards the Presidency Magistrates. If that construction were adopted, section 342 could be rendered nugatory even in the trial of warrant cases by Magistrates and trials by Sessions Courts, as the same words are used in sections 253 and 289 of the Code. It seems to me that the weakness of the argument urged on behalf of the Crown is indicated by the circumstance that, without a laboured attempt to control or limit the plain meaning of the words of a section applicable to all trials and inquiries by reference to provisions in different chapters relating to different purposes, the result contended for by the prosecution cannot be reached. I should say that if the Legislature intended to limit the application of section 342 in the sense suggested by the Crown

(1) 9 Bom. L. R. 356; 5 Cr. L. J. 332.
(2) 9 Bom. L. R. 730; 6 Cr. L. J. 74.
(3) 31 Ind. Cas. 365; 17 Bom. L. R. 892; 16 Cr. L. J. 765.

there would have been clear words to that effect in the section itself. In the Chapter relating to general provisions as to inquiries and trials there are some sections of limited application and the words indicating the limitation are to be found in such sections.

I may mention that I have referred to the different provisions relating to the examination of the accused in the earlier Codes of 1861, 1872 and 1882, and in the Presidency Magistrates Act (IV of 1877). The scheme of the existing provisions as to the examination of the accused was adopted in the Code of 1882. I do not think that it will serve any useful purpose to examine them in detail: it is sufficient to say that I have not been able to find any indication therein to favour the contrary view. I am, therefore, satisfied that the accused should have been examined in this case as required by section 342.

The question relating to the manner in which such examination is to be recorded under section 464 stands on a different footing. On hat point I do not find any special provision regarding the Presidency Magistrates except that contained in section 364, sub section (3). As regards the recording of evidence, section 362 makes a special and specific provision for the Presidency Magistrates. It is not without significance that in section 364, which is to be found in the same Chapter, no similar differentiation is made as regards the manner of recording the examination of an accused person by the Presidency Magistrates. In the present case, however, the point is not whether the examination of the accused was properly recorded or not, but whether the accused was questioned at all after the witnesses for the prosecution were examined.

The omission to examine the accused, as required by section 342, cannot be condoned. Having regard to the nature of the offence and the facts of the case, I do not think that it is necessary in the interest of justice to order a re-trial. I would, therefore, set aside the conviction and sentence and direct the fine, if paid, to be refunded.

CRUMP, J.—The question which arises for decision at the outset in this case is, whether a Presidency Magistrate trying an accused person for an offence punishable under section 352 of the Indian Penal Code is bound, before convicting, to examine the accused person in the manner prescribed by section 342 of the Code of Criminal Procedure.

The procedure to be followed by Presidency Magistrates differs from the procedure to be followed by other Magistrates only in those particulars which are specifically laid down in the Code of Criminal Procedure and, in this respect, the relevant sections are sections 362 and 370 which prescribe the manner in which the evidence and the judgment respectively shall be recorded. These two sections form exceptions to the provisions of Chapters XXV and XXVI which deal with the mode of recording evidence in inquiries and trials and with the judgment. *Prima facie*, nothing in these Chapters has any bearing on section 342 which belongs to Chapter XXIV which contains general provisions as to inquiries and trials. The words of section 370 (*f*) "the plea of the accused and his examination (if any)" do not in reality affect the present question, for it cannot be doubted that there are cases, other than those in which an accused person is convicted, where it is unnecessary to record his examination under section 342. If, for instance, there is an acquittal under section 247 or 248 or a discharge under section 253 there may be no occasion for the examination prescribed by section 342. That this is so is plain, if it is remembered that the examination of the accused under that section is obligatory only for the purpose of enabling him to explain any circumstance appearing in evidence against him. If there is nothing to explain, there is no necessity for the examination. *Cessante legis ratione cessat et ipsa lex.*

There is, therefore, nothing in the special procedure provided for Courts of Presidency Magistrates which, for the purposes of the present question, needs to be taken into account With the exception of the two particulars noted in the preceding paragraph, the procedure for the trial of summons cases and warrant cases is applicable in those Courts.

The present case was a summons case, and the question may, therefore, be generally stated thus: "Is a Magistrate, before convicting an accused person of an offence triable as a summons case, bound to examine him as required by section 342?"

FERNANDAZ *v.* EMPEROR.

The mandatory portion of section 342 may be set out as follows: "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court...shall...question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." This is one of the general provisions as to inquiries and trials, as stated in the title of Chapter XXIV of which it forms part. It has been held by this Court that it applies to trials before a Court of Session in spite of the words "if any" in section 289: *Emperor* v. *Raju Ahila i* (2) and *Emperor* v. *Savalya* (1). It has also been held by this Court that a Presidency Magistrate cannot convict an accused of an offence triable as a warrant case without recording his examination under this section: *Emperor* v. *Harischandra* (4). So far as I am aware, the point has not hitherto been decided with reference to summons cases.

Prima facie, section 342 is of general application and is based on the salutary principle that an accused person should have an opportunity of furnishing an explanation before he is convicted. The Legislature has not specifically excepted cases triable under Chapter XX (summons cases) from its operation, and the general principle on which it is based applies to those cases as strongly as to any other cases. But it has been urged that the language used in that Chapter excludes the applicability of section 342. Reliance is placed on the words "if he thinks fit" in section 245 (1). It has been held, as I have already stated, that similar words in section 289 do not have the effect contended for. It is significant that these words occur in paragraph (1) of the section which deals with acquittals. We are not now concerned with cases of acquittals. As I have already pointed out, there may be cases in which the Court finds nothing for the accused to explain, and in such cases it may have a discretion not to examine the accused. But I am unable to infer from these words that where the Court finds that damnatory circumstances appear in the evidence against the accused, there is any discretion in the matter. It is to be remarked that section 244 (1) makes it obligatory on the Magistrate to "hear the accused after the evidence for the prosecution is recorded," and I find it difficult to hold that, had the Legislature intended to exclude the applicability of section 342, they would not have done so in plain terms.

The scope of section 342 has been the subject of discussion in a recent case before the Patna High Court *Raghu Bhumij* v. *Emperor* (5). The point there was as regards Sessions trials, but it appears that Sultan Ahmed, J., was inclined to hold that section 342 did not apply to the trial of summons cases. The remarks upon this point are, of course, *obiter*. The distinction suggested, however, is that the words "before he is called on for his defence" occurring in section 342 are found in section 256 which deals with warrant cases, and in section 239 which deals with Sessions trials, but do not appear in Chapter XX which prescribes the procedure for the trial of summons cases. With all deference, I am constrained to say that the argument depends upon matters of form rather than of substance. To call upon an accused person to enter upon his defence is a necessary incident of every trial. Though that precise form of words is not used, the thing itself is indicated with sufficient clearness in section 244. A Magistrate trying a summons case must necessarily, under that section, ask the accused what he has to say, and if he wishes to examine any witnesses, and when a Magistrate does this he does in substance call upon the accused to enter upon his defence.

After giving the matter my best consideration I find no substantial reason to doubt that section 342 is applicable to the trial of summons cases to the extent which I have endeavoured to indicate. The omission to comply with the section must necessarily attract the same consequence in these as in other trials, and it follows, I think, that the illegality vitiates the proceedings.

It is not necessary to pronounce upon the merits, but, in view of the trivial nature of the offence, and the circumstances as a whole, no useful purpose would be served

(4) 10 Bom. L. R. 201; 7 Cr. L. J. 194.

(5) 58 Ind. Cas. 49; 5 P. L. J. 420; 1 P. L. T. 241; 21 Cr. L. J. 705.

by a re trial. I would set aside the conviction and sentence and direct the fine, if paid, to be refunded.

Conviction and sentence set aside.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 524 OF 1920.
July 30, 1920.
Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Cuming.
MUKBUL ALI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Opium Act (I of 1878), s. 9 (c)—Contraband opium in possession of passenger by boat—Boatman, liability of.

The mere fact that a passenger by boat has contraband opium with him, places no liability on the boatman to give any satisfactory account of the opium; more especially where the prosecution evidence shows that it was the passenger who had the opium; the boatman, in such a case, cannot be convicted under section 9 (*c*) of the Opium Act. [p. 134, col. 1.]

FACTS appear from the judgment.

Mr. *Ashraf Ali*, for the Crown.—The petitioner is rightly convicted of an offence under section 9 of the Opium Act. Reads sections 9 and 10 of the Opium Act. Section 10 of the Act makes it clear that in a prosecution under section 9 of the Opium Act there is a presumption against the accused. The ordinary principles of Criminal Law do not apply to such cases because in these cases the Statute expressly lays down that, unless the contrary is proved, all opium for which an accused person is unable to give a satisfactory account, shall be presumed to be opium in respect of which an offence was committed under the Act. Refers to *Government of Eastern Bengal and Assam* v. *Seraj-ud-Din* (*Emperor* v. *Hamid Ali*) (1).

Babu *Narendra Kumar Das*, for the Petitioner.—I was only a common carrier. There is nothing to show that I was aware that the passenger had opium with him. If a common carrier is to be held liable under such circumstances, it would be impossible to carry on his business, and from principles also it is obvious that the Legislature could not have intended such absurd consequences.

Mr. *Ashraf Ali* in reply.—A common carrier is not exempted from the provisons of section 10 of the Opium Act. The position might be exceptional but not absurd. See *Chedi Mala* v. *King-Emperor* (2).

JUDGMENT.—The petitioner in this case has been convicted under section 9, clause (*c*), of the Opium Act, 1878, and sentenced to rigorous imprisonment for two months and a fine of Rs. 100.

The petitioner is a boatman who plies *Shampan* in the river Karnafully in Chittagong. On the date of occurrence he plied his boat and took over one Abdul Rashid, a resident of Halishahar, who is a *Lascar* of the steamship *Minhla* to the said steamer which was to start the next morning for Rangoon at 9 A. M. The Excise Officers, who had received information that opium would be smuggled by the crew of the steamer, kept watch and at 2 o'clock in the night, the boat which was plied by the petitioner was seized by them. Thereupon, Abdul Rashid threw out a bundle into the *khal*, which was subsequently recovered and found to contain 4 seers of opium. Both Abdul Rashid and the petitioner were tried under section 9, clause (*c*), of the Opium Act. The former was sentenced to six months' rigorous imprisonment with a fine of Rs. 300, and the latter to two months with a fine of Rs. 100.

The petitioner, admittedly, is a boatman and it is not suggested that the opium belonged to him. The information received by the Excise Officers was that the crew of the steamer would smuggle opium. Abdul Rashid was one of the crew. He carried opium in the boat and he has been rightly convicted. But we do not see how the petitioner, who is a boatman, can, in the circumstances of the present case, be convicted under section 9.

The learned Deputy Legal Remembrancer relies upon section 10 of the Act which lays down that, in a prosecution under section 9, it shall be presumed until the contrary is proved, that all opium for which an

(1) 5 Ind. Cas. 555; 37 C. 24; 14 C. W. N. 308; 12 Cr. L. J. 178.

(2) 8 C. W. N. 349; 1 Cr. L. J. 205.

MUHAMMAD WASI *v.* EMPEROR.

accused person is unable to account satisfactorily, is opium in respect of which he has committed an offence under this Act.

It is necessary to consider in what circumstances a boatman may be said to be in possession of the opium found in his boat. In the present case, when the Excise Officers seized the boat, Abdul Rashid threw out a bundle into the *khal*. There is evidence of one of the Excise Officers that Abdul Rashid was sitting in the *Shampan* with a bundle and the petitioner, Mukbul Ali, was plying the *Shampan*. So, according to the evidence of the prosecution itself, the opium was with Abdul Rashid, though the latter was in the boat plied by the petitioner. In these circumstances, we are unable to hold that the petitioner had to give any satisfactory account when the evidence for the prosecution itself shows that it was Abdul Rashid who had the opium with him and who threw it into the river. The time of occurrence was 2 o'clock at night, but there is nothing to show that the boatman was aware that Abdul Rashid had with him 4 seers of opium.

The Court below placed much reliance upon the fact that Abdul Rashid was going to the steamer at 2 o'clock at night though the steamer was not going to start until 9 A. M. the next day; but that would not necessarily raise any suspicion in the boat man's mind, as people go to steamers at all times.

We think, having regard to all the circumstances, that the conviction of the petitioner and the sentence passed upon him must be set aside and the fine, if paid, will be refunded to him He will be discharged from his bail-bond.

Conviction and sentence set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 480 OF 1920.
August 3, 1920.
Present :—Mr. Justice Piggott
MUHAMMAD WASI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Security for good behaviour—Surety offered, refusal of, without valid reason, legality of.

Where a person is called upon to furnish security under section 110 of the Criminal Procedure Code, the mere fact that the surety offered is a relation of that person, is on intimate terms with him and is named by him as a witness, is not a valid reason in law for refusing to accept the surety.

Criminal Reference by the Sessions Judge, Moradabad.

FACTS appear from the following Recommendation by the Sessions Judge :—

The learned Magistrate in this case called upon one Ilias to furnish security for good behaviour under section 110 of the Criminal Procedure Code to the extent of Rs. 100 for one year.

One Muhammad Wasi, a petty Zemindar and a relation of his, offered the security required but the learned Magistrate refused it on the ground that it was not such as to keep him back from misbehaviour and that, on the other hand, he appeared to be on intimate terms with Ilias as he was named as a witness in his defence. In view of the ruling in *Emperor* v. *Shib Singh* (1) and *Munshi Singh* v. *Emperor* (2), I am of opinion that the learned Magistrate was not right in refusing the security.

Muhammad Wasi possessed some Zemindari and *sir* and *khudkasht* land as deposed to by the Patwari and was the maternal uncle of Ilias. He was, therefore, as the Patwari stated, the most likely person to have the man under his control and, therefore, a desirable surety. His relationship was an advantage rather than a disadvantage, and nothing whatever was shown against his own character.

I, therefore, submit the record to the Hon'ble High Court with the recommendation that the Magistrate may be directed to accept the surety and discharge Ilias.

JUDGMENT.—In my opinion, the learned Sessions Judge was obviously right in referring to this Court the Magistrate's order refusing to accept the security-bond offered by one Mohammad Wasi for the good behaviour of Ilias, who had been ordered to furnish security under section 110 of the Criminal Procedure Code. The Magistrate shows no valid reason in law for refusing

(1) 25 A. 131; A. W. N. (1902) 197.
(2) 55 Ind. Cas. 733; 18 A. L. J. 824; 21 Cr. L. J. 365.

to accept this security. I set aside the order in question and direct that the security-bond furnished by Mohammad Wasi be accepted.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL APPLICATIONS FOR REVISION Nos. 110 AND 113 OF 1920.

July 12, 1920.

Present :—Mr. Justice Shah and Mr. Justice Crump.

RAJARAM BHAVANISHANKAR AND ANOTHER—ACCUSED

versus

EMPEPOR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 192, 193—Fabricating false rent-note—Offence—Judicial proceeding not pending, effect of.

It is not essential for the purpose of section 192 of the Penal Code that there should be any judicial proceeding pending at the time of the fabrication. It is enough that there is a reasonable prospect of such a proceeding, having regard to the circumstances of the case, and that the document in question is intended to be used in such a proceeding. [p. 136, col. 2.]

A person who fabricates a false rent-note showing that a house has been let to him for a certain period is guilty of an offence under section 193 of the Penal Code. [p. 136, col. 2.]

Criminal applications from the order of the Sessions Judge, Ahmedabad confirming the convictions and sentences passed by the First Class Magistrate, Kaira.

Mr. *Coyajee* (with him Mr. *G. N. Thakor*), for Accused No. 1.

Mr. *Dhirajlal K. Thakor* (with him Mr. *Ratanlal Ranchhoddas*), for Accused No. 2.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—These are two applications in revision arising under the following circumstances:—

Accused No. 1 was in possession of a house at Dakore under a rent note, dated the 13th of July 1918. The house belonged to the complainant, Bai Dhiraj. That rent note expired in June 1919, and Bai Dhiraj asked accused No. 1 to vacate the house. About this time a document, Exhibit X in the case, is said to have been fabricated by accused No. 1. That document purports to be a rent-note executed by accused No. 1 in favour of Bai Dhiraj. It purports to have been executed on the 14th of June 1919, and the terms of the document indicate that Bai Dhiraj had let the house to him for four years on an annual rental of Rs. 30. This document was presented for registration by accused No. 1 on the 17th of June and, on his admission of the execution of the document, it was registered on that day. Bai Dhiraj, however, was anxious throughout to get possession of the house and, in the course of her efforts to get accused No. 1 to vacate the house, she came to know of the document which was presented for registration on the 17th of June. The document was written by accused No. 2 and attested by accused No. 3 and one other person. After taking advice in the matter, Bai Dhiraj lodged a complaint on the 10th July 1919 against accused No. 1, her tenant, accused No. 2, the writer of the document, and accused No. 3, one of the attestors of the document. Bai Dhiraj repudiated all knowledge of the document and maintained that the document was false. The defence of accused No. 1 which was supported by the other accused, was that the document was written with the consent and knowledge of Bai Dhiraj. There was considerable evidence on both sides and, as a result of the consideration of the evidence, the Trial Magistrate came to the conclusion that the document was false. Accordingly he convicted all the three accused under the first part of section 193 for fabricating false evidence for the purpose of being used in a judicial proceeding and sentenced the accused to different terms of imprisonment and fines. The accused appealed to the Sessions Court at Ahmedabad, and the learned Sessions Judge found the facts generally in favour of the prosecution, confirmed the convictions of accused Nos. 1 and 2, felt a doubt as to the guilt of accused No. 3 and acquitted him. The sentences were modified by the Sessions Judge as to accused Nos. 1 and 2.

Now accused Nos. 1 and 2 have applied to this Court in revision. Two points have been urged in support of his application on behalf of accused No. 1 Rajaram Bhawani.

shanker. First, it is urged that one of the essential conditions required under section 192 of the Indian Penal Code for fabricating false evidence is, that there should be an intention on the part of the person fabricating the document that such document so appearing in evidence may cause any person who, in such judicial proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding. It is urged that this condition is not satisfied in this case, and is not capable of being satisfied, as the document said to have been fabricated would be inadmissible in evidence. Secondly, it is urged that there was no judicial proceeding in existence at the time and nothing to show that there was any judicial proceeding contemplated at the time and that, therefore, it could not be said that it was intended that the document in question should appear in evidence in a judicial proceeding, or that the document was fabricated for the purpose of being used in any stage of a judicial proceeding.

As regards the first point, the whole argument is based upon the proposition that the document in question, which is a rent note, is inadmissible in evidence, and certain decided cases have been referred to in support of the further proposition that, in case the document fabricated is inadmissible in evidence, the last condition required under section 192 cannot possibly be satisfied. I am, however, unable in this case to accept the first proposition that the document is inadmissible in evidence. The document purports to be a rent note executed by accused No. 1 in favour of Bai Dhiraj and as such it contains an admission against the interest of the person purporting to execute it. Accused No. 1 admits therein that he is a tenant. He admits his liability to pay certain annual rent. In my opinior, it is an entirely untenable position that this document could not be admitted in evidence, because it would be an admission by the accused No. 1 in his own favour. As I take this view as to the admissibility of the document in question, I do not consider it necessary to exmaine the further part of the argument which is based upon certain decided cases, and I express no opinion thereon. I feel quite clear that the first contention must be disallowed.

As regards the second contention, it is true that no judicial proceeding was pending at the time. It is also true that no notice was given by Bai Dhiraj threatening to take any judicial proceeding against accused No. 1. But it is clear from the evidence that Bai Dhiraj then insisted upon accused No. 1 vacating the house and, for one reason or other, the tenant was anxious to hold on to the house. Under these circumstances, it is quite a reasonable inference that, in case of his refusal to vacate, there would be an ejectment suit by Bai Dhiraj against him, and the only reasonable purpose for which the document which accused No. 1 took the trouble of getting registered could be said to have been intended is its use in a judicial proceeding which might be initiated against him. It is not essential for the purpose of section 192 that there should be any judicial proceeding pending at the time of the fabrication. It is enough that there is a reasonable prospect of such a proceeding, having regard to the circumstances of the case, and that the document in question is intended to be used in such a proceeding. The fabrication in the present case satisfied the requirement of section 192 as to the intention to use the document in a judicial proceeding. I have no doubt that both the lower Courts are right in holding that accused No. 1 intended that this document should be used in a judicial proceeding.

Lastly, on his behalf it was urged that the finding of the lower Appellate Court on the evidence was largely based upon probabilities. But, having regard to the reasons given by the learned Sessions Judge in support of his finding, it is clear that it is based upon evidence and in revision we must accept the finding that Bai Dhiraj never consented to allow accused No. 1 to continue as a tenant and never consented to the rent-note being executed by accused No. 1 in her favour. There is no doubt, therefore, as to the correctness of the conviction of accused No. 1.

As regards the sentence, it seems to me that, practically, nothing was done in respect of this document. The whole thing came to be known before accused No. 1 could make any use of the document, and, in

view of all the circumstances connected with the case, I am of opinion that the sentence may properly be reduced to rigorous imprisonment for six months.

I would accordingly confirm his conviction, and reduce the sentence to rigorous imprisonment for six months.

As regards accused No. 2, Nagarbhai Talsibhai, he is a professional writer of documents and undoubtedly he wrote the rent-note in question. Beyond the general suggestion that he is on friendly terms with accused No. 1, there is no evidence in the case to show that, at the time he wrote this document, he had any guilty intention or knowledge. Such a document might well be written by a person in the position of accused No. 2 either at the instance of Bai Dhiraj or of Rajaram, accused No. 1. Apart from the defence which he has made in this case, there is nothing in the evidence to prove any guilty intention on his part. The lower Appellate Court has confirmed his conviction on the ground that he stated in his defence that the document was written at the instance of Bai Dhiraj. This defence is found by the lower Appellate Court to be false and must be accepted as being false for the purposes of this application. I do not think, however, that his making such a false defence, when he was being jointly tried with accused No. 1, is a sufficient basis for supplying the *lacuna* which undoubtedly exists in the prosecution case so far as accused No. 2 is concerned. The explanation which is offered by an accused person under section 342, is, after all, to explain the evidence against him, and in the present case I do not think that, really, there was any evidence against accused No. 2 to show his guilty intention. Under these circumstances, I do not think that it would be fair to press the false explanation offered by him at the trial, against him to the extent to which it has been pressed by the lower Appellate Court. The lower Appellate Court took, in my opinion, a reasonable view as to the case of accused No. 3 and should have taken the same view of the position of accused No. 2. In his case, I do not think that the charge is established.

I would, therefore, set aside his conviction and sentence, acquit him and direct his bail bond to be cancelled.

CRUMP, J.—I concur.

Orders accordingly.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 404 OF 1920.

July 30, 1920.

Present :—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Cuming.

ALOKE MOHAN SAHA—PETITIONER

versus

THE NARAYANGANJ MUNICIPALITY—OPPOSITE PARTY.

Bengal Municipal Act (III of 1884), s. 202, applicability of—Dispute as to title—Order under section, nature of—High Court, power of, to interfere.

Section 202 of the Bengal Municipal Act gives a summary power for the removal of an obstruction or encroachment on a road, drain, sewer or aqueduct, and its provisions cannot be applied where there is a dispute between any person and the Municipality with regard to the title to any land. Such a dispute must be decided in the ordinary way by a Civil Court. [p. 139, col. 2.]

An order made by a Magistrate under section 202 of the Bengal Municipal Act is a judicial proceeding, and the High Court has power to revise such order. [p. 140, col. 2.]

FACTS appear from the judgment.

Babu *Dasarathi Sanyal* (with him Babus *Manmatha Nath Mukerjee* and *Satis Chandra Choudhury*), for the Petitioner.—The order of the Sub-Divisional Magistrate directing the removal of the wall of my building cannot be supported under section 202 of the Bengal Municipal Act. Reads section 202. In order that the provisions of the section may be applicable it is absolutely necessary that the obstruction or encroachment must have been erected or made on or in any "road or open drain, sewer or aqueduct." The encroachment, if any, has been made on the bank of the "long tank." The land upon which the encroachment is alleged to have been effected must be either a road, open drain, sewer or aqueduct. Ordinary cases of disputes between any person and the Municipality with regard to title to land cannot be

summarily dealt with under section 202. It is only the Civil Courts that have authority to determine such disputes. The order of the Magistrate is clearly illegal and ought to be set aside.

Dr. *Sarat Chandra Basak* (with him Babu *Jotindra Kumar Sen Gupta*), for the Opposite Party.—The "long tank" is a sewer and the land encroached upon is part of the sewer. It is, therefore, a clear case under section 202 of the Bengal Municipal Act. It is admitted that the land encroached upon is part of the bank of the "long tank." The case in *Ahmadi Begum* v. *Taraknath Ghosh* (1) is an authority for the proposition that "bank" of a river is part of the river itself. The bank of the "long tank" or sewer is, therefore, part of the sewer itself.

I shall next contend that the order of the Magistrate under section 202 of the Bengal Municipal Act is not a judicial order and, therefore, your Lordships have no power to raise that order. It is a purely executive order and the High Court is not competent to interfere with such order. See *Baboo Chunder Narain Singh* v. *Brojo Bullub Gooie* (2), *Annie Besant* v. *Advocate-General of Madras* (3), *Annie Besant* v. *Emperor* (4) and *Karim Bux* v. *Emperor* (5).

Babu *Dasarathi Sanyal* in reply.—It is now too late for my learned friend to question the jurisdiction of the High Court. My friend has relied upon the cases reported in *Baboo Chunder Narain Singh* v. *Brojo Bullub Gooie* (2) and *Annie Basant* v. *Advocate General of Madras* (3). These are cases under different statutes. The case in *Baboo Chunder Narain Singh* v. *Brojo Bullub Gooie* (2) was one under Act VI B. C. of 1868. There the question of the removal of the obstruction was dealt with separately from the judicial acts of determining who the offender was and of inflicting punishment upon him. That was the opinion of the learned Chief Justice who decided the case. Under the present Bengal Municipal Act (III B. C. of 1884) the question of removal of the obstruction is dealt with in section 202 while the question of punishment is dealt with in section 218. Section 205 of the present Bengal Municipal Act makes it perfectly clear that the order of a Magistrate under section 202 is a judicial order. As to the meaning of the word "Magistrate" see section 3, sub-section (8), of the Bengal Municipal Act, General Clauses Act (I of 1899), section 3, sub-section (25). When Act III B. C. of 1884 was passed, the Code of Criminal Procedure was Act X of 1882. See section 8 of the Code of Criminal Procedure of 1882. Refers also to the definition of judicial proceeding in section 4, clause (*n*) of Act V of 1898. The question is set at rest by the decision of their Lordships of the Judicial Committee in *Clarke* v. *Brojendra Kishore Roy* (6). If the order of the Magistrate is not to be treated as a judicial order, the Magistrate will be protected under section 205 read with Act XVIII of 1850, but the aggrieved party will be without any remedy. Refers to *Mahomed Ali* v. *Emperor* (7). Refers also to section 22 of the Press Act (I of 1910).

JUDGMENT.—The petitioner is the owner of a holding situate by the side of the "long tank" within the Municipality of Narayangunge. In April 1918 he applied for and obtained sanction for the construction of a two-storied building on his holding. After the first storey of the building had nearly reached completion, a notice was served upon him under section 202 of the Bengal Municipal Act to remove an encroachment alleged to have been made on a portion of the "long tank." The petitioner thereupon filed objection under section 176 of the Act, but it is alleged that the procedure prescribed by sections 178 and 179 were not followed by the Municipal authorities. The Municipality, however, in-

(1) 21 Ind. Cas. 233; 18 C. L. J. 399 at p. 448; 17 C. W. N. 1173.
(2) 21 W. R. 391; 14 B. L. R. 254.
(3) 52 Ind. Cas. 209; 43 M. 146; 37 M. L. J. 139; 17 A. L. J. 925; 23 C. W. N. 986; 21 Bom. L. R. 867; (1919) M. W. N. 555; 10 L. W. 451; 20 Cr. L. J. 593; 26 M. L. T. 408; 1 U. P. L. R. (P. C.) 74; (1919) 35 T. L. R. 500; 46 I. A. 176 (P. C.).
(4) 37 Ind. Cas. 607; 39 M. 1164 at p. 1176; (1916) 2 M. W. N. 497; 4 L. W. 625; 32 M. L. J. 151; 18 Cr. L. J. 239; 21 M. L. T. 190.
(5) 57 Ind. Cas. 101; 24 C. W. N. 624; 21 Cr. L. J. 581.
(6) 16 Ind. Cas. 501; 39 C. 953 at p. 966; (1912) M. W. N. 760; 12 M. L. T. 171; 10 A. L. J. 193; 16 C. L. J. 231; 16 C. W. N. 865; 23 M. L. J. 32; 14 Bom. L. R. 717; 13 Cr. L. J. 693; 39 I. A. 163 (P. C.).
(7) 20 Ind. Cas. 977; 41 C. 466; 18 C. W. N. 1; 14 Cr. L. J. 497.

stituted proceedings against the petitioner under sections 217 and 218. The latter, among other objections, denied the title of the Municipality to the land upon which the building had been erected and denied that he had encroached upon any land of the Municipality. That case was dismissed mainly upon the ground of defect in the notice served upon the petitioner. The Municipality, thereupon issued fresh notice upon the petitioner and, the latter having failed to comply with the requisition, started proceedings under section 202 of the Act. The Sub Divisional Magistrate who tried the case found that there was an encroachment of one foot beyond the sanctioned plan upon Municipal land, and directed the removal of the encroachment under section 202 of the Act. The petitioners thereupon moved this Court and obtained this Rule.

It is contended on behalf of the petitioner that the land on which the encroachment is said to have been made is not a drain, sewer or road, and that, therefore, the provisions of section 202 are inapplicable to the case, even if the land belongs to the Municipality. It is contended, on the other hand, by the opposite party that the "long tank" is a sewer and the land encroached upon is part of the sewer. It is not clear, however, whether the land in dispute forms part of the sewer or drain. It is referred to in one passage in the judgment of the Magistrate as Municipal land, but the opposite party relies upon other passages in the judgment as indicating that it forms part of the "long tank."

Section 202 of the Bengal Municipal Act provides: "The Commissioners may issue a notice requiring any person to remove any wall which he may have built or any fence, rail, post or other obstruction or encroachment which he may have erected in or on any road or open drain, sewer or aqueduct.....and if such person shall fail to comply with such requisition within eight days of the receipt of the same, the Magistrate may on the application of the Commissioners, order that such obstruction or encroachment be removed, and thereupon the Commissioners may remove any such obstruction or encroachment and the expenses thereby incurred shall be paid by the person who erected the same." In order, therefore, that the provisions of the section may be applicable it is essential that the wall must have been built or the obstruction or encroachment erected in or on any road or *open drain, sewer or aqueduct*. Assuming that the land upon which the encroachment is alleged to have been made forms part of the "long tank," it must be shown that it is part of the sewer itself or forms part of its slope, which may be treated as part of the sewer itself.

The section gives a summary power to remove a wall or encroachment only where it is erected on a road, drain sewer or aqueduct and it cannot apply to a case where there is a dispute between any person and Municipality with regard to the title to any land. Such disputes must be determined in the ordinary way the Civil Courts and the Municipality cannot avail themselves of the provisions of section 202 of the Act for pulling down the wall (in the present case the wall of a two-storied building) unless it is shown that the land encroached upon forms part of the sewer itself.

It is contended, however, on behalf of the opposite party, that the order of the Magistrate under section 202 of the Municipal Act is not a judicial order, and, therefore, cannot be revised by the High Court. Now, Act VI (B. C.) of 1868, Schedule K, clause (1) provided that "whoever builds any wall, or erects or sets up any fence, rail, post, or other obstruction or encroachment in any public highway, or in or over any open drain, sewer, or aqueduct along the side of any such highway, shall be liable to a fine not exceeding fifty rupees, and the Magistrate shall have power to remove any such obstruction or encroachment; and the expense of such removal shall be paid by the person erecting the same; and shall be recoverable from him in the manner provided in section 83 of this Act." In the case of *Baboo Chunder Narain Singh* v. *Brojo Bullub Gooie* (2) a question was raised whether an order of the Magistrate directing the removal of the obstruction was a judicial act. There was difference of opinion between the learned Judges, Markby and Birch, JJ., and the case was referred to Couch, C. J., who held that the removal of an obstruction by a Magistrate in exercise of the power given to him by Act VI of 1863 (B. C.), Schedule K, clause 1 is not

a judicial act, but an executive or ministerial act, and even the circumstance that a fine is imposed on the person who set up the obstruction does not protect the Magistrate under Act XVIII of 1850 from an action being brought to try the question of such person's right to leave the obstructions there. The learned Chief Justice observed :—"The clause, although it contains two provisions, one for the punishment of the author of the obstruction and the other for the removal of the obstruction, must be looked at as if it was in fact two clauses, one providing for the judicial act of determining who the offender is and punishing him, and the other for what may be done separately and without any offender being punished, namely, the act of removing the obstruction, which may properly be called an executive or ministerial act."

In the present Bengal Municipal Act (Act III of 1884 B. C.), the question of removal of the encroachment is dealt with in section 202 separately from the question of penalty for disobedience of the requisition (under section 202) in section 218. It is contended on behalf of the opposite party that the matter dealt with under section 218 is a judicial act, whereas that under section 202 is not so. Section 205, however, provides that every order made by the Magistrate under sections 202, 203, 204 or 233 shall be deemed to be an order made by him in the discharge of his judicial duty, and the Commissioners shall be deemed to be persons bound to execute such order of a Magistrate within the meaning of Act XVIII of 1850 (for the protection of judicial officers). It seems that section 205 was enacted to meet the difficulty raised in the case referred to above. It is contended, however, on behalf of the opposite party that the section says, "shall be deemed to be an order by him in the discharge of his judicial duty," not that it is a judicial proceeding ; in other words, the Magistrate shall be treated as acting judicially only for a particular purpose, namely, for his own protection.

We do not think that is a reasonable interpretation of the section. The Legislature appears to have used the language "shall be deemed to be an order made by him in the discharge of his judicial duty" because, in the case of *Baboo Chunder Narain Singh* v. *Brojo Bullub Goois* (2), the learned Chief Justice pointed out that the act of the Magistrate directing the removal of the obstruction is not a judicial act. In the present Act it is expressly stated that the Magistrate shall be deemed to be acting judicially. Moreover, if the order is not to be treated as a judicial act, the party is without any remedy because the Magistrate, according to the wording of the section, will be acting judicially and, therefore, will be protected by Act XVIII of 1850 (for the protection of judicial officers) and, at the same time, cannot be revised by the High Court as not being a judicial order.

We are accordingly of opinion that the order made under section 202 is a judicial proceeding and we have got the power to revise the order of the Magistrate.

It may be pointed out that in this case the Magistrate took evidence and held a judicial proceeding before making the order for removal of the wall.

The question whether the alleged encroachment was made upon the sewer itself or upon the land which might form part of the bank of the long tank has not been clearly found in the judgment and that is the most important question in deciding the case. We think that the Court should definitely find whether the encroachment has been made upon the slope of the sewer itself, as contended on behalf of the Municipality, or upon land not constituting any sewer or its slope, though the land may form the bank of the "long tank" as contended on behalf of the petitioner.

We accordingly set aside the order complained of, and send the case to the Court below in order that it may come to a definite finding upon the point dealt with above and dispose of the case according to law.

Order set aside.

EMPEROR *v.* SHAMSUNDERBAI.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 133 OF 1920.

July 21, 1920.

Present :—Mr. Justice Shah and Mr. Justice Crump.

EMPEROR—PROSECUTOR

versus

SHAMSUNDERBAI—ACCUSED.

Penal Code (Act XLV of 1860), s. 373—Obtaining possession of minor for purpose of prostitution—Possession, whether must be obtained from third person.

It is not requisite for the purpose of section 373, Penal Code, that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with intent that the minor shall be used for the purpose of prostitution. [p. 142, col. 1.]

Criminal application for revision against an order of discharge passed by the Additional Presidency Magistrate, Bombay.

Sir *Thomas Strangman* (Advocate General) (with him Mr. *Bowen* Public Prosecutor and *S. S. Patkar*, Government Pleader), for the Crown.

Mr. *G. S. Rao*, for the Accused.

JUDGMENT.

SHAH, J.—In this case, the accused was tried apparently in respect of a charge under section 372, Indian Penal Code. But in the course of the trial the prosecution tried to prove that she was guilty under section 373 of the Indian Penal Code. After the prosecution evidence was recorded, the Trial Magistrate considered the case with reference to section 373, and discharged the accused. The present application has been made to this Court on behalf of the Government of Bombay for revising this order of discharge and for a further inquiry into this case. We have heard the arguments on both sides, and, in view of the order which we propose to make, I do not desire to say anything as to the merits of the case.

It is necessary, however, to state the facts alleged on behalf of the Crown, briefly, in order to understand the point of law which has been argued and to appreciate the case for the Crown. The accused in this case, Shamsunderbai, is a brothel-keeper. A girl, Chandrabai, who used to stay with her husband, and who was about fifteen years old at the material time, was taken by two men to Shamsunderbai. At that time, the girl stayed with her for about three days. Chandrabai's husband and his relatives traced her at the house of the accused and at the time the girl was brought back to her husband's place. She stayed with her husband for about a week and again went back to the accused. On this second occasion, after a few days, it is said that, she commenced to lead the life of a prostitute under the protection and guidance of the accused. The case for the prosecution is that, both when the girl was kept on the first occasion for about three days by the accused and on the second occasion when she was kept by the accused for about a month, the accused kept her with the intention of using her for the purpose of prostitution, and that the accused is guilty under section 373, Indian Penal Code. The learned Magistrate has come to the conclusion that, when the girl stayed with the accused on the first occasion, the latter had no criminal intention, that when the girl went to the accused on the second occasion, she went to the accused of her own accord, that the accused did not obtain possession of the girl from a third person, and that, therefore, she committed no offence under section 373, Indian Penal Code. The contention for the Crown before us is that the conduct of the girl should be taken as a whole in judging of the intention of the accused. It is urged that her stay with the accused on the first occasion when there was no act of prostitution committed by her and her going to the accused on the second occasion, when she did take to prostitution, should be taken together as showing that the accused obtained possession of the girl from the two persons and ultimately succeeded in carrying out her evil intention, which she entertained from the beginning. The learned Magistrate has dealt with the two occasions separately and it is urged for the Crown that, in doing so, the Magistrate has misappreciated the situation. As regards the stay of the girl on the second occasion, apart from her first visit to the accused, it is contended that it is not essential for the purpose of section 373, Indian Penal Code, that the possession of the minor should be obtained by the

accused from a third person. It is quite enough, it is urged, if in fact the accused obtains possession of the minor so as to have a sufficient control and power of disposal over her for the purpose of prostitution.

On the question of intention, I do not desire to express any opinion beyond saying that a case for further inquiry is made out.

As regards the question of law upon which the Magistrate has come to a definite conclusion, I am of opinion that it is not requisite for the purpose of section 373, Indian Penal Code, that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with intent that the minor shall be used for the purpose of prostitution. Dewan Bahadur Rao has relied upon *Queen* v. *Shaik Ali* (1) particularly upon the judgment of Mr. Justice Holloway; but the view taken by the other two Judges in that case does not appear to me to support his contention. There are no words in the section as to the necessity of there being a third party, from whom possession of the minor is obtained. It is true that the words used indicate that there would ordinarily be a third party from whom the minor may be bought or hired, or her possession obtained by the person charged under section 373, Indian Penal Code. But I do not see any sufficient reason to restrict the scope of the section by applying it only to those cases where there is a third party concerned, from whom the accused may be said to buy, hire or otherwise obtain possession of the minor. On this point, with respect, I prefer the view taken by Scotland, C. J., in the said case. I agree that the possession should be such as would imply a sufficient control over the minor and not such temporary possession as was found in that case.

Therefore, apart from the connection between the two occasions on which the girl is said to have stayed with the accused, as regards her going to the accused on the second occasion, if the facts alleged are proved, I do not see any insuperable difficulty in the way of the prosecution on the interpretation of the section. On this ground also there is need for a further inquiry.

I would, therefore, set aside the order of discharge and direct a further inquiry into the case by the Chief Presidency Magistrate or by any Presidency Magistrate, other than Mr. Dastur, whom the Chief Presidency Magistrate may appoint.

CRUMP, J.—I concur.

Order set aside.

(1) 5 M. H. C. R. 473; 1 Weir 377.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1069 OF 1920.

October 29, 1920.

Present :—Mr. Justice Wilberforce.

MIHAN SINGH AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Punjab Excise Act (I of 1914), s. 61—Illegal possession of liquor and distilling apparatus—Joint owners, liability of.

The mere fact of a person being a joint owner of a house and field in which illicit liquor and distilling apparatus are found, without anything further to connect him with the illicit distillation, is not sufficient to warrant his conviction under section 61 of the Excise Act. [p. 143, col. 1.]

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Gurdaspur, dated the 13th June 1920, affirming that of the Magistrate, 1st Class, Gurdaspur, dated the 22nd April 1920.

Mr. *M. S. Bhagat*, for the Petitioners.

JUDGMENT.—In this case the petitioners, Mihan Singh, Hardit Singh and Bhagwan Singh, have each been sentenced under section 61 of the Excise Act for being in possession of illicit liquor and of distilling apparatus. Their appeal was dismissed by the Sessions Judge and they have applied for revision. The learned Judge who admitted this petition apparently only con-

sidered that the cases of Hardit Singh and Bhagwan Singh, required consideration. As for Mihan Singh, he admitted that three bottles of illicit liquor were discovered from his house and distilling apparatus was discovered in his field. His conviction was, therefore, clearly justified. As for Hardit Singh, who is his uncle, and Bhagwan Singh, his cousin, however, Counsel urges that the bottles and the distilling apparatus were discovered in Mihan Singh's house and field and that they were in no way responsible. The prosecution story was that all the convicts were in joint possession of the house and the field and there was some evidence to this effect. There was, however, nothing further to connect Hardit Singh and Bhagwan Singh with any illicit distillation, and petitioner's Counsel urges correctly that the mere fact of their being joint owners of the house and the field was not sufficient for their conviction. I agree with this contention and accept the petition of Hardit Singh and Bhagwan Singh and acquit them. I dismiss the petition of Mihan Singh.

Petition partly dismissed.

CALCUTTA HIGH COURT.
SPECIAL BENCH.
SPECIAL BENCH REFERENCE No. 1 OF 1920 IN CRIMINAL MISCELLANEOUS CASE No. 41 OF 1920.
July 13, 1920.
Present:—Sir Ashutosh Mookerjee, KT., Acting Chief Justice, Justice Sir Ernest Fletcher, KT., Mr. Justice Richardson, Mr. Justice Walmsley and Mr. Justice Buckland.
SATIS CHANDRA CHAKRABARTI—ACCUSED—PETITIONER
versus
RAM DAYAL DE—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 499—Defamation — Party to judicial proceeding making defamatory statement—Privilege, qualified—Party to judicial proceeding sued in Civil Court for defamation, liability of, for damages—Criminal Procedure Code (Act V of 1898), s. 195—Refusal to sanction prosecution, whether bar to prosecution for defamation.

Where a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise his liability must be determined by reference to the provisions of section 499 of the Penal Code, and he is entitled only to the benefit of the qualified privilege mentioned in that section. [p. 159, cols. 1 & 2.]

(Case-law on the subject of absolute privilege discussed.)

Where a party to a judicial proceeding is sued in a Civil Court for defamation in respect of a statement made therein on oath or otherwise, his liability, in the absence of statutory rules applicable to the subject, must be determined with reference to the principles of justice, equity and good conscience. [p. 159, col. 2.]

The dismissal of an application for sanction under section 195 of the Criminal Procedure Code to prosecute for defamation in respect of a statement made in a judicial proceeding is no bar to the institution of a prosecution for defamation. [p. 159, col. 2.]

FACTS appear from the judgment.

Babu *Narendra Kumar Basu*, for the Petitioner.—The petitioner before your Lordships obtained the present Rule with a view to quash the proceedings instituted against him in the Court of the Chief Presidency Magistrate of Calcutta on the ground that certain alleged defamatory statements were absolutely privileged, as they were contained in a petition presented to this Hon'ble Court in the exercise of its disciplinary jurisdiction. The alleged defamatory statements are contained in the petition presented to this Hon'ble Court on the 11th of July 1919.

Reads the petition of the 11th of July 1919.

[MOOKERJEE, A. C. J.—Do you deny that the language of the petition was defamatory?]

No. I contend that the statements in the petition were absolutely privileged. Under the English Common Law there is no doubt that the statements were absolutely privileged. So far as the Presidency Towns are concerned the English Common Law on the subject is the law applicable.

[MOOKERJEE, A. C. J.—Your contention is that section 499 of the Indian Penal Code does not apply to Presidency Towns.]

Yes. Reads the preamble and sections 1 and 2 of the Indian Penal Code. The Indian Penal Code professes to be an Act which provides for the punishment of certain offences.

[MOOKERJEE, A. C. J.—What is the meaning of "and not otherwise" in section 2?]

The expression "and not otherwise" in section 2 has reference to liability for punish-

ment and does not refer to immunity from punishment. Reads section 5, Indian Penal Code.

[FLETCHER, J.—The law of defamation is not based on English Common Law. It is based on certain Statute, chiefly Fox's Libel Act.]

Reads Statute 3 and 4 William IV, Chapter 85.

[MOOKERJEE, A. C. J.—That Statute is of no avail to you.

In *Kari Singh* v. *Emperor* (1) it was held that the Common Law doctrine of absolute privilege did not obtain in the Mufassil in India, but nothing was said about the applicability of the doctrine to the Presidency Towns. Refers to *Kari Singh* v. *J. Finch* (*Emperor*) (2).

If your Lordships are of opinion that the present case is governed by section 499 of the Indian Penal Code, my contention will be that there is a respectable body of judicial opinion which support my view of absolute privilege even under the law as enunciated in section 499, Indian Penal Code. So far as witnesses are concerned, I would refer your Lordships to *Bhikumber Singh* v. *Becharam Sircar* (3). It was a civil case.

[MOOKERJEE, A. C. J.—But civil cases wo'nt help you.]

The case in *Waolfun Bibi* v *Jenrat Sheikh* (4) is a case of conviction under section 500, Indian Penal Code. This is also a case of prosecution for defamatory statements made by witnesses. About parties, we have the two cases in *Kari Singh* v. *Emperor* (1) and *Kari Singh* v. *J. Finch* (*Emperor*) (2). The other case is in *Profulla Kumar Ghose* v. *Harendra Nath Chatterjee* (5). Refers also to *Baboo Gunesh Dutt Singh* v. *Mugneeram* (6).

The remedy of the opposite party lay in having resourse to the provisions of sections 182, 193 and 211, Indian Penal Code. Refers to *Muthuswami* v. *Emperor* (7), *Manjaya* v. *Sesha Shetti* (8), *Emperor* v. *Ganga Prasad* (9), *Abdul Hakim* v. *Tej Chandar* (10), *Dawan Singh* v. *Mahip Singh* (11), *Queen-Empress* v. *Babaji* (12), *Queen-Empress* v. *Balkrishna Vithal* (13), *Nagarji Trikamji, In re* (14), *Crowdy* v. *Reilly* (15), *Sandyal* v. *Bhaba Sundari Debi* (16).

Even if it be held that there was no absolute privilege, the present is not a fit case for a prosecution under section 500, Indian Penal Code, having regard to the fact that sanction under section 195, Criminal Procedure Code, was refused.

Babu *Dasarathi Sanyal* (with him Mr. *Lt. G. Sarkar* and Babus *Debendra Narain Bhattacharjee*, *Ram Taran Chatterjee* and *Amir Chand Pal*), for the Opposite Party.

[MOOKERJEE, A. C. J.—We don't want to hear you on the applicability of section 499, Indian Penal Code to Presidency Towns.]

I shall then address your Lordships on the other two points raised by my learned friend, *viz.*, (1) whether the statements were absolutely privileged, and (2) whether the fact that sanction under section 195, Criminal Procedure Code, was refused is a sufficient ground to stifle a prosecution under section 500, Indian Penal Code.

In support of his first point my learned friend has attempted to introduce an eleventh exception to section 499, Indian Penal Code. The framers of the Penal Code had the idea of absolute privilege in their mind. See section 77, Indian Penal Code (a Judge acting judicially). The framers of the Code in their wisdom have intentionally rejected the doctrine of absolute privilege in section 499, Indian Penal Code. In this section the question of qualified privilege has only been considered. The question of absolute privilege was elaborately discussed in *Crowdy* v. *Reilly* (15). Then

(1) 18 Ind Cas. 660; 40 C. 433; 17 C. W. N. 297; 14 Cr. L. J. 100.
(2) 18 Ind. Cas. 349; 40 C. 441*n*; 17 C. W. N. 449; 14 Cr. L. J. 61.
(3) 15 C. 264; 7 Ind. Dec. (N. S.) 761.
(4) 27 C. 262; 14 Ind. Dec. (N. S.) 178.
(5) 38 Ind. Cas. 761; 44 C. 970; 21 C. W. N. 252; 25 C. L. J. 445; 18 Cr. L. J. 377.
(6) 17 W. R. 283; 11 B. L. R. (P. C.) 21.
(7) 14 Ind. Cas. 757; 37 M. 110; 11 M. L. T. 431; 13 Cr. L. J. 293.
(8) 11 M. 477; 1 Weir 586; 4 Ind. Dec. (N. S.) 332.
(9) 29 A. 685; 4 A. L. J. 605; 6 Cr. L. J. 197; A. W. N. (1907) 235.
(10) 3 A. 815; A. W. N. (1881) 81; 6 Ind. Jur. 320; 2 Ind. Dec. (N. S.) 521.
(11) 10 A. 425; A. W. N. (1888) 157; 6 Ind. Dec. (N. S.) 286.
(12) 17 B. 127; 9 Ind. Dec. (N. S.) 83.
(13) 17 B. 573; 9 Ind. Dec. (N. S.) 374.
(14) 19 B. 340; 10 Ind. Dec. (N. S.) 230.
(15) 18 Ind. Cas. 737; 17 C. W. N. 554; 17 C. L. J. 105.
(16) 7 Ind. Cas. 803; 15 C. W. N. 995; 14 C. L. J. 31.

it has been pointed out that in criminal cases the Court is bound to apply the doctrine of qualified privilege enunciated in section 499, Indian Penal Code. You cannot bring in an exception to the section by implication from a comparison of the law on the subject with the doctrine of the English Common Law. Refers to *Bhuban Ram* v. *Bibhuti Bhusan Biswas* (17). See also *Crowdy* v. *Reilly* (15).

My friend has asked your Lordships to stifle the prosecution at the present stage. I submit your Lordships should not interfere unless it is shown that the prosecution is illegal. See *Chandi Pershad* v. *Abdur Rahman* (18), *Ohoa Lal Dass* v. *Anant Pershad Misser* (19). Refers also to section 132 of the Evidence Act. That section only gives a qualified privilege to a witness. See *Giribala Dassi* v. *Pran Krishto Ghosh* (20), *Queen* v. *Pursoram* (21) and *Greene* v. *Delanney* (22).

The last point made out by my learned friend is that the refusal of my application for sanction under section 195, Criminal Procedure Code, operates as a bar to the present prosecution under section 500, Indian Penal Code. If the contention of my learned friend were correct it would be equivalent to adding another *autrefois acquit* which is not to be found in the Criminal Procedure Code.

[FLETCHER, J.—Can you punish a man for perjury and then bring him to trial under section 500, Indian Penal Code?]

Yes. See section 403, Criminal Procedure Code and section 235, Criminal Procedure Code. The dismissal of an application for sanction under section 195, Criminal Procedure Code, does not come under section 403, Criminal Procedure Code, so as to bar a prosecution under section 500, Indian Penal Code. See *Ram Sewak Lal* v. *Maneshwar Singh* (23).

Lastly, even under the English Law, the use of extravagant language will destroy good faith and privilege. See Mayne's Criminal Law of India, 3rd Edition, paragraph 677, page 899. At any rate, my learned friend cannot invite your Lordships to interfere at this stage of the prosecution.

Babu *Narendra Kumar Basu* replied.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—On the 11th July 1919 Satis Chandra Chakrabarti, the petitioner in the present Rule, made an application to this Court and prayed that disciplinary action might be taken against Mr. Ramdayal De, a Vakil of this Court, who had acted on behalf of one Chandra Kumar Chakrabarti with whom he had been involved in a protracted litigation. It is not necessary for our present purpose to narrate the history or review the progress of that litigation; it is sufficient to state that the application made by the petitioner contained grave charges of misconduct against Mr. De. The application was supported by an affidavit which recited that the facts mentioned in the petition were true to the knowledge of the deponent except those contained in paragraphs 19, 25 and 27, and that a part of paragraphs 4, 47 and 50 were true to his information and belief. The application was heard in the first instance by Fletcher and Duval, JJ. On the 17th July 1919 the matter was referred to the Government Pleader for inquiry and report. On the 25th July, Mr. De was called upon to submit an explanation within three weeks, which he did, on the 10th November 1919. The question was thereafter considered by Sanderson, C. J., and Fletcher, J., who, on the 3rd December 1919, came to the conclusion that no disciplinary action could be taken upon the application. On the 15th March 1920 Mr. De moved this Court for sanction to prosecute Satis Chandra Chakrabarti for offences under sections 181 and 193, Indian Penal Code, alleged to have been committed by him in respect of the statements made in paragraphs 52 and 22 of the application to this Court on the 11th July 1919. This application for sanction was refused by Sanderson, C. J., and Walmsley, J. Meanwhile, on the 24th February 1920, Mr. De had lodged a complaint in the Court of the Chief Presidency Magistrate against Satish Chandra Chakrabarti with a view to prosecute him for an offence under section 500, Indian Penal Code, in respect of the

(17) 47 Ind. Cas. 287; 46 C. 515; 22 C. W. N. 1062; 29 C. L. J. 262; 19 Cr. L. J. 915.
(18) 22 C. 131; 11 Ind Dec. (N. S.) 89.
(19) 25 C. 233; 13 Ind. Dec. (N. S.) 157.
(20) 8 C. W. N. 292.
(21) 2 W. R. (Cr.) 36; 3 W. R. (Cr.) 45.
(22) 14 W. R. (Cr. 27.
(23) 6 Ind. Cas. 352; 37 C. 604; 11 Cr. L. J. 325; 12 C. L. J. 15; 14 C. W. N. 839.

following nine statements selected from the petition of the 11th July 1919 :—

"(1) That the said Vakil, when the suit No. 5 3 of 1910 (Probate Case) was pending in the Judge's Court at Chittagong after remand, offered money to Prasanna Kumar Singh, the Kabiraj, the witness No. 1, who deposed on 20th July 1914 and Radha Govinda Bhattacharyya, witness No. 9, who deposed on 23rd July 1914, to depose falsely, and paid Probhat Chandra Bose, witness No. 10, to depose falsely and strongly on behalf of his side.

"(2) That the said Vakil, since the institution of the pending Revocation Case No. 11 of 1918, frequently goes to Chittagong and there bribed some of the witnesses and attempted to bribe the others, amongst Romjan Ali, Dalilar Rohman, Uma Charan Dhupi, Ashlam Khan, Sarada Kumar Dey, who were served with summonses. He also tried to raise a few witnesses on payment of money to adduce false evidence against the petitioner.

"(3) That Babu Ramdayal De, who was always bent upon wrongly getting hold of the property of the testator, instigated the said decree-holders (Ramdayal Pal and Bhairab Chandra De) to execute their decree for about Rs. 6,000, knowing well that it would not be probable for your petitioner to pay up at once such a large amount, in which case Babu Ramdayal De would be able to purchase some of the properties of the testator and father of the petitioners and other executors at a small price.

"(4) That Babu Ramdayal De, intentionally, and, in order to win the case, misprinted in the paper-book (of Appeal from Original Decrees Nos. 438 and 580 of 1914) many other things (that is, than those referred to in paragraphs 44 and 45) which were material for the case.

"(5) When the judgment of the Honourable High Court was forwarded to the District Judge, it transpired that the names of Babu Ramdayal De and the first point of appeal decided were of different ink and of different hand, thereby probably Babu Ramdayal De tried to omit his name from list of appellant's Pleaders and to raise a suspicion in the mind of the District Judge that the petitioner and other executors were not appointed executors though the first point decided in favour of the petitioner.....and the petitioner believes it was managed by Babu Ramdayal De, the said judgment not to be forwarded with the original record, though there was an urgent order for sending the record to the District Judge in that judgment itself.

"(6)... ...it is his duty to teach the witnesses and see the record and draft big volumes of false application.

"(7) That petitioner understood that every Court now a days is very liberal to the reduction of rate of interest and grant easy instalment to the debtors, but the petitioner is so unfortunate that he is unable to get any consideration of the other Court. So the petitioner believes that it is by the influence of Babu Ramdayal De, Vakil, High Court.

"(8) That Babu Ramdayal De came down to Mirsarai and opposed the petitioner's agents and peons from realising rent during the expiry of the year 1320 M. E. and then came down to Chittagong, stayed there three or four days, during which, through his agent Indra Singh, he intimated with the witnesses of the pending Revocation case and induced them with payment and offering money to give false evidence against the petitioner, one of the witnesses Nisi Chandra Dey who also told the petitioner the story.

"(9) That there is nothing impossible for Babu Ramdayal De, so the petitioner most humbly prays for an order for safe custody of his letters, envelopes Exhibits E, F, L, M, S, T, and U, V and W and the original note written by Babu Surendra Nath Das which is exhibited and marked P, and for an urgent order to keep some of the paper-books in Appeals Nos. 580 and 438 of 1914 in the safe custody."

It may be mentioned here that one of these statements, namely, No. 8, is one of the two statements included in the subsequent application by Mr. De for sanction to prosecute Satis Chandra Chakrabarti. Statements Nos. 4, 6 and 9 were, but statements Nos. 1, 2, 3, 5 and 7 were not, covered by the affidavit appended to the application of the 11th July 1919. On the 3rd May 1920, Satis Chandra Chakrabarti applied to this Court and obtained the present Rule with a view to quash the proceedings in the Court of the Chief Presidency Magistrate on the ground that the alleged defamatory statements were absolutely privileged, as

they were contained in a petition presented to this Court in the exercise of its disciplinary jurisdiction. The Rule was argued in the first instance before Walmsley and Buckland, JJ., who were of opinion that in view of the importance of the question involved, namely, whether statements contained in an application to this Court upon which a charge of defamation is based are absolutely privileged, it should be considered by a Special Bench. The present Bench has accordingly been constituted, with the concurrence of the Full Court, to hear the Rule.

The determination of the matter in controversy depends upon the true construction of section 499, Indian Penal Code, which contains four explanations and ten exceptions: *Channing Arnold* v. *Emperor* (24). No reference need be made to the explanations, as there can be no reasonable doubt as to the meaning and effect of the imputations contained in the statements. Nor need we consider the scope of any of the exceptions, except the eighth and the ninth which alone bear upon the question under consideration. Consequently, the statutory provision relevant for the decision of this matter may be formulated as follows :

"Whoever by words either spoken or intended to be read or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

"Eighth Exception—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustrations.

"If *A.* in good faith accuses *Z.* before a Magistrate; if *A.* in good faith complains of the conduct of *Z.*, a servant, to *Z.*'s master ; if *A.* in good faith complains of the conduct of *Z.*, a child, to *Z.*'s father—*A.* is within this exception.

"Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations.

'(*a*) *A.*, a shopkeeper, says to *B.*, who manages his business 'Sell nothing to *Z.*, unless he pays you ready money, for I have no opinion of his honesty.' *A.* is within the exception, if he has made this imputation on *Z.* in good faith for the protection of his own interest.

"(*b*) *A*, a Magistrate, in making a report to his superior officer, casts an imputation on the character of *Z.* Here, if the imputation is made in good faith and for the public good, *A.* is within the exception."

It is indisputable that, unless the case can be brought within either of the two exceptions just set out, the petitioner must be taken to have defamed Mr. De, as the statements embodied in his application to this Court were of such a character that he must have known that they would harm his reputation. We have, consequently, to examine the provisions of the two exceptions, but it is plain that neither of them formulates any rule of absolute privilege. The eighth exception refers to accusations preferred in good faith to an authorised person. The ninth exception refers to imputations made in good faith by persons for protection of their interest or for the public good. It is thus clear that, to take a case out of the primary rule and to bring it within either of the exceptions, good faith on the part of the person who makes or publishes the imputation must be established. We cannot in this connection overlook the illustration to the eighth exception, although we are not unmindful that an illustration is useful so far as it helps to furnish some indication of the presumable intention of the Legislature and does not bind the Courts to place a meaning on the section which is inconsistent with its language: *Dubey Sahai* v. *Ganeshi* (25), *Queen Empress* v. *Fakirappa* (26), *Koylash Chunder Ghose* v. *Sonatun Chung* (27). Reference may here be usefully made

(24) 23 Ind. Cas. 661; 41 C. 1023 at p. 1048; 41 I. A. 149 at p. 157; 20 C. L. J. 161 at p. 165; 18 C. W. N. 785; 26 M. L. J. 621; 15 Cr. L. J. 309; 1 L. W. 431; 7 Bur. L. T. 167; (1914) M. W. N. 501; 16 M. L. T. 79; 12 A. L. J. 1042; 16 Bom. L. R. 544; 8 L. B. R. 16 (P. C.).

(25) 1 A. 34 at p. 36 (F. B.); 1 Ind. Dec. (N. S.) 23.

(26) 15 B. 49 at p. 496; 8 Ind. Dec. (N. S.) 333.

(27) 7 C. 132 at p. 135; 8 C. L. R. 281; 4 Shome L. R. 144; 5 Ind. Jur. 642; 3 Ind. Dec. (N. S.) 635.

to the following observations of Lord Shaw in the judgment of the Judicial Committee in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*(28):—

"It is the duty of a Court of Law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the Statute, should not be thus impaired."

In the present instance, however, there is no conflict between the exception and the illustration which states that a person who in good faith accuses another before a Magistrate is allowed the benefit of the exception. In view of the plain language of the eighth and ninth exceptions, it is really difficult to see how absolute privilege can be claimed in respect of statements made by the petitioner in his application to this Court for disciplinary action against Mr. De; the Magistrate is bound to investigate the question of good faith which is expressly made an essential ingredient by both the exceptions.

Mr. Bose, who appeared in support of this Rule, fully realised this difficulty and was constrained to take recourse to what might well be called a desperate argument. He did not, indeed, maintain the view that the provisions of the Indian Penal Code should be construed in different ways within and beyond the limits of a Presidency Town; but he attempted to support the position that the liability of the petitioner depends, not on the provisions of the Indian Penal Code alone, but on those provisions as modified by the Common Law of England. His argument in substance was that, to determine the criminal liability of a person in Calcutta, we must investigate the rule of the Common Law of England on the subject and engraft it on the Indian Penal Code, with the result that where the two systems are not in agreement, the Common Law of England should prevail. Mr. Bose was not slow to recognise that this argument is opposed to the preamble, as also the provisions of section 1 and section 2 of the Indian Penal Code. The preamble shows that the object of the Legislature was to provide a general Penal Code for British India. Section 1 provides that the Code shall take effect throughout the whole of the territories which were or might become vested in Her Majesty under the Government of India Act, 1858, which has since been replaced by the Government of India Act, 1915. Section 2 explicitly lays down that every person shall be liable to punishment under the Code and *not otherwise* for every act or omission contrary to the provisions thereof of which he shall be guilty within the territories vested in Her Majesty; these words repeal all former laws for the punishment of every offence which is made punishable by the Indian Penal Code. These provisions clearly militate against the contention put forward in support of the Rule. As a last resort, Mr. Bose relied upon section 5 which provides that nothing in the Code "is intended to repeal, vary, suspend or affect any of the provisions of Statute 3 and 4, Will. IV, C. 85, or of any Act of Parliament passed after that Statute in anywise affecting the East India Company or the said territories or the inhabitants thereof; or any of the provisions or any Act for punishing mutiny and desertion of officers and soldiers in the service of Her Majesty or of any special or local law." Mr. Bose, however, did not explain how this provision in any way assisted his argument. It need not be disputed that the effect of section 5 is to qualify the general repeal prescribed by section 2. The two sections taken together declare that offences defined by special and local laws continue to be punishable as before; in other words, all acts or omissions contrary to the provisions of the Code itself or of the provisions of special and local laws and the other laws enumerated in section 5, and these alone and none others, are punishable as offences. (See the judgment

(28) (1916) 2 A. C. 575; 43 I. A. 256; 115 L. T. 564; 32 T. L. R. 673; 86 L. J. P. C. 15; 39 Ind. Cas. 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157 (P. C.)

of Collett, J. *Proceedings 22nd December* 1866 (29)]. But our attention has not been invited to any of the provisions of the Government of India Act, 1833, which are saved by section 5 and which may be supposed to have any bearing, direct or indirect, on the argument advanced in support of the Rule. The provisions which relate to the legislative powers of the Governor-General in Council (sections 43, 44, 45, 46, 84 and 85) or which maintain unaffected the right of Parliament to legislate (section 51) clearly do not bear on the question we are called upon to consider. Nor is any light thrown on the matter by sections 9 and 10 of the Indian High Courts Act (24 and 25 Vict., C. 104) which define the jurisdiction and powers of the Indian High Courts, and embody the following provisions : —

"9. Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, Original and Appellate, and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil, and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

"10. Until the Crown shall otherwise provide under the powers of this Act, all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William, Madras and Bombay, shall be exercised by such High Courts respectively."

Section 10 was repealed by section 2 of 23 and 29 Vict., C. 15, section 9, which has now been replaced by section 106 of the Government of India Act, 1915, preserves to the High Court all jurisdiction and every power and authority vested in any of the Courts abolished by the High Courts Act, 1861, that is, the Supreme Court and the Court of Sudder Dewani Adalat and Sadar Nizamat Adalat, mentioned in section 8. This provision, however, is made expressly subject to the legislative powers of the Governor-General in Council which is further emphasised by the provision of clause 44 of the Letters Patent recently extended in scope by the amendment of the 11th March 1919 :

"And We do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor General in Legislative Council, and also of the Governor-General in Council under section seventy-one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section seventy-two of that Act, and may be in all respects amended and altered thereby."

The phraseology used in section 9 cannot possibly mean that the High Court is to apply the Common Law of England, in the exercise of the criminal jurisdiction vested in it. This is placed beyond dispute by the Letters Patent mentioned in the section. We need refer only to clause 30 of the Letters Patent of 1865 which replaces clause 29 of the Letters Patent of 1862.

"30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of Appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860 called the 'Indian Penal Code' or by any Act amending or excluding the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise."

It may be noted that the words "or by any Act amending or excluding the said

(29) 3 M. H. C. R. (App.) xi at p. xvii.

Act which may have been passed prior to the publication of these presents" were introduced for the first time in clause 30 of the Letters Patent of 1865, while the words 'subject nevertheless to such alterations, modifications and additions in and to such Code as may have been or may be prescribed by any Acts or Regulations made by the Governor-General in Council' which occurred in clause 29 of the Letters Patent of 1862 were not reproduced in clause 30 of the Letters Patent of 1865. Clause 30 of the Letters Patent which is now in force makes the argument entirely untenable that the High Court is not to administer criminal law as contained in the Indian Penal Code but is to engraft thereon the rules of the Common Law of England.

It is, in our opinion, indisputable that all persons brought before the High Court for trial in the exercise of its original criminal jurisdiction, or in the exercise of its jurisdiction as a Court of criminal appeal, reference or revision, if charged with an offence under the Indian Penal Code, shall be liable to punishment under that Code *and not otherwise*. This does not militate against the view that the High Court has jurisdiction, like the Supreme Court, to punish for contempt of Court, which, as was pointed out by Sir Barnes Peacock in *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (30), is not an offence under the Indian Penal Code: "It is an offence which by the Common Law of England is punishable by the High Court in a summary manner by fine or imprisonment or both; that part of the Common Law of England was introduced into the Presidency Towns when the late Supreme Courts were respectively established by the charters of justice. The High Courts in the Presidencies are superior Courts of Record and the offence of contempt and the powers of the High Court for punishing it are the same in India as in England, not by virtue of the Penal Code in British India and the Code of Criminal Procedure, 1882, but by virtue of the Common Law of England. *McDermott* v. *Judges of British Guiana* (31)." It is not necessary for our present purpose to deal elaborately with the question of the jurisdiction of this Court to punish for contempt of Court; such power was undoubtedly possessed by the Supreme Court and may be exercised by this Court either as a power inherited from that Court or as inherent in the Court as a Court of Record and the exercise of the power is not restricted by the provisions of clause 30 of the Letters Patent [See *Governor of Bengal (Legal Remembrancer)* v. *Moti Lal Ghosh* (32) and *Amrita Bazar Patrika, In the matter of (Moti Lal Ghose, In re)* (33)]. Similarly, section 9 of the Indian High Courts Act, 1861, may be deemed to have vested in the High Court, the power and authority which might be exercised by the Supreme Court beyond the limits of the Presidency Towns as indicated by the observations of Peel, C. J., *Maharanee of Lahore, In the matter of* (34). Here, again, however, the exercise of the jurisdiction is subject to the provisions of the Letters Patent and is without prejudice to the legislative powers of the Governor General in Council. Consequently, from whatever point the matter may be examined, there is no escape from the position that the petitioner in the present Rule is subject to the operation of section 500, Indian Penal Code and other relevant provisions, if any, of the Indian Penal Code; the measure of his liability cannot be tested by reference to the rules recognised by the Common Law of England.

We may point out that the conclusion we have reached is not contradicted by what is known of the history of the legislation on the subject. We are not unmindful that such reference to the history of legislation can only be legitimately made, as was done by the Judicial Committee in *Maharajah Ishuree Persad Narain Sing* v. *Lal Chutterput Sing* (35) and *Brown* v. *McLachlan* (36), when reasonable doubt is entertained as to the construction of a Statute: the operation may, however, be easily carried too far, and may, in the case of codification

(30) 10 C. 109; 10 I. A. 171; 4 Sar. P. C. J. 474; 5 Ind. Dec. (N. S.) 76.

(31) (1868) 5 Moo. P. C. (N. S.) 466 at p. 497; 2 P. C. 341; 38 L. J. P. C. 1; 20 L. T. 47; 17 W. R. 352; 16 E. R. 590.

(32) 20 Ind. Cas. 81; 41 C. 173 at p. 176; 18 C. L. J. 452; 14 Cr. L. J. 321; 17 C. W. N. 1253.

(33) 45 Ind. Cas. 338; 45 C. 169; 26 C. L. J. 459; 21 C. W. N. 1161; 19 Cr. L. R. 530.

(34) (1848) Taylor 478; 2 Ind. Dec. (o. s.) 256.

(35) 3 M. I. A. 100 at p. 130; 6 W. R. P. C. 27; 1 Sar. P. C. J. 245; 18 E. R. 435;

(36) (1872) 5 P. C. 443 at p. 450; 42 L. J. P. C. 18; 21 W. R. 277; 9 Moo. P. C. (N. S.) 384; 17 E. R. 559.

of Acts, lead to results which have been emphatically condemned in decisions of the highest authority; see, for instance the observations of Lord Herschell in *Bank of England* v. *Vagliano* (37), of Lord Watson in *Robinson* v. *Canadian Pacific Railway Co.* (38) and of Lord Macnaghten in *Norendra Nath* v. *Kamalbasini Dasi* (39). The proper course is, in the first instance, to examine the language of the Statute, to interpret it, to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law; to begin with an examination of the previous state of the law on the point, is to attack the problem on the wrong end; and it is a grave error to force upon the plain language of the section an interpretation, which the words will not bear, on the assumption of a supposed policy on the part of the Legislature not to depart from the rules of the English Law on the subject. In the present instance, however, a reference to the history of the Indian Penal Code, not only does not support the theory of such a policy, but shows clearly an intention on the part of the Legislature to deviate in many respects from the rules of the English Law on this particular topic. This is manifest from an analysis of note R, appended to the draft of the Indian Penal Code prepared by the Indian Law Commissioners (Macaulay, Macleod, Anderson and Millett) and submitted to the Governor-General in Council on the 14th October 1837. The Commissioners not only did not faithfully adhere to the rules of the English Common Law, but in some respects, framed provisions which were at variance therewith, as also with the French Code and the Code of Lousiana. The Commissioners further intended that provision should be made, in the Code of Procedure, for rules for pleading in cases of defamation. The subsequent reports on the draft Code by the Indian Law Commission (Cameron and Eliott) on the 5th November 1846, and 24th June 1847 devote one entire chapter (Chapter XXV, paragraphs 360-414) to the subject of defamation. It is sufficient to state that there is no indication of an intention to adhere to the rules of the English Law on the subject: on the other hand, the Commissioners depart from those rules in many respects, although they had before them the Digest prepared by the English Criminal Law Commissioners. In a subsequent report submitted by the Indian Law Commissioners (Cameron and Eliott) on the 1st February 1848, they embodied a scheme of provisions and rules for the administration of criminal justice according to the Penal Code. To this scheme, they appended forms of indictment; Form No. 66 which refers to defamation sets out the plea of "not guilty of defamation" on the ground that the imputation had been made in good faith for the public benefit. These rules for pleading do not appear, however, to have been ever adopted by the Legislature. We do not rely on this history of the composition of the Indian Penal Code with a view to interpret its provisions, but we refer to it only to show how unsafe it would be to interpret the sections of the Code on the erroneous assumption that the framers did not intend to depart from the rules of the Common Law.

As a last resort, Mr. Bose has argued that if the language of section 499, Indian Penal Code, militates against his contention, there is a respectable body of judicial opinions which support his view of absolute privilege. Before we examine these decisions, it is necessary to emphasise that in this country questions of civil liability for damages for defamation and questions of liability to criminal prosecution for defamation do not, for purpose of adjudication, stand on the same basis; as regards the former, we have no codified law; as regards the latter the relevant provisions are embodied in the Indian Penal Code. This fundamental distinction, as will presently appear, has not always been borne in mind. The position then is that questions relating to civil liability for damages for defamation must be determined with reference to either the rules of English Common Law where they are shown to be applicable [*Mayor of Lyons* v. *East India Co.* (40)] and with reference to

(37) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 363; 39 W. R. 657; 55 J. P. 676.

(38) (1892) A. C. 481; 61 L. J. P. C. 79; 67 L. T. 505.

(39) 23 C. 563; 23 I. A. 18; 6 Sar. P. C. J. 667; 6 M. L. J. 71; 12 Ind. Dec. (N. S.) 374.

(40) 1 M. I. A. 175; 1 Moo. P. C. 175; 3 State Tr. (N. S.) 617; 1 Sar. P. C. J. 107; 18 E. R. 66; 12 E. R. 782.

principles of justice, equity and good conscience in all other cases. The principle that, in all cases for which no specific statutory directions are given, Judges should act according to justice, equity and good conscience, was expressly formulated in section 93 of the Administration of Justice Regulation promulgated by the Governor-General in Council on the 5th July 1781. The rule was thereafter successively reproduced in section 21 of Regulation III of 1793, in section 24 of the Bengal Civil Courts Act, 1871, and in section 37 of the Bengal Civil Courts Act, 1887. Now, the decision of a case according to the principles of justice, equity and good conscience has generally meant decision according to the principles of English Law applicable to a similar state of circumstances. This was justified in *Dada Honaji* v. *Babaji Jagushet* (41) mentioned by Jenkins, C. J., in *Shivrao Narayan* v. *Pundlik Bhaire* (42), on the authority of the judgment of the Judicial Committee in *Varden Seth San* v. *Luckpathy Royjee Lallah* (43) but it is doubtful, whether the Judicial Committe really intended to enunciate the comprehensive rule attributed to their decision. Lord Hobhouse, however, in the later case of *Waghela Rajsanji* v. *Sheikh Masludin* (44) state that "equity and good conscience" had been "generally interpreted to mean the rules of English Law if found applicable to Indian society and circumstances." See also *Maharaja of Vizianagaram* v. *Sri Rajah Setrucherla* (45). In this connection, reference may be made to the observation of Sir Barnes Peacock, C. J., in *Rambux Chittangeo* v. *Modoosoodhun Paul* (46) that, where rights of parties are determined according to the general principles of equity and justice, this must be done without any distinction, as in England, between that partial justice which is administered in the Courts of Law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of equity. This was adopted by Jenkins, C. J., in *Deb Narain Dutt* v. *Ram Sadhan Mandal* (47). In these circumstances, when the law of torts has not been codified and cases of civil liability for damages have been left to be decided according to rules of justice, equity and good conscience, it is not surprising to find that the law of civil wrongs as administered in British Indian Courts has been practically taken in its entirety from the Common Law of England; the only justice, equity and good conscience which Judges steeped in the principles of English jurisprudence could and did administer in default of any other rule was so much of English Law and usage as seemed reasonably applicable in this country. A familiar illustration of this is afforded by the judgment of the Judicial Committee in the case of *Baboo Gunesh Dutt Singh* v. *Mugneeram* (6) where the principle that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding was enunciated in the following terms in affirmance of the decision of this Court in *Mugnee Ram Chowdhry* v. *Gonesh Dutt Singh* (48): "Their Lordships hold this maxim which certainly has been recognised by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harrassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury." This, in the absence of legislation on the subject of civil wrongs, is, if we may say so without impropriety, a perfectly legitimate process; but if we were to read into the provisions of the Indian Penal Code an exception which finds no place therein, as the Court was invited to do in *Nagarji Trikamji, In re* (14), where Counsel relied upon the lucid statement of Brett, M R, in *Munster* v. *Lamb* (49), as

(41) 2 B. H. C. R. 36.
(42) 26 B. 437; 4 Bom. L. R. 90.
(43) 9 M. I. A. 303 at p. 321; Marsh. 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756.
(44) 11 B. 551 at p. 561; 14 I. A. 89 at p. 96; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec (N. S.) 364.
(45) 13 M. L. J. 83; 26 M. 686.
(46) B. L. R. Supp. Vol. 675 (F. B.); 7 W. R. 377; 2 Ind. Jur. (N. S.) 155.
(47) 20 Ind Cas. 630; 41 C. 137 at p. 146; 18 C. L. J. 603; 17 C. W. N. 1143.
(48) 5 W. R. 134
(49) (1883) 11 Q. B. D. 588 at p. 603; 52 L. J. Q. B. 726; 49 L. T. 252; 32 W. R. 248; 47 J. P. 805.

to the immunity enjoyed by Judges, Counsels and witnesses under the Common Law, the operation would in essence be legislation in the guise of judicial interpretation. This, as we shall next see, is precisely what happened in some of the cases in the books. We may add that no question has been, or, indeed, could be raised as to the prerogative and power of the Legislature to discard the principles of the Common Law, wholly or partially, and, in its enactments, to embody other rules which it prefers [see the observations of Lord Atkinson is *Rodrigues* v. *Speyer Brothers* (50), where the reason for the rule of immunity of Judges, Advocates and witnesses is lucidly stated].

One of the earliest cases in this Court is that of *Queen* v. *Pursoram* (21), where the petitioner was prosecuted for an offence under section 500, Indian Penal Code, in respect of statements made by him to a Sub-Inspector of Police during preliminary enquiries in a case of riot: it was ruled that the decision of the question depended upon the provisions of the Indian Penal Code and the conviction was sustained. It was observed that the case did not fall under the ninth exception to section 499, as the imputation was not made in good faith nor was it necessary for the protection of the interests of the party making it. This view was affirmed on review, *Queen* v. *Pursoram* (21), where, in answer to the contention of Mr. Doyne that under the English Law a defendant in a criminal case was not tongue-tied and might make use of any remarks, however defamatory *per se*, with perfect imunity and protection from indictment or action, Kemp, J., observed that the case before them was governed by the provisions of the Indian Penal Code; Glover, J., added that English Law gave greater license to a person in the position of the accused than exception nine to section 499, Indian Penal Code, which required good faith as defined in section 52. The question was raised again in *Greene* v. *Delanney* (22), where an attempt was made to test the propriety of the conviction by reference to the rules of the English Law of defamation. The defamatory matter was contained in a petition presented to a Civil Court. Phear, J. observed as follows:—

"The Judge erred in looking outside the Penal Code itself for the purpose of ascertaining the Criminal Law of this country with regard to defamation. If the facts which are the subject of a complaint fall within the limits of the definition in section 499, construed as the section ought to be, according to the plain meaning of the words therein used, and if they are not covered by any of the exceptions to be found in the Code, then, in my judgment, they amount to defamation quite irrespective of what may be the English Law on the same subject.

"It is, I think, most important in the interests of the public that the procedure of our Courts of Justice should not with impunity be used as the means of indulging feelings of personal spite. It is quite time for litigants in many of our Mofussil Courts to learn that if they make written statements and petitions the vehicle of groundless accusations against their opponents or other persons, whatever may be their purpose, they do so at their own peril."

Jackson, J. added,—

"If he made the imputation in the petition presented by him to the Civil Court without good faith, he is liable to punishment for defamation. His act will not come within the ninth exception to the 499th section of the Penal Code in which defamation is defined. I also think, with Mr. Justice Phear, that in this country where litigants are so habitually regardless of the allegations they prefer against their opponents, it is right and proper that they should understand that false defamatory allegations made without good faith are punishable under the Criminal Laws of the country."

The point arose for consideration again in *Shibo Prosad Pandah, In the matter of the Petition of* (51). Markby and Prinsep, JJ., held that where the defamation charged was contained in a petition to a Mgistrate, the question of good faith was material, as the case was governed by section 499, Indian Penal Code. It may be observed in passing that a question was also raised as to burden

(50) (1919) A. C. 59 at p. 90; 88 L. J. K. B. 147; 119 L. T. 409; 62 S. J. 765; 34 T. L. R. 628.

(51) 4 C. 124; 3 C. L. R. 122; 1 Shome L. R. Cr. 72; 2 Ind. Dec. (N. s.) 80.

of proof and as to a possible difference on that point between a trial in the original criminal jurisdiction of the High Court and a trial beyond the limits of the Presidency Town. The question turned upon the scope of the first Criminal Procedure Code, 1862, and the effect thereon of the Indian Evidence Act, 1872, and is not material for the solution of the point we are called upon to consider. The point arose again, but only incidentally, in *Augada Ram Shaha* v. *Nemai Chand Shaha* (52) which was a civil suit for damages for defamation. Petheram, C. J., after referring to the decisions already mentioned under section 499, Indian Penal Code, which he considered as binding, added: "We do not think it possible that a statement may be the subject of a criminal prosecution for defamation, and at the same time may be absolutely privileged, as far as the Civil Courts are concerned. But if there had been no authority on the point in this Court, we should have come to the same conclusion." There can be no doubt that, according to Petheram, C. J., and Rampini, J., the test of criminal liability is to be found in the provisions of the Indian Penal Code as had been held in previous cases; but their opinion as to the test of civil liability for damages for defamation was contrary to the view which had been adopted in *Bhikumber Singh* v. *Becharam Sircar* (3); this, it is clear from the report, was not brought to the notice of the Court. The next case where the question appears to have come under consideration is that of *Woolfun Bibi* v. *Jesarat Sheikh* (4). This was a reference in a case of conviction under section 500, Indian Penal Code, for defamatory statements made by two persons as witnesses in a civil suit. The Sessions Judge referred to the cases of *Manjaya* v. *Sesha Shetti* (8), *Queen-Empress* v. *Babaji* (12) and *Queen-Empress* v. *Balkrishna Vithal* (13) as authorities for the proposition that witnesses could not be prosecuted for defamation on account of statements made in the witness-box. Reference was also made to *Bhikumber Singh* v. *Becharam Sircar* (3) and *Baboo Guresh Dutt Singh* v. *Mugneeram* (6) both of which, as we have seen, arose out of civil suits. The earlier decisions in this Court, which were directly in point, had evidently not been traced. The Sessions Judge on the merits thought that the reasons given by the Magistrate for holding that the statements were not made in good faith did not appear to be sound. When the matter came up to this Court, there was no appearance on behalf of either the accused or the Crown, and the Court, on the authorities cited by the Sessions Judge, held that the accused who had as witnesses made statements relevant to the issue in the case under inquiry could not be prosecuted for defamation. We do not overlook the observation of Sir Barnes Peacock, C. J., in *Rambux Chittangeo* v. *Modooscodhun Paul* (46) that it should not be assumed that arguments of Counsel are necessary to enable the Court to arrive at a sound conclusion, as, whether the case is argued by Counsel or not, the Court should accurately ascertain the facts, apply their own knowledge of the law to the facts ascertained, and, if the law is doubtful, should search, if necessary, into the authorities before they pronounce a decision. This may be accepted as the general rule; but the fact remains that, in this instance, the earlier decisions in *Queen* v. *Pursoram* (21) and *Greene* v. *Delanney* (22) which were directly in point and had been mentioned with approval in *Augada Ram Shaha* v. *Nemai Chand Shaha* (52), were not brought to the notice of the Court. Nor was any reference made to the decision in *Kali Nath* v. *Gobinda Chandra* (53) where Stevens and Handley, JJ., had ruled that statements made by parties to a suit in the pleadings were not absolutely privileged and had referred with approval to the view expressed by Petheram, C. J., in *Augada Ram Shaha* v. *Nemai Chand Saha* (52) dissenting from the contrary opinion in *Nathji Muleshvar* v. *Lalbhai Ravidat* (54). The case of *Woolfun Bibi* v. *Jesarat Sheikh* (4) was considered and distinguished in *Haidar Ali* v. *Abru Mia* (55). It was observed that even if the rule laid down therein was accepted as correct, it could not be extended to voluntary and irrelevant statements made by a witness while under examination. Substantially to the same effect, is the decision in *Giribala Dasi* v. *Pran Krishto Ghosh* (20). Amongst more recent

(52) 23 C. 867; 12 Ind. Dec. (N. S.) 576.

(53) 5 C. W. N. 293.

(54) 14 B. 97; 7 Ind. Dec. (N. S.) 522.

(55) 32 C. 756; 2 C. L. J. 105; 9 C. W. N. 911; 2 Cr. L. J. 452.

cases in this Court, reference may be made to *Kari Singh* v. *Emperor* (1), where it was ruled that section 499 is exhaustive, that the Common Law doctrine of absolute privilege does not obtain in the Mofussil in India and that a defamatory statement which does not fall within the exceptions to section 499 is not privileged. In this case, reference was made to the decision in *Kari Singh* v. *Emperor* (2) where no final opinion was expressed upon the question of principle involved, but the conviction was set aside on the ground that its propriety was open to serious doubt. Reference was also made to the dictum of Jenkins, C. J., in *Golap Jan* v. *Bhola Nath* (56) where a complaint to a Magistrate, though defamatory, was said to be protected by the absolute privilege accorded in the public interest to those who make statements to the Courts in the course of, and in relation to judicial proceedings. The question before Jenkins, C. J., however, arose in a civil suit for damages, and the Court was not invited to consider the true effect of section 499, Indian Penal Code, in relation to a criminal prosecution for defamation. The question was raised again in *Profulla Kumar Ghose* v. *Harendra Nath Chatterjee* (5) but no opinion was expressed as the order of the Court below was set aside on another ground. The question of absolute privilege was elaborately discussed also in *Crowdy* v. *Reilly* (15) where it was pointed out that in civil suits for damages for defamation, the Court is free to adopt the Common Law rule on the subject, although in criminal cases the Court is bound to apply the rule of qualified privilege enunciated in section 499. Beachcroft, J., was, however, inclined to the opinion that even in civil cases, the same restricted rule should be applied as in criminal cases, as laid down in *Augada Ram Shaha* v. *Nemai Chand Shaha* (52) and *Sandyal* v. *Bhaba Sundari Debi* (16). A review of these decisions shows that the trend of judicial opinion in this Court is decidedly in favour of the view that in cases of criminal prosecution for defamation, the Court is bound to apply the rule of qualified privilege enunciated in exceptions 7 and 9 to section 499, Indian Penal Code. *Woolfun Bibi* v. *Jesarat Sheikh* (4) is, perhaps, the solitary exception to this rule, though there are expressions of opinion in civil cases which also point in the same direction but in those cases, the question did not directly arise and the true effect of the provisions of the Indian Penal Code was not taken into consideration. The case of *Upendra Nath Bagchi* v. *F. A. Sait* (57), which was followed in *Nikunja Behari Sen* v. *Harendra Chandra Sinha* (58) clearly recognises that the question of liability to conviction for the offence of defamation depends upon the terms of section 499, Indian Penal Code, and approves the view taken by Jardine and Farran, JJ., in *Nagarji Trikamji, In re* (14) and by Chandavarkar and Knight, JJ., in *Emperor* v. *Purshottamdas* (59) that the liability of a Pleader charged with defamation in respect of words spoken or written in the performance of professional duty depends upon section 499, though it is held that the Court should presume good faith unless there is cogent proof to the contrary. This case clearly affirms the view that the privilege is not absolute but qualified; no doubt the burden is cast upon the prosecution to prove absence of good faith.

It is not necessary to analyse in minute detail the decisions in the other Courts. In Bombay, there are two decisions which favour the rule of absolute privilege: *Queen-Empress* v. *Babaji* (12), *Queen-Empress* v. *Balkrishna Vithal* (13). The decision in *Nagarji Trikamji, In re* (14) does not fall within this category, as it recognises the applicability of section 499, Indian Penal Code, and the impropriety of importing into a carefully considered Statute like the Indian Penal Code, the rules of the Common Law of England based on public policy. The decision in *Bhaishankar* v. *Wadia* (60) also is distinguishable, as the question of the privilege of Counsel came up for consideration by the Court in the exercise of its disciplinary powers, while the case of *Raghavendra* v. *Kashinathbhat* (61) only incidentally touches upon

(56) 11 Ind. Cas. 311; 38 C. 880; 15 C. W. N. 917.

(57) 1 Ind. Cas. 147; 36 C. 375; 13 C. W. N. 340; 9 C. L. J. 259; 9 Cr. L. J. 165.

(58) 20 Ind. Cas. 1008; 41 C. 514; 18 C. W. N. 424; 14 Cr. L. J. 528.

(59) 9 Bom. L. R. 1287; 6 Cr. L. J. 387.

(60) 2 Bom. L. R. 3.

(61) 19 B. 717; 10 Ind. Dec. (N. S.) 480.

the question. In the Madras High Court the rule of absolute privilge appears to be, generally favoured. The leading decision is that of *Sullivan* v. *Norton* (62), where the question of the privilege of an Advocate in India came up for consideration before the Court in its disciplinary jurisdiction. The question of the liability of an Advocate to prosecution for the offence of defamation under the provisions of the Indian Penal Code did not directly arise for discussion; but the opinion was thrown out that it would be beyond measure embarassing to the Advocate and disastrous to the interests of the client if the Advocate was exposed to the liability of a criminal or civil charge for defamation for words uttered in Court. The question came up again in *Manjaya* v. *Sesha Shetti* (8) where it was ruled that the statements of witnesses, when under cross-examination before a Court of criminal jurisdiction, are absolutely privileged, and that if they are false, the remedy is by indictment for perjury and not for defamation. Reference was made by Collins, C. J., to the rule of the Common Law on the subject and by Shephard, J., to the decision of the Judicial Committee in *Baboo Gunesh Dutt Singh* v. *Mugneeram* (6) there is no discussion in either judgment of the effect of the provisions of the Indian Penal Code. In *Hayes* v. *Christian* (63), the Court appears to have held, however, that the answer to the question depended upon section 500, Indian Penal Code, but it reverted to *Manjaya* v. *Sesha Shetti* (8), in the later cases of *Queen-Empress* v. *Govinda Pillai* (64), *Alraja Naidu, In re* (65) and *Padmaraju Pantulu* v. *Vencataramana Aiyar* (66). A dissentient note was sounded by Moore, J., in *Nadu Goundan* v. *Nadu Goundan* (67), where he held that an accused could not claim a special privilege beyond what was provided by the exceptions to section 499. Subramaniya Iyer, J., relied upon *Manjaya* v. *Shesha Shetti* (8). It became unnecessary, however, to make a reference to a Full Bench as the statement in question was found to have been false and malicious. This course of decisions furnishes an admirable example of what is described by Lord Denman as "Law taken for granted" in a celebrated passage of his judgment in *O'Connell* v. *Reg.* (68), which will be found quoted in *Amrita Bazar Patrika, In the matter of* (*Moti Lal Ghose, In re*) (33). In *Ramun Nayar* v. *Subramanya Aiyar* (69) it was ruled that a Judge was absolutely privileged in respect of words used by him whilst trying a case in Court. This conclusion was based on the rule of the Common Law, and no reference was made to section 77, Indian Penal Code, which provides that nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is or which in good faith he believes to be given to him by law. In this state of the authorities, the question was ultimately referred to a Full Bench of three Judges in *Potaraju Venkata Reddy* v. *Emperor* (70). It was ruled that, though the English doctrine of absolute privilege was not expressly recognised in section 499 Indian Penal Code, it did not necessarily follow that it was the intention of the Legislature to exclude its application from the law of this country. We see no escape from the conclusion that, for reasons already assigned, the mode of interpretation adopted by the Madras High Court is opposed to the well-established canons of construction laid down by the House of Lords in *Bank of England* v. *Vagliano* (37) and by the Judicial Committee in *Norendra Nath* v. *Kamalbasini Dasi* (39). The Indian Law Commissioners who prepared the draft of the Indian Penal Code took as their motto a statement which was drawn up by Macaulay and has now become classical; "Our principle is simply this—uniformity when you can have it; diversity when you must have it; but in all cases certainty." We find it impossible to hold that, although they framed an elaborate section with

(62) 10 M. 28 (F. B.); 3 Ind. Dec. (N. S.) 770.
(63) 15 M. 414; 2 M. L. J. 142; 1 Weir 588; 5 Ind. Dec. (N. S.) 641.
(64) 16 M. 235; 1 Weir 587. 5 Ind. Dec (N. S.) 871.
(65) 30 M. 222; 6 Cr. L. J. 130.
(66) 1 Ind. Cas. 799; 19 M. L. J. 217; 6 M. L. T. 15; 9 Cr. L. J. 385.
(67) 1 Weir 589.

(68) (1844) 5 St. Tr. (N. S.) 1 (877); 11 Cl. & Fin. 155 at p. 372; 9 Jur. 25; 1 Cox. C. C. 413; 7 Ir. L. R. 261; 8 E. R. 1061 at p. 1163; 65 R. R. 59.
(69) 17 M. 57; 3 Ind. Dec. (N. S.) 60.
(70) 14 Ind. Cas. 659; 36 M. 216; (1912) M. W. N. 476; 13 Cr. L. J. 275; 11 M. L. T. 416; 23 M. L. J. 39.

carefully worded explanations and exceptions, they still intended that the Courts should engraft thereon the rules of the Common Law of England based on public policy which might conceivably vary from time to time. It is manifest that if the method of interpretation which found favour with the Madras High Court in the case of *Potaraju Venkata Reddy* v. *Emperor* (70) were adopted, a similar attempt might be made to invoke the aid of the principles of English Law or the rules of public policy, so as to qualify many other provisions of the Indian Penal Code. The inevitable result would follow that certainty would be replaced by uncertainty and order by chaos in a branch of the law which most vitally affects the people. [See the observations of Baron Parke as to the dangers of the application of rules of public policy, in *Egerton* v. *Brownlow* (71) quoted by Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines* (72) and by Lord Reading in *Continental Tyre Rubber Co.* v. *Daimler Co.*, (73)]. We may add that the subsequent judgment of the Madras High Court in *Muthuswami* v. *Emperor*(7)does not throw further light upon the matter, while the decision of the Full Bench in *Krishnamal* v. *Krishnaiyangar* (74) merely shows that a registration officer is not a judicial officer, a statement before whom, if defamatory, would be absolutely privileged under the rule laid down in *Potaraju Venkata Reddy* v. *Emperor* (70).

The question has not come up before the Allahabad High Court for consideration quite so frequently as in Madras; but the view has uniformly prevailed there that the liability to prosecution for defamation must always be determined with reference to section 499, Indian Penal Code. In *Abdal Hakim* v. *Tek Chandar* (10) it was ruled in a civil suit for recovery of damages for defamation, that the law to be applied is that laid down in the Indian Penal Code and not the English Law of Libel and Slander. On this ground it was held that defamatory statements were not privileged merely because they were used in a petition preferred in a judicial proceeding. A different note was sounded by Brodhurst, J., in *Dawan Singh* v. *Mahip Singh* (11) where, in considering the civil liability of a witness for damages for defamation, the principles of English Law as enunciated in *Seaman* v. *Netherclift* (75) and *Dawkins* v. *Rokeby* (76) were quoted by him with approval. On the other hand, in *Isuri Prasad Singh* v. *Umrao Singh* (77) a statement made in a petition presented to a District Magistrate for the transfer of a criminal case, was held not to amount to defamation,—not because of any principles of English Law which did not apply to prosecutions for defamation under the Indian Penal Code, but because the statement fell within the ninth exception to section 499, Indian Penal Code. In *Emperor* v. *Ganga Prasad* (9) the question arose with reference to a statement made by a witness in a criminal case. Knox, C. J., and Aikman, J. held that the statement was not absolutely privileged and further that the burden lay upon the accused to show that the statement he had made fell within one or other of the exceptions to section 499, Indian Penal Code, or that he was protected from prosecution by the proviso to section 132 of the Indian Evidence Act. Richards, J., in dissenting from this view, and holding that a prosecution for defamation under section 499, Indian Penal Code, would not lie against a witness in respect of any statement made by him while under examination, even if such statement should not be relevant to the matter under enquiry, observed as follows:—

"It would be simply disastrous to the administration of justice in this country if a prosecution could be instituted against every witness who gave evidence in a Court of Justice for defamation. In proper cases, with the sanction of the Court a prosecution can be instituted against a witness for giving false evidence. It is hardly conceivable that the law which

(71) (1853) 4 H. L. C. 1 at p. 123; 23 L. J. Ch. 348; 18 Jur. 71; 8 St. Tr. (N. S.) 194; 10 E. R. 359; 94 R. R. 1.

(72) (1902) A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268; 18 T. L. R. 793.

(73) (1915) 1 K. B. 893; 84 L. J. K. B. 926; 112 L. T. 324; 20 Com. Cas. 208; 59 S. J. 232; 31 T. L. R. 159.

(74) 15 Ind. Cas. 652; 23 M. L. J. 50; (1912) M. W. N. 473; 13 Cr. L. J. 108.

(75) (1876) 2 C. P. D. 53; 46 L. J. C. P. 128; 35 L. T. 784; 25 W. R. 159.

(76) (1875) 7 H. L. 744; 45 L. J. Q. B. 8; 33 L. T. 196; 23 W. R. 931.

(77) 22 A. 234; A. W. N. (1900) 46; 9 Ind Dec, (N.S.) 1187.

provides for the sanction of the Court being obtained as a condition precedent to the institution of a prosecution against a witness for giving false evidence would permit a prosecution for defamation without any such sanction."

In a later case, *Til Kanchan Gir* v. *Emperor* (78), Karamat Hossain, J., held, with reference to a statement made in a plaint in a civil suit, that the plaintiff had been rightly prosecuted and convicted under section 499, Indian Penal Code, as the element of good faith was wanting. It appears, consequently, that in Allahabad the view has uniformly prevailed, notwithstanding the dissentient note sounded by Richards, J., that liability to criminal prosecution for defamation must be determined by reference to the provisions of section 499, Indian Penal Code, and that a party or a witness is not protected unless good faith is established. A similar view has been adopted also in the Punjab: *Maya Das* v. *Queen-Empress* (79), *Phundi Ram* v. *Emperor* (80) and *Miran Shah* v. *Emperor* (81).

In the case of *Emperor* v. *Ganga Prasad* (9) Richards, J., as we have seen, felt much pressed by the circumstance that a statement on oath in a judicial proceeding cannot be made the subject matter of a prosecution for an offence under section 211, Indian Penal Code, without the prior sanction of the Court under section 195, sub-section (1), clause (*b*), Criminal Procedure Code. The same difficulty had been felt earlier by Fulton, J., in *Queen-Empress* v. *Balkrishna Vithal* (13) where he observed as follows :—

"The intention of the Legislature to protect witnesses from the fear of improper prosecutions is shown by section 195 of the Criminal Procedure Code, which forbids their prosecution for perjury without the express sanction of the Court cognizant of the facts of the case in which the false evidence is said to have been given. But all this solicitude for their protection would be wholly unavailing, if it were open to any private individuals to prosecute for defamation any witness who made a statement which he considered injurious to his reputation."

In the same case, Telang, J., explained his reasons for the adoption of the contrary view in the following terms :—

"I am unable to adopt the view, that on any correct principles of construction we should limit the meaning of the words of the section of the Indian Penal Code, defining defamation, so as to exclude therefrom any evidence given by a witness before a Court of Justice. It is admitted that the words are wide enough to include such evidence, and I do not think that judicial interpretation can properly limit their scope either in view of general considerations about the policy of protecting witnesses from being harassed or of the absence of any prosecutions being hitherto instituted in such cases."

It is manifest that the ground assigned by Telang, J, must carry considerable weight. The Court is bound to administer the law as enunciated by the Legislature and neither to enlarge nor to restrict the sphere of its application. As Baron Parke said in *Egerton* v. *Brownlow* (71), "it is the province of the Judge to expound the law only; the written from the Statutes; the unwritten or Common Law from the decisions of our predecessors and of our existing Courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inferance." Now, the maker of a single statement may be guilty of two distinct offences one under section 211 (which is an offence against public justice) and the other, an offence under section 499, wherein the personal element largely predominates. The Legislature has provided, in the Criminal Procedure Code, that the sanction of the Court, where the offence is committed, is essential in the former case for the institution of criminal proceedings. In the latter case, the Legislature has omitted to make a similar provision. This diversity, for aught we know, may have been deliberate, and plainly affords no reason why the Court should struggle to hold that the statement does not fall within the mischief of the rule embodied in section 499. The two offences are fundamentally distinct in nature, as is patent from the fact that the former is

(78) 8 Ind. Cas. 220; 11 Cr. L. J. 594.
(79) 14 P. R. 1893 Cr.
(80) 10 Ind. Cas. 682; 7 P. W. R. 1911 Cr; 12 Cr. L. J. 193.
(81) 15 Ind. Cas. 494; 244 P. L. R. 1912; 5 P. R. 1913 Cr.; 31 P. W. R. 1912 Cr.; 13 Cr. L. J. 494.

made non-compoundable while the latter remains compoundable; in the former case, for the initiation of the proceedings, the Legislature requires the sanction of the Court under section 195, Criminal Procedure Code; in the latter case, cognizance can be taken of the offence, only upon a complaint made by the person aggrieved, under section 198, Criminal Procedure Code. Whether every statement made by an Advocate, by a party to a judicial proceeding, or by a witness therein should be excluded from the category of defamation, or, if included therein, should be made punishable in a proceeding instituted only with the sanction of the Court where the statement was made, are manifestly questions of policy which can be settled appropriately only by the Legislature. If, for reasons of public policy, the Legislature thinks fit to adopt the first alternative, as it is unquestionably competent to do, and to confer on Advocates, parties and witnesses, not merely a qualified privilege as at present, but an absolute privilege as in the case of Judges, a new exception framed in suitable terms should be inserted in section 499, Indian Penal Code. If, on the other hand, the second alternative commends itself to the Legislature as more expedient, section 500, Indian Penal Code may well be included in the list of sections contained in sections 195 (1) (*b*), Criminal Procedure Code. It is, after all, the province of the Statesman, and not of a Judicial Tribunal, to discuss, and of the Legislature to determine, what is the best for the public good and to provide for it by proper enactments. But, till the law has been amended, in one or other of the modes just indicated, or, possibly in some other manner, it is incumbent upon us, if we are to avoid the greatest uncertainty and confusion, to interpret the clear and unambiguous provisions of the Statute in their plain, natural sense, and not allow ourselves to be led into speculations as to their reasonableness or unreasonableness by reference to the ever captivating but often misleading ideals of public policy.

Our conclusions then may be summarised as follows:—

(1) If a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise, his liability must be determined by reference to the provisions of section 499, Indian Penal Code. Under the Letters Patent, the question must be solved by the application of the provisions of the Indian Penal Code and not otherwise; the Court cannot engraft thereupon exceptions derived from the Common Law of England or based on grounds of public policy. Consequently, a person in such a position is entitled only to the benefit of the qualified privilege mentioned in section 499, Indian Penal Code.

(2) If a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability, in the absence of statutory rules applicable to the subject, must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules embodied in the Indian Penal Code.

Tested in the light of the first rule just formulated, it is plain that the question of good faith is material, and as the disputed statements are not absolutely privileged, the proceedings cannot be quashed at this stage. The application of the petitioner thus fails, and it fails in its entirety, notwithstanding the dismissal of the application under section 195, Criminal Procedure Code. In the first place, that application was subsequent to the institution of the complaint before the Presidency Magistrate. In the second place, the decision in *Ram Sewak Lal* v. *Maneshwar Singh* (23) indicates that, whether prior or subsequent, the dismissal of the application for sanction does not attract the operation of section 403, Criminal Procedure Code, so as to bar the prosecution for defamation.

The result is that the Rule is discharged.

FLETCHER, J.—I agree.

RICHARDSON, J.—I agree.

WALMSLEY, J.—I agree.

BUCKLAND, J.—I agree.

Rule discharged.

LAHORE HIGH COURT.
CRIMINAL REVISION No. 983 OF 1920.
October 15, 1920.
Present :—Mr. Justice Scott-Smith.
RAM DITTA—PETITIONER
versus
DYAL MAL AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (*Act V of* 1898), *s.* 145—*Temporary order, pending decision of question of possession, legality of.*

A Magistrate has no power to pass a temporary order pending his decision of the question of possession under section 145 of the Criminal Procedure Code.

Case reported by the District Magistrate, Jhang, with his No. 1346 of 24th June 1920.

FACTS.—On 24th April 1920, the applicants put in an application under section 145, Criminal Procedure Code, praying that the second party should be prevented from building on an open courtyard which has been reserved for public functions. The Magistrate, first Class after recording the statements of the applicants inspected the spot on 25th April 1920, and ordered that buildings operations should be stopped till further orders and that the second party should file their pleas and applicants their proof in support of their allegation on 3rd May 1920. On this date, the Magistrate passed another order to the effect that as, according to the statement of the applicants, there is a danger of breach of peace, a copy of the complaint should be made over to both parties, who should file their written pleas with their proof, on 27th May 1920. The applicants filed another application on the same day praying that their previous application should be considered as one under section 147, Criminal Procedure Code. The second party also lodged an application asking for cancellation of the prohibitory order against them. The Magistrate noted on it that he was not going to pass any order until the written pleas and documents had been filed. The second party file an application for revision of the prohibitory order.

GROUNDS.—There is no doubt the order is illegal and cannot stand. The Magistrate passed it without complying with the provisions of section 145, Criminal Procedure Code. It is, therefore, *ultra vires* and bad in law. He did not record any order stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the courtyard in dispute and requiring the parties to put in written statements of their respective claims as respects the fact of actual possession of it. In the same way, he did not adopt the procedure as laid down in sub-section (4), and decide which of the parties was at the date of the order in possession of it. I submit the case for cancellation of the order, dated 25th April 1920.

Mr. *Devi Dayal*, for the Petitioner.
Mr. *Ghulam Rasul*, for the Respondents.

ORDER.—Counsel for respondents admits that the Magistrate had no power to pass a temporary order pending his decision of the question of possession under section 145, Criminal Procedure Code. He suggests that the order may have been passed under section 144, but it does not purport to have been so passed, and it is not shown that the Magistrate was specially empowered under that section. I, therefore, cancel the Magistrate's order of 25th April 1920 and direct him to proceed in accordance with law. I note that he has not complied with sub section (1) of section 145 which lays down that he shall make an order in writing stating the grounds of his being so satisfied (that a dispute likely to cause a breach of the peace exists).

Order cancelled.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 90 OF 1919.

March 2, 1920.

Present :—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

RAMALINGA ROWTHAN—DEFENDANT No. 4—APPELLANT

versus

Sheik IBRAHIM SAHIB—ASSIGNEE-DECREE-HOLDER—PETITIONER—RESPONDENT.

Res judicata—*Execution of decree—Mortgage-decree—Final decree, absence of—Decree-holder directed to obtain final decree—Subsequent application for execution without final decree, whether barred.*

In execution of a mortgage-decree the decree-holder was directed to obtain a final decree for sale before execution could issue. Without obtaining such a decree he again applied for execution and his application was allowed :

Held, that the application was not maintainable in consequence of his failure to comply with the Court's order to obtain a final decree, which order was binding on him.

Appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 225 of 1918, preferred against the order of the Court of the Principal District Munsif, Erode, in E. P. R. No. 130 of 1918, E. P. No. VII, in Original Suit No. 702 of 1907.

FACTS—A decree on a mortgage was passed in November 1908, and the decree-holder applied for execution thereof by sale of the hypotheca. On the 13th March 1917 he was directed to obtain a final decree before applying for execution. Without complying with that order, he again applied for execution under Order XXI, rule 11 of the Civil Procedure Code. The defendant objected that the application was not sustainable as the decree-holder had failed to obtain a final decree for sale which he had been directed to obtain. The executing Court overruled the objection on the ground that a final decree was not necessary as the decree was passed before the Code of 1908 came into operation, and that the order of the 13th March 1917 did not operate as a bar to the issue of execution by ordering sale on the subsequent application. This order was upheld in appeal by the District Judge. The defendant then came in second appeal to the High Court.

Mr. *N. Sivaramakrishna Iyer*, for the Appellant.

Mr. *V. Ganapathi*, for the Respondent.

JUDGMENT.—This decree was passed in November 1908; the time fixed for payment would expire in or about May 1909. It is contended that the new Code of Civil Procedure, which came into force in January 1909, is applicable to this case. Upon that point there is a conflict of opinion in this Court: *Vide Ramasami Reddi* v. *Sokkappa Reddi* (1) and *Nimmala Mahankali* v. *Kallakuri Subba Rao* (2). But it is not necessary to decide this question, as, in our opinion, the decree-holder is bound by the order passed on the 13th March 1917 on his application for execution. That decision is clearly binding on him: *Vide Vyapuri Goundan* v. *Chidambara Mudaliar* (3). He might have appealed against it, but as he submitted to the adjudication, it is not open to him to ignore it. It is admitted that no final order has yet been obtained as directed in the order of March 1917; consequently, the present application for execution is incompetent. It may be open to him, if he is so advised, to apply to the lower Court to amend his present application so as to make it one for an order absolute or to present a fresh application for a decree absolute before applying for execution. We think the application, in its present form, is not maintainable. We reverse the order of the lower Courts and remand the application to the 1st Court for disposal in the light of the above observations.

Respondent must pay the costs of the appellant in this Court as he failed to carry out the direction of the Court made in March 1917.

M. C. P.

Appeal allowed.

(1) 48 Ind. Cas. 732; 35 M. L. J. 194.
(2) 41 Ind. Cas. 268; 32 M. L. J. 455.
(3) 18 Ind. Cas. 607; 37 M. 314; 24 M. L. J. 26.

PAHALWAN SINGH *v.* JIWAN DAS.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 32 OF 1916.
July 30, 1919.
Present :—Mr. Justice Stuart and
Mr. Justice Ryves.
PAHALWAN SINGH AND OTHERS
—DEFENDANTS—APPELLANTS
versus
Lala JIWAN DAS AND OTHERS—
PLAINTIFFS—RESPONDENTS.

[*Hindu Law—Widow—Alienation—Necessity—Widow carrying on husband's business, right of, to alienate.*

A Hindu widow in possession of a widow's estate cannot alienate immoveable property which she inherited from her husband, beyond her life except for necessity. But where she inherits a trade or business belonging to her husband she is entitled to carry it on, and can sell in the course of the business, the necessity being the prudent conduct of the business irrespective of whether the sale results in a profit or a loss. [p. 165, col. 1; p. 166, col. 2.]

First appeal from the decree of the Subordinate Judge, Shahjahanpur.

The Hon'ble Dr. *T. B. Sapru*, Dr. *S. M. Sulaiman*, Messrs. *S. P. Ghosh* and *P. N. Banerjee*, for the Appellants.

Mr. *B. E. O'Conor*, Dr. *J. N. Misra*, Messrs. *Baldeo Ram Dave*, and *R. S. Bajpai*, for the Respondents.

JUDGMENT.

RYVES, J.—The facts, as found by the lower Court and not contested, are as follows:—One Braj Kishore, who was related to the plaintiffs-respondents, as will be explained later on, inherited a very valuable banking business and Zemindari estate from his mother's family, which he carried on under the style of Jugal Kishore-Chunna Mal, and afterwards of Jugal Kishore-Braj Kishore. He himself became Government Treasurer of Shahjahanpur. He died in 1878 leaving surviving him a widow, *Musammat* Durga Dei. This lady carried on her late husband's business for something like 25 years till her death on the 8th June 1905.

It is admitted that she was careful in her management, and was not a spendthrift. The evidence on the point as to how far she was successful is perhaps vague, but one of the plaintiffs, Kishan Chand, admitted that the value of the property left by Braj Kishore, was believed to be about 21 or 22 lakhs, and that at Durga Dei's death, the property left by her was of about the same value. At any rate, there is nothing to show that she wasted the property.

She adopted, or is said to have adopted, Murari Lal, one of the plaintiffs.

After her death, a number of suits were instituted, by some or other of the plaintiffs, against Murari Lal, and as against other plaintiffs, all of which were settled by compromise. The details of these litigations are fully given in the judgment of the Court below, and need not be repeated. By these suits it was mutually established that Lala Jiwan Das, Ramji Das, Narain Das, Kishan Chand and Murari Lal, the adopted son, were entitled to succeed as reversioners to the estate of Braj Kishore, and the share in which each was entitled (the lion's share going to Murari Lal) was also settled *inter se*.

Rai Din Dayal and Govind Prasad, who had acquired some of Kishan Cand's interest, and who were parties to some of the previous litigations, were also recognised as entitled to a particular share. Having settled their disputes among themselves to their satisfaction, they combined in bringing this suit against a large number of persons, forty-three to be accurate, who were transferees from *Musammat* Durga Dei to recover the properties which were in their possession and which they had acquired from her, on the ground that all the transfers were made by her without "legal necessity" and became void on her death. The details of the properties claimed in the suit are given in the schedules attached to the plaint.

The broad defence to the suit was a denial that the plaintiffs were the reversioners of Braj Kishore, and, secondly, that the transfers were made either for legal necessity, or in the ordinary course of business of Braj Kishore's firm of Jugal Kishore Chunna Mal, which Durga Dei carried on after his death, and were, therefore, valid.

The lower Court gave a decree against the bulk of the defendants, holding that the transfers were without legal necessity, and were, therefore, void on Durga Dei's death at the instance of the plaintiffs, who were, it held, entitled to sue as reversioners. In some cases, the plaintiffs were ordered to re-pay the sale consideration, as a condition precedent to their obtaining their decree, in other cases, no such condition was imposed. Some of the claims were compromised.

In this appeal we are only concerned with three sets of property.

(1) No. 2, Lalpur, (2) No. 6 Manorathpur, and (3) Items Nos. 10 to 19 of Schedule I. The appellants are the transferees of these properties, or their representatives in-interest.

Two main grounds are pressed in appeal,—(1) that the plaintiffs have not proved themselves to be reversioners of Braj Kishore,

(2) That the transfers made by Durga Dei, were justified under the Hindu Law.

It was also, however, argued on the 6th ground of the memorandum of appeal that some of the properties affected by the appeal were not part of Braj Kishore's estate.

The first argument, (based on the first five grounds of appeal), may be disposed of very shortly.

The plaintiffs, in proof of their title to sue, put in a pedigree, which they sought to prove by oral evidence, and by a number of letters written by members of the family to Braj Kishore, or written by Braj Kishore to members of the family. They also put in evidence the various decrees obtained by them in their litigation amongst themselves which has already been mentioned.

The defendants denied the genuineness of the pedigree, and argued that the letters, which they said had never been produced before, had probably been manufactured for the purpose of this case, and that in any event they were too suspicious to afford corroboration of any value to the oral evidence. They did not assert that any other particular person or persons were the real reversioners, but simply put the plaintiffs to the proof of their title.

The learned Subordinate Judge accepted the plaintiff's evidence on this point, and, in my opinion, rightly.

As I have said, before, Braj Kishore himself and his family do not seem originally to have been wealthy; it was owing to his inheritance from his mother's family that he acquired the bulk at any rate of his property, and thereby became very wealthy. It is only natural, under such circumstances, that the members of his own father's family would take a very keen interest in ascertaining their own relationship to him as possible successors and in keeping closely in touch with him. It is not correct to say that the letters were all produced for the first time in this case, for we find that some of them at least were exhibited in the previous litigations, and they seem to have been produced from proper custody.

They fully bear out the relationship set up by the plaintiffs.

The second argument raises a very important point of Hindu Law, which, as far as we can ascertain, is not directly covered by any reported authority.

Were the transfers made by Durga Dei justified by Hindu Law? One aspect of this question is well raised in paragraph 16 of some of the defendant's written statement:—"Lala Braj Kishore was a banker. He used to advance money as loans. He also used to purchase property and sell it at a profit. This was the business which was carried on by him. This business was carried on in the names of Jugal Kishore Chunna Mal. After the death of Braj Kishore the same business and practice were carried on by *Musammat* Durga Dei. All the transfers which have been made were made for the benefit of the business or for procuring loans. She did not make the transfers as a Hindu widow. Consequently, all the transfers made are valid."

The other aspect is, were the transfers made for "legal necessity," as that term is understood in Hindu Law?

The issue on this point, keeping in view both aspects of the question, was clearly raised in Issue No. 4: "Whether *Musammat* Durga Dei executed the various sale deeds in suit for legal necessity, for urgent necessity or for sufficient cause, and whether the legal heirs of *Musammat* Durga Dei are bound by them?"

The first aspect of the question is disposed of by the learned Subordinate Judge somewhat summarily, and not entirely by itself. He says: "It is contended that Durga Dei, to realise debts, purchased the property at auction-sales, and then sold the property; that if she had realized the debts in cash she could have spent that cash in any way she liked, why should she not be able to sell away property and turn it into cash and use that cash; that purchasing property for her and not husband's debts, and then selling it were incidents of money-lending, which she carried on; and if, under those cir-

cumstances, she sold the property she transferred it for valid necessity. But this argument cannot avail. At page 458 of Trevelyan's Hindu Law we find that 'where additions are made to an estate by a restricted female owner with the intention that they should form part of the estate, such additions pass with the estate and not to the heirs of such owner.' As to accumulations it is ordained that if she invest the income with the intention that it should be an accretion to her husband's estate, she cannot thereafter deal with it, except under circumstances which would justify her dealing with the original estate. But if she invest the income in such a way as to indicate her intention that is not to form part of her husband's estate, but to remain at her disposal, she can deal with it during her lifetime, at any rate."

"Now, in this instance there is no indication that she intended that the purchased property should not form part of her husband's estate. She remained in possession for a few months, and then sold the property she had purchased for her husband's debts. I find that she had no power to do so; that no legal necessity is proved, and the sale is not binding on the reversioners."

Before discussing the question of law I will state the facts of each of the transfers with which this appeal is concerned.

1. Lalpur. This property belonged to Braj Kishore; that is to say, he bought it in 1874. Durga Dei sold it in 1904 for Rs. 9,000 to Gauri Bibi. The sale consideration was made up as follows:— Rs. 7,200, which had been deposited by the vendee's deceased husband in the banking business, while Durga Dei was managing the business after Braj Kishore's death, was set off: Rs 300 was paid in cash, and Durga Dei accepted a *rukka* for the balance, Rs. 1,500.

2. Manorathpur. This property and other property had been mortgaged to Braj Kishore, and he obtained a decree for sale of the mortgaged property shortly before his death in 1878. In execution of the decree, Durga Dei purchased it for Rs. 25 (it is fractional share) in 1882, and got possession in 1884; in the next year she sold it for twice what she gave for it.

3. Items Nos. 10 to 19. These were mortgaged to Braj Kishore in 1876. Durga Dei sued on the mortgage in 1879, and got a decree, in execution of which she purchased the same property for Rs. 5,900 in 1882 and 1884, and sold it to Ishri Singh in 1890 for Rs. 5,000 whose heirs and representatives are now in possession. The defence, in this instance, was that *Musammat* Durga Dei's purchase was *benami* for Ishri Singh, and that Ishri Singh had all along been in possession, and that *Musammat* Durga Dei had never had possession. On this point we agree with the finding of the lower Court that this allegation of a *benami* purchase was false, *Musammat* Durga Dei bought it herself, and enjoyed its profits until 1890, when she told it to Ishri Singh.

The lower Court found that all these transfers had been made without legal necessity, and decreed the plaintiff's claim, though in the case of the first, Lalpur, it made its decree conditional on the plaintiffs repaying Rs. 7,200. The cross appeal is against this portion of the decree.

It seems to me that three propositions of Hindu Law are now settled beyond controversy.

1. The general rule—that a widow in possession of a widow's estate cannot alienate immoveable property which she inherited from her husband, beyond her own life, except for "legal necessity."

2. The same rule applies to both immoveable and moveable property in the hands of the widow inherited from her husband.

3. That a trade or business belonging to the husband is heritable by the widow and she is entitled to carry it on. I do not think that there is any real inconsistency in these rules. In every case the widow is entitled to alienate only for "necessity," but it seems to me that there may be a great difference between what amounts in law to "necessity" between the sale of the family dwelling-house or home farm, and the sale of a bale of cloth or other article of merchandise.

If the business of the husband was, let us say, that of a cloth merchant, the widow would be entitled to carry it on and she could only do so by selling, buying again and again selling. The very existence of

the business creates the necessity, it is inherent in its proper conduct.

Now, if the husband's business was that of a banker in the rural parts of India, as in this case, his chief business is lending money on mortgage, and if not re-paid recovering it by a suit for sale of the property mortgaged. In execution he buys it, not in most cases, with the intention of permanently retaining it, but in order to sell it if a favourable opportunity offers. The property will often consist of an undivided share in some villages situated far away from the banker's permises, and it would often be practically impossible, or, at any rate, very inconvenient to look after it for his own profit.

The banker dies and leaves a widow. It is admitted that, if she so chooses, instead of going on with the business, she is entitled to realise outstandings, and invest them, and then enjoy the income in any way she pleases for her own profit. So long as the corpus of the estate remains whole, the reversioners have no ground for complaint. But that is not carrying on the business as she is entitled to do. If she elects to carry on the business, as she is entitled to do, she must surely be entitled to do so in the same way as her deceased husband. The learned Counsel for the respondents admits this, but with a reservation. He says if she invests any of the income in the purchase of land, that piece of land becomes at once alienable and can only be legally sold by her if forced to, by the same dire necessity as would justify her in selling the family dwelling-house. But the same argument should apply to the purchase of a bale of cloth out of the income of the widow of a cloth merchant.

I agree that in both cases the re-sale can only be justified by "necessity" and that the widow is not entitled to give it away or sell it at a nominal and wholly inadequate price to, say, her brother or her own friends and relations. But I think she can sell in the course of business, the "necessity" being the prudent conduct of the business.

Nor do I think the test can be "was there a profit or a loss?" It is often prudent to cut one's loss. It is, I think, enough if it can be shown that the business was carried on with reasonable care. To press the argument a little further, suppose Durga Dei invested some of the income of the estate in the purchase of shares in one of the large limited liability coal companies, which own extensive purely Zamindari property beside their collieries. It is not suggested that she could not re-sell the shares. But by her purchase she has become the owner or partner in the ownership of an undivided fraction of land. Nevertheless, she can sell freely, and if the market has appreciated the gain goes to the estate, and if it has depreciated, the estate bears the loss. But, what in essential, is the difference, if instead of purchasing shares in a company owning land, she buys a *biswa* of an undivided village? All she acquires by her sale is an undivided fraction. Of course, the analogy is not perfect and cannot be pressed too far, because in the latter case by her purchase she also acquires the right to have her undivided share partitioned off from the rest and so get possession of a definite area delimited by metes and bounds. But, unless and until she exercises this right, her position is the same. Yet, in the latter case, she cannot re-sell in the ordinary course of business but only for "legal necessity" in its strictest sense if the argument is sound. If so, the widow of a rural banker can only carry on the business in a limited and greatly curtailed manner. This seems to me to offend against the third rule set out above. Both sides admit that there is no direct authority which covers this case. By the respondents great reliance is placed on the case of *Sham Sundar Lal* v. *Achhan Kunwar* (1), and especially on the observations reported at the bottom of page 83. The facts of that case, however, are totally different, and the actual decision turns on quite another point. The passage referred to, has been considered by the Full Bench of the Bombay High Court, in *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (2), and that decision has been approved of by this Court in *Radha Kishan* v. *Janki* (3), by Sir John Stanley, C. J., and Burkitt, J.

In any case, I do not consider that I am in any way deciding contrary to what was laid down by the Privy Council for, as was quoted in that case, "the touchstone is necessity." I base my decision mainly on

(1) 21 A. 71 (P. C.); 2 C. W. N. 729; 25 I. A. 183; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. s.) 755.
(2) 26 B. 206; 3 Bom. L. R. 738.
(3) A. W. N. (1907) 155.

the Bombay case and Sir Lawrence Jenkins' judgment which fully deals with the point.

I now propose to examine each of the transfers impugned, to see if I can find it possible to justify them, on any view of what constitutes "necessity," and I cannot forget that two of these transfers were made more than a quarter of a century ago, and only one as recently as ten years before suit.

(1) A deposit had been made in the family bank, and the depositor asked it to be refunded. It is in evidence that, at that moment, the bank was unable to re-pay in cash; this may mean that it had not got sufficient funds or that it was inconvenient then to pay in cash. Let it be, that the cash was not available. The widow agreed to liquidate the debt in the manner already described. The refund was due and had to be paid. She must pay or go bankrupt. Surely, here was "necessity" which legalised the widow transferring in part payment a portion of property which, although acquired by the husband, and, therefore, in a legal sense, part of the corpus of his estate, was in no sense a part of the ancestral property belonging to the family. If she had sold the ancestral dwelling-house, or home farm which the reversioners might reasonably hope some day to inherit it would perhaps be otherwise. The property transferred can only technically be called ancestral, it never belonged to the reversioner's family, and was only bought in and sold again in the course of the business. In any case, if I am wrong in my view that the widow was entitled to sell it I agree with the Court below, that the reversioners must in equity pay back at least the Rs. 7,200, which had been paid into the family business; they cannot get both, the benefit of the Rs. 7,200, paid to the firm and the property and I would, therefore, dismiss the cross objection.

(2) This is an insignificant item. The widow bought a small undivided fraction of a village and re-sold it at a profit of 100 per cent. which was credited to the firm. What possible complaint have the reversioners? It is true that if she had not sold, in the course of years, the property may have become much more valuable. Landed property over many parts of India has appreciated, in some it has not. Here was a banking firm who acquired a very small fractional share in a village. The widow thought fit to get rid of it at a profit of Rs. 100 per cent. The money was paid into the firm. I think this is, on the face of it, a prudent and sound transaction, and hold that, in the absence of anything to the contrary, it must be held that there was "necessity" to sell the village.

(3) In this case the decree obtained by *Musammat* Durga Dei was for Rs. 7,266 11-8 including costs. In execution she bought the property for Rs. 5,920, and some years afterwards sold it for Rs. 5,000. It may be fairly presumed that when she bought it the property was not worth much if anything, more than about what she gave for it, and, on paper, there would seem to be a loss of at least Rs. 920. The original mortgage was for Rs. 5,000. But this included a sum of Rs. 3,371 due under an earlier deed, Rs. 1,612-8-0 were taken for purchasing another property, and only Rs. 16 8 0 was paid in cash. The earlier mortgage of 1872 is not on the record but it is clear that the actual amount of cash originally lent was a good deal less than Rs. 5,000 and was probably not more than about half, or, say, Rs. 3,000. It is true that the decree obtained in 1879 on the mortgage was for something over Rs. 7,200 but that included interest and costs, and apparently this was more than the property was worth. When Durga Dei purchased it in execution of her decree it must be remembered, she paid nothing in cash, she merely got the property in satisfaction of the decree. She enjoyed the profits for some years; it all went into the business, and when she sold it again for Rs. 5,000, which money was also paid into the firm, there is nothing to show that her sale was not justifiable or one that a prudent man would not have made, nor is it shown that there was any actual loss to the estate. Under these circumstances, in my opinion, the sale was valid and was made for necessity.

For these reasons, I decree the appeal in favour of the appellants concerned against respondents Nos. 1 to 5 and 7 as indicated above in respect of these three items with proportionate costs on the higher scale, and dismiss the cross-objections with costs on the higher scale.

STUART, J.—I concur in the order proposed. I find that in all three instances there was an inherent necessity arising from the circumstances of the transactions.

BY THE COURT.—The order of the Court is that the appeal is decreed accordingly with costs on the higher scale and the cross-objections dismissed with costs on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 321 OF 1919.

April 14, 1920.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

JAYARAMA AIYAR—APPLICANT-AUCTION-PURCHASER—APPELLANT

versus

VR DHIGIRI A YAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution sale—Mistake in publishing sale, effect of.

Where in publishing a poclamation of sale, by mistake the selling officer and place of sale are announced as different from those fixed by the Court the sale is illegal. [p. 169, col. 2]

Appeal against the order of the District Court, South Arcot, in Interlocutory Application No. 233 of 1919, in Execution Petition Register No. 18 of 1919, in Original Suit No. 26 of 1915.

FACTS appear from the judgment.

Mr. *K. V. Krishnasawmy Aiyar*, for the Appellant.—The lower Court was wrong in holding that the sale was a nullity. The sale was held though at a different place and time. In a series of decisions the Privy Council and the High Court have held that such violation of and lapses from a technical rule of procedure amount to an irregularity and not to an illegality so as to vitiate the sale altogether. In *Trimbak Ravji* v. *Nana* (1) the omission to beat the drum was only treated as an irregularity. In the case reported in *Krishnaji* v. *Bomanji* (2) there was a failure to proclaim in the Collector's office and it was held to be only an irregularity. In *Rang Lal Singh* v. *Ravaneshwar Pershad Singh* (3) the Judicial Committee held that a sale held a few days after the date mentioned in the proclamation was not an illegality but an irregularity.

Mr. *N. Chandrasekhara Aiyar*, for the Respondents.—The sale in this case was vitiated by a grave illegality. Under Order XXI, rule 90, Civil Procedure Code, the sale is liable to be set aside if there was a material irregularity or fraud in publishing or conducting. When there was no publication or conduct of the sale it should be treated as a nullity. The cases cited by the appellant's Vakil are not similar to the present and the decision in each was reached on its particular facts. Where the sale is held at a place different from that advertised it has the effect of not attracting bidders to that place and nothing can be concerned as more prejudicial or disadvantageous to the parties. In *Trimbak Ravji* v. *Nana* (1) the proclamation was made in a manner to which the villagers were accustomed and the beating of the drum was not obligatory under the rules. In *Nana Kumar Roy* v. *Golam Ohunder Dey* (4) the decision was based on the fact that the failure to proclaim at the Collector's office could not have as serious an effect on bidders as the failure to proclaim at the village. In *Rang Lal Singh* v. *Ravaneshwar Pershad Singh* (3) the sale was adjourned owing to the absence of the presiding officer and was held again when he returned. These were held to be mere irregularities.

The case more in point is that reported in *Basharutulla* v. *Uma Churn Dutt* (5) where the holding of a sale at an hour before that notified was held to be a grave violation of the rule.

JUDGMENT.

OLDFIELD, J.—These proceedings were marked in the lower Court by grave irregularities; and it is the more necessary

(1) 10 B. 504; 5 Ind. Dec. (N. S.) 725.

(2) 2 Ind. Cas. 459; 11 Bom. L. R. 380.

(3) 12 Ind. Cas. 174; 39 C. 26; (1911) 2 M. W. N. 108; 10 M. L. T. 161; 13 Bom. L. R. 823; 14 C. L. J. 334; 8 A. L. J. 1173; 16 C. W. N. 1; 38 I. A. 200 (P. C.).

(4) 18 C. 422 (F. B.); 9 Ind. Dec. (N. S.) 282.

(5) 16 C. 794; 8 Ind. Dec. (N. S.) 527.

that, in correcting these irregularities, we should be careful to do nothing which would inflict unfair prejudice on either party.

The sale, which is the subject of these proceedings, was according to the proclamation to be held by the Central Nazir of the Cuddalore District on 10th July 1919 and it was held accordingly. On the evening of that day, the judgment-debtor represented to the Court that bidders had not come and that the sale was open to objection on other grounds, with which we are not concerned. Afterwards, and this was material in connection with the representation that bidders had not come, he brought to the notice of the Nazir that the process-server charged with the duty of making the proclamation in the village had proclaimed that the sale would be held not by the Central Nazir at Cuddalore, but by the District Munsif's Court of Villupuram. This communication from the judgment-debtor to the Nazir was brought to the notice of the Court on the next day, 11th July 1919, and I am constrained to express my disapproval of the Court's method of doing business, by accepting a representation of this kind made by a subordinate officer. Such complaints should be considered by the Court only when they are made to it in open Court in the usual way.

The Court then, however, at once cancelled the sale of three items of property which had been sold the previous day, of which the second and third items, those purchased by the appellant, are the subject of the present appeal. It also directed the refund to the purchasers of their deposits and, lastly, it ordered that a fresh sale should be held on the 20th August, on a fresh proclamation. It does not appear that any communication of these orders was made, at all events at the time, to the present appellant for, on the 24th July 1919, he paid into Court the remainder of the purchase-money due from him and on the 12th August 1919 applied for confirmation of sale and the grant of sale certificate; and again this cancellation of the sale was obviously an irregularity of considerable moment.

On the 29th July 1919, the Court had obtained a draft proclamation apparently from the decree-holder and altered the date fixed for sale to 4th September 1919. Later, it may be said that, as regards items other than Nos. 2 and 3, to which I shall return, the Court passed an order that the original sale should be continued, as it was the Court's own fault that it was not held properly; and as, properly speaking, there was no sale; and, later on, the sale was stopped by an order of this Court, dated 6th November 1919.

To go back to items Nos. 2 and 3, on the purchaser's application for confirmation of sale and sale certificate, of 12th August 1919, notice was issued to the decree-holder who contended that the sale should be set aside, that a re-sale should be ordered and that the purchaser's petition should be dismissed; and in these proceedings the order now under appeal was passed.

It is material that there has, in this case, been an order (now appealed against) which was passed after notice to all concerned and it was passed after every opportunity had been given for the production of evidence. In these circumstances, greatly as we must regret the irregular manner in which the then District Judge, Mr. Edington, passed the order by which the sale was in the first instance set aside, we think we can disregard that order and deal with the matter simply with reference to what happened afterwards in connection with the application of 12th August 1919. As I have pointed out, there was no prejudice to the appellant, the purchaser, or to any one else owing to any omission of the Court to hear them or to take evidence. These proceedings were perfectly regular and we, therefore, examine the order now under appeal simply on its merits and without regard to what had happened at the earlier stage.

The order under appeal purports to be passed under Order XXI, rule 90, on the ground of a material irregularity in publishing the sale proclamation. We have been shown no valid objection to the lower Court's finding that the sale proclamation, as it was framed by the Court, was not published in the village. The process server owing to carelessness or some other reason substituted for the selling officer and place of sale fixed by the Court a different selling officer and a different place of sale. Besides finding that this occurred and that it was an irregularity, the Court has also, as rule 90 requires, found that the plaintiff, decree-holder sustained

substantial injury, by reason of that irregularity. We do not think it necessary to follow the lower Court in that part of its order because we do not think that rule 90 is applicable at all. The mistake, so to describe it, made by the process-server resulted not in any irregularity, but in an illegality which invalidated the proceedings.

Mr. Krishnaswamy Aiyar on behalf of the appellant has referred to a number of authorities dealing with the facts in particular cases, which were, or were not, held to constitute irregularities or illegalities. It is unnecessary to go through those cases, because the decision in each rested on the facts in it and because it does not appear that any general rule for distinguishing between an irregularity and an illegality has ever been laid down. It would appear, in fact, that the distinction is one of degree and that an irregularity of so serious a nature as to render impossible the publicity which affords one main security for the fairness of public sales, must be deemed to be an illegality. This view that the question is one of degree, is implicit, it seems to me, in the judgment of Mr. Justice Heaton in *Krishnaji* v. *Bomanji* (2) and although I am doubtful as to the correctness of the main conclusion reached by the learned Judges in that case, I avail myself of the support, which the view I take, receives from Mr. Justice Heaton's observation that, although the facts before him did not constitute such an illegality as would render the sale in question viod, yet he wished at the same time to be clearly understood not to ignore that in other cases there might be other circumstances, which, combined with similar ones, would amount to an illegality, such as the Court could act on.

The nearest case, perhaps, to the facts before us is *Basharutull* v. *Uma Churn Dutt* (5). There the property that had been advertised for a particular date was sold on that date, but at an earlier hour than that stated in the proclamation and the Court said that in those circumstances it seemed to it that there was no sale within the meaning of the Code and that the proclamation of the time and the place and the holding of the sale at such time and place advertised were conditional precedent to its being a sale under the Code at all. It appeared to the Court that the property never had been sold under the Code, and consequently the plaintiff was entitled to a declaration that whatever took place when the property was put up for sale had no effect as against him. It seems to me that, if, when a proclamation was made, any of the usual and effective methods prescribed or permitted by the Code for its publication has been misleading as to details of the matter proclaimed and has been such as not merely not to give information to possible bidders, but to divert them to a place where the sale is not to be held, the result must be, in the words of *Basharutulla* v. *Uma Churn Dutt* (5), that the property had never been sold under the Code at all.

In these circumstances, the order of the lower Court must be confirmed and the appeal dismissed. As regards the question of costs we bear in mind that the decree-holder and the judgment-debtor were in fact present during the sale and apparently it was not until the sale was concluded that the latter made any objection to the manner in which it had been proclaimed or conducted. There is then the fact that throughout the proceedings, apparently without objection from the decree-holder, who ordinarily would have their direction, have been carried on in the highly irregular manner, to which we have referred. In these circumstances we think that we are justified in making no order as to costs in this Court.

SESH. GIRI AIYAR, J.—I entirely agree. The facts have been fully stated by my learned brother. The question for consideration is, whether the Court sale should be regarded as having been irregularly conducted, or whether it was illegal. As this point was argued with some insistence by Mr. Krishnaswamy Aiyar, I propose to say a few words on it.

The Code itself gives some indication as to when a sale can be regarded as irregular and when illegal. In Order XXI, rule 90, which permits an aggrieved party to come to Court to set aside a sale, the language employed is that it may be set aside on the ground of material irregularity or fraud in publishing or conducting it. Where there is no publication or conduct of the sale, it is, I think, a right inference to draw from rule 90 that the sale should be regarded as illegal. In the present case, on the facts which my learned brother has fully stated, my conclusion is that there has been no publication

at all. If a sale is held at a place to which the proclamation at the village makes no reference and *per contra* invites bidders to go to another place, I am prepared to hold that there was no proclamation leading up to sale. Mr. Krishnaswamy Aiyar drew our attention to cases where there was no beating of drum and it was held that such a mistake should be regarded only as an irregularity. As Mr. Chandrasekhara Aiyar pointed out, under the rules it is not obligatory to beat the drum and the proclamation may be made in any other manner which the people of the village are accustomed to hear. Therefore, the decision in *Trimbak Ravji* v. *Nana* (1) that the omission to beat the drum is only an irregularity does not effect the present case.

The present case, I agree with my learned brother, is practically covered by the authority of *Basharutulla* v. *Uma Churn Dutt* (5). In that case, the question was whether, if a sale was held at an hour anterior to the one mentioned in the proclamation, the sale was irregularly conducted, or whether it was illegally held. The learned Judges came to the conclusion that there was a violation of the fundamental condition of the sale, namely, the time of sale, and that, consequently, the sale was a nullity. The same argument can be used with reference to a sale held at a place different from the one mentioned in the proclamation.

I concede that it is not easy to draw the line between an irregularity and an illegality, but I am clear that where a substantial provision of law has been violated and that has the effect of not attracting persons who could be expected to be present, for the purpose of bidding at the sale, the sale should be regarded as having been illegally conducted. As regards the decision chiefly relied on by Mr. Krishnaswamy Aiyar, namely, *Krishnaji* v. *Bomanji* (2) I agree with my learned brother in dissenting from the conclusion reached in that case. Mr. Justice Chandavarkar bases his conclusion mainly on *Arunachellam Chetty* v. *Arunachellam Chetty* (6). In the latter case, the Judicial Committee had before it a case of misdescription of property and their Lordships were of opinion that a mere misdescription would be only an irregularity. Their Lordships laid stress on the fact that the judgment debtor was throughout present and acquiesced in the irregularity, and that when he found that there was no other means of vacating the order, he resorted to this expediment of setting aside the sale. The principle on which their Lordships rested their decision was estoppel. There is no such question in this case. I do not think that case is an authority for the broad proposition which Chandavarkar, J., had deduced in *Krishnaji* v. *Bomanji* (2).

In *Nana Kumar Roy* v. *Golam Chunder Dey* (4) the proclamation was in the Collector's office. Mr. Krishnaswamy Aiyar argued that as the proclamation in the Court or in the Collector's office and the proclamation in the village are all mentioned together in the Code, no distinction is to be drawn between one mode of proclamation and another. I am unable to agree with him. The failure to proclaim in the Collector's office will not have as serious an effect on bidders as the failure to proclaim in the village. It is in the latter place that people who are likely to purchase will gather. That is the most important part of the procedure relating to proclamation; and, if it is violated, such a violation does not stand upon the same footing as the failure to affix a copy of the proclamation in the Collector's office.

There is only one other decision to which reference may be made and that is *Rang Lal Singh* v. *Ravaneshwar Pershad Singh* (3). In that case the Judicial Committee had to consider a case of sale which was held some days after the date mentioned in the proclamation. The facts of that case make it clear that that was a case of mere irregularity. The sale itself was being adjourned from day to day and ultimately it was fixed for the day on which the usual Court sales were held. That was the 13th July. On the 13th July the presiding officer happened to be absent on leave and the sale was held on the day when he returned. The people in the locality were apparently aware that, in consequence of the absence of the presiding officer, the monthly sale would not be held on the usual day but would be held immediately on the return of the presiding officer. On these facts, the Judicial Committee came to the conclusion that there was only an irregularity and that it would not vitiate the sale, unless

(6) 15 I. A. 171 at p. 174; 12 M. 19 (P. C.); 5 Sar. P. C. J. 265; 12 Ind. Jur. 371; 1 Ind. Dec. (N. S.) 863.

substantial loss was proved. That case is no authority for this case, where there was no proclamation relating to the place, where the sale was actually held.

For these reasons, I agree that the order of Mr. Stodart is right and that this appeal must be dismissed.

Appeal dismissed.

M. C. P.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 654 OF 1919.

August 2, 1920.

Present:—Mr. Justice Jwala Prasad.

RAJU MAHTON AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HOSSAINI MIAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Sale—Title when passes—Possession not delivered—Consideration not paid—Registration, whether sufficient to pass title.

Where neither the deed of sale nor possession of the property sold is delivered to the vendee and no consideration passes, the mere registration of the deed of sale does not operate to pass the title to the vendee.

Appeal from a decision of the Subordinate Judge, Manbhum, dated the 23rd May 1919, confirming a decision of the Additional Munsif, Dhanbad, dated the 24th February 1919.

Mr. *N. N. Sen* for Mr. *S. M. Mullick*, for the Appellants.

Messrs. *N. C. Sinha* and *N. C. Ghose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of possession on the basis of a sale-deed said to have been executed by the defendants in favour of the plaintiff's father in March 1906.

The defendants impugn the document as having been executed on account of fraud practised upon them by the plaintiff's father representing that the deed to be executed would be only an usufructuary mortgage, and not a deed of sale. They further state that on discovery of the fraud they withheld the document and did not deliver it to the plaintiff's father nor gave possession of the properties in question. They also denied the passing of the consideration.

Both the Courts below have dismissed the suit. On appeal, the only question raised before the Court below was as to whether the plaintiffs have any right, title or interest in the suit lands and are they entitled to get possession thereof (Issue No. 4). The lower Appellate Court held that the transaction between the parties was proved to be a sale and that the deed in question was intended to be operative; but that the transaction was incomplete inasmuch as the consideration did not pass. The lower Appellate Court agreed with the finding of the Munsif that the recital as to the discharge of the consideration money by payment of the prior debts due from the defendants, was false and that the prior debts were as a matter of fact not discharged. The prior mortgage-bonds were neither torn off nor any endorsement made thereon to show that they were paid off or discharged. The finding of the Courts below is based upon good evidence and being a finding of fact cannot be challenged in second appeal. The result is that the consideration-money in the sale-deed did not at all pass. The sale-deed in question remained throughout in the possession of the defendants and was not given to the plaintiffs. The possession of the vended property was not also parted. To put it shorly, there was no delivery of the sale-deed and the property in question, nor the passing of the consideration. There was, therefore, nothing to show that there was any transfer of ownership which is essential for a valid sale under section 54 of the Transfer of Property Act. There is no particular mode prescribed for effecting the transfer of ownership, but the ordinary modes are those indicated above, namely, the delivery of title-deed and of the property and the passing of the consideration. It has not been proved that there was any intention of the parties in the present case to do away with the aforesaid requirements. It appears to me that the mere registration of the document in this case did not pass the title to the plaintiffs. Although more than 10 years after the execution of the sale-deed have elapsed no attempt was made until the institution of the present suit by the plaintiffs to recover possession of the property or to enforce their right under the deed. The finding of the Court that

they were never in possession shows clearly that they never thought that they had acquired any title under the sale-deed in question. It is impossible to conceive that a vendee would sleep over his right after paying the consideration-money, for many years.

I do not propose to discuss the various authorities on the point, for the principle appears to be simple and well-established. Each case has to be determined according to the circumstances of that case, showing the intention of the parties. This principle was laid down in the leading case of *London Freehold and Leasehold Property Company* v. *Baron Suffield* (1) and has been reiterated in a string of cases, *vide Sarat Chandra Naskar* v. *Hari Pada Mistri* (2).

I, therefore, agree with the view taken by the Court below and dismiss the appeal with costs.

Appeal dismissed.

(1) (1897) 2 Ch. 608; 66 L. J. Ch. 790; 77 L. T. 445; 46 W. R. 102.
(2) 4 C. L. J. 338.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 90 OF 1919.
July 13, 1920.
Present :—Mr. Hallifax, A. J. C.
Musammat RUKHMABAI WIDOW OF VITHAL RAO—APPLICANT
versus
BALWANT HARI—NON-APPLICANT.

Legal Practitioners Act (XVIII of 1879), ss. 27, 28—Agreement under s. 28—Suit based on agreement—Agreement invalid or no agreement—Pleader, right of, to sue—Party and party fee, question of, relevancy of.

Where there is an agreement under section 28 of the Legal Practitioners Act duly filed in Court, the Pleader can only sue upon it, and is entitled to the amount agreed on. [p 175, col. 1.]

If the agreement is invalid under that section, or there is no agreement, he can sue under section 70 of the Contract Act, and is entitled to whatever is a fair and just remuneration for the services he has actually rendered, and, in the former case, the terms of the agreement may be considered in determining the proper remuneration, and, except as a piece of evidence as to what the remuneration, should be, the "party and party" fee under section 27 of the Legal Practitioners Act does not come into question. [p. 175, col. 1.]

Application for revision of the decree of the Judge, Small Cause Court, Nagpur, dated the 18th February 1919.

Mr. *G. R. Deo*, for the Applicant.

Mr. *D. W. Kathaley*, for the Non-Applicant.

ORDER.—(1). The non-applicant who is a Pleader (and might have known better) sued on an alleged oral agreement between himself and the defendant that he should conduct a certain suit for the latter, who should pay him as remuneration the amount awarded by the Court as Pleader's fee between party and party. It was held in the Small Cause Court that the oral agreement alleged was proved but was invalid under section 28 of the Legal Practitioners Act, but that the plaintiff could recover the amount claimed as fair remuneration for services rendered under section 70 of the Contract Act, as it was the amount awarded by the Court as payable between party and party in accordance with the rules framed under section 27 of the Legal Practitioners Act. The applicant in revision, who is the widow of the original defendant now deceased, seeks to have this decree set aside on the ground that the existence of an agreement declared to be invalid by section 28 of the Legal Practitioners Act bars the claim for remuneration under section 70 of the Contract Act.

(2.) I am bound to say that at first sight I find it impossible to read any such meaning as that suggested into the plain words of the two sections mentioned. That and other meanings, however, appear to have been read into them, and the authorities on the point require examination. The only ruling directly supporting the contention of the applicant is the decision given in 1893 by the Chief Court of the Punjab (Sir Meredyth Plowden and Bullock, JJ.) in *Hasan Lal* v. *Tilok Chand* (1) where it was held that where a Pleader sues upon an oral contract for services rendered to a client he cannot succeed because the contract is not in writing, and because there is a contract he cannot fall back upon section 70 of the Contract Act. With all respect I am bound to say that I find it impossible

(1) 136 P. R. 1893.

to accept the reasoning of the learned Judges. The assertion on which the judgment is to a great extent based, that a void contract is only one that has ceased to be enforceable under the law and not one that never was enforceable under the law, is very open to question. As, however, this is the only ruling directly supporting the applicant's contention and as it is contrary to a previous judgment of the same Court in *Khazan Chand* v. *Gobind Singh* (2) and as also a different view was taken by the same Court in 1909 in *Sarju Parshad* v. *Girdhari Lal* (3) the judgment does not require further discussion.

(3.) The Calcutta case of *Sarat Chunder Roy Chowdhry* v. *Chundra Kanta Roy* (4) decided in 1893 was also cited by the learned Pleader for the applicant. The learned Judges (Prinsep and Stevens, JJ.) do say that they cannot follow the Madras decisions to the effect that, notwithstanding anything in the Legal Practitioners Act, section 70 of the Contract Act can be applied to suits for Pleader's fees. They appear to hold that there can be no claim under the Contract Act, even in the entire absence of an agreement, but where there is no agreement or one that is invalidated by section 28 of the Legal Practitioners Act the Pleader can sue for such amounts, apparently no more and no less, as can be legally obtained under section 27. A view directly contrary to this was expressed by Ismay (P), J. C., in *Maolvi Zahurul Islam* v. *Jiwan Lal* (5). Their Lordships seem to contemplate a suit under section 27 of the Legal Practitioners Act, and they say that that Act, as they read it, "contemplates that legal practitioners shall be entitled to receive under section 27 the amount payable under certain rules prepared within the terms of that section, and that they shall not be entitled to claim anything further, unless the terms of section 28 are observed." With all respect, I venture to dissent from this. Section 27 emprowers the High Court to "fix and regulate the fees payable by any party in respect of the fees of his adversary's Advocate" and there is no apparent justification for extending this power of regulation to cover the fees payable by a party to his own Advocate. Nor can I understand how a suit could be brought or maintained under the Legal Practitioners Act, by which, in their Lordships' opinion, "the Legislature deliberately intended, in respect of agreements between such parties, to provide definitively for them, and even to go so far as to rescind anything in the Contract Act or any previous legislation relating to the subject." This view of the law would also lead to obvious hardships and injustice in, for instance, a long and contentious case of low valuation in which no agreement as to a special fee had been made in accordance with section 28 because the case appeared simple and short at the beginning. Similar injustice would be inflicted on the client in a case involving several lakhs and apparently long and contentious, in which the defendant confessed judgment at the first hearing.

(4.) In that case, as in the Allahabad cases of *Razzuddin* v. *Karim Bakhsh* (6), and *Chhannu Lal* v. *Asharfi Lal* (7), it was also held that the provisions of section 28 apply only to agreements in respect of amounts in excess of those recoverable from the unsuccessful party under the decree and fixed under section 27 of the Act. I can find no justification whatever for so restricting the operation of section 28, any more than I can find justification for extending its negative provisions into what are called "express directions" in the Punjab case first cited. I prefer the view taken by Ismay, J. C., in *Maolvi Zahurul Islam* v. *Jiwan Lal* (5). That judgment does not deal with the main point in issue here, but lays down that, in the absence of a special agreement in accordance with section 28, a Pleader can claim fair remuneration under section 70 of the Contract Act, and further that the amount of the "Pleader's fee" fixed under section 27 is by no means necessarily the amount of that fair remuneration, though it may often be good evidence of it.

(2) 160 P. R. 1888.
(3) 1 Ind. Cas. 393; 1 P. R. 1909; 8 P. W. R. 1909; 21 P. L. R. 1909.
(4) 25 C. 805; 13 Ind. Dec. (N. S.) 524.
(5) 11 C. P. L. R. 137.
(6) 12 A. 169; A. W. N. (1890) 36; 6 Ind. Dec. (N. S.) 856.
(7) 29 A. 649; 4 A. L. J. 535; A. W. N. (1907) 260.

(5.) The case of *Sarat Chunder Roy Chowdhry* v. *Chundra Kanta Roy* (4) was not mentioned in the later ruling of the same Court in *Kamini Moni Debi* v. *Khetra Mohan Ganguli* (8), (Mookerjee and Carnduff, JJ.) but a contrary view was taken. It was held that an agreement not in accordance with section 28 cannot be enforced even when the amount agreed on does not exceed what could be allowed under section 27. As to section 70 of the Contract Act, the learned Judges were inclined to the view that it could be pleaded in spite of the existence of an invalid agreement, but the question did not arise as the plea had not been taken in the lower Court and also the Pleader concerned was the defendant in the case and could not be allowed to plead an unascertained sum as a set-off.

(6.) In the Allahabad High Court a Full Bench consisting of Sir John Stanley, C. J., Sir George Knox and Richards, JJ., in *Raghunath Saran Singh* v. *Sri Ram* (9) considered the point, though it did not really arise in the case. The Pleader's suit there was for damages for breach of the alleged agreement to employ him in certain litigation, and he had rendered no services, so that there could be no question of remuneration for them. But Mr. Justice Richards, in the course of a judgment in which the whole Bench concurred, said:—"In England machinery is provided for the taxation of all costs, whether between party and party or Solicitor and client, and whether the business be civil or criminal, litigious or non-litigious. In India there is no, or practically no, corresponding machinery. If a Pleader and his client fail to adjust their accounts by mutual consent and payment, the only conceivable course is a suit in the Civil Court by the Pleader for work done. The Civil Court can then decide what work has been done, what is reasonable and fair remuneration for the services rendered. Such a course, unless prohibited by the Legislature, seems to me quite unobjectionable under existing circumstances in this country." Speaking later of section 28 of the Legal Practitioners Act, he said:—"In my judgment the Legislature intended by this section that all special agreements between a Pleader and his client should be in writing, signed and filed according to the provisions of the section. It intended, at the same time, to leave the Pleader his full right to recover from his client his reasonable and proper fees for work actually done for the client and also all moneys duly and properly disbursed on his behalf. If a Pleader relies on an express or special agreement, he must prove one made in accordance with the provisions of the section." The view that the amount payable to the Pleader was limited to the amount payable under rules framed under section 27 was not taken in the case. In fact, exactly the contrary view is expressed in the two extracts just quoted. Mr. Justice Griffin in the same High Court, however, quoted the case as laying down this principle in *Chhannu Lal* v. *Asharfi Lal* (7). In that case it was held that the existence of an oral agreement did not bar the recovery of remuneration for services rendered, with again the curious proviso just mentioned, that it must not exceed the fees payable by party to party.

(7.) In *Sarju Parshad* v. *Girdhari Lal* (3) Mr. Justice Lal Chand of the Chief Court of the Punjab mentioned the case of *Hazari Lal* v. *Tilok Chand* (1) but did not discuss or definitely approve it. As there was no agreement, valid or invalid, in the case before him the question of the operation of section 70 of the Contract Act being barred by such an agreement did not arise, but he did express the opinion that section 28 of the Legal Practitioners Act only applies to agreements for amounts in excess of "party and party" fees, for which, as I have said, I am unable to discover the grounds.

(8.) The High Court of Madras has always held what seems to me the only right view of this subject. It is stated in *Subba Pillai* v. *Ramasami Ayyar* (10). In that case there was an agreement in writing, but it had not been filed in Court as required by section 28 and was, therefore, invalid. The learned Judges held that the

(8) 13 Ind. Cas. 43; 17 C. W. N. 45; 15 C. L. J. 660.

(9) 28 A. 764; 3 A. L J. 579; A. W. N. (1906) 235; 1 M. L. T. 242.

(10) 27 M. 512.

Legal Practitioners Act does not lay down that no claim by a Pleader for professional services rendered shall be sustainable unless an agreement in writing for the same has been made and filed in Court, but only that an agreement in respect of the remuneration shall be void unless it is reduced to writing and filed in Court, that section 28 of the Act is general, and there is nothing to restrict its operation to agreements which provide for the payment of an amount in excess of that allowed on taxation between party and party in accordance with the rules framed under section 27, and that the existence of an agreement which is void under section 28 of the Act is no bar to a claim for remuneration for services rendered under section 70 of the Contract Act This seems to be in accordance with the plain words of the sections mentioned. It is also in accordance with the ruling of this Court in *Maolvi Zahurul Islam* v. *Jiwan Lal* (5).

(9.) The position then seems to be this. Section 28 provides for cases in which the parties agree that there ought to be a special fee irrespective of the amount of work which the conduct of the suit may eventually be found to entail. This may be more or less than the "party and party" fee fixed under section 27. If there is such a written agreement duly filed, the Pleader cannot sue otherwise than on it. He cannot get more than the amount agreed on, under section 30, but he may get less, under section 29. If there is an agreement which is invalid under section 28 or no agreement at all, he can sue under section 70 of the Contract Act, and he can get whatever is a fair and just remuneration for the services he has actually rendered. In neither suit, whether on the valid agreement or under section 70 of the Contract Act, does the "party and party" fee come into question at all except as one piece of evidence to help in deciding what the proper remuneration would be, and other evidence may always prove that remuneration to be more or less than the "party and party" fee. Further, in a case in which there is an agreement which is invalid under section 28 I can see no reason why the terms of that agreement should not be considered in evidence for what they may be worth, for the decision of the same issue of the proper remuneration.

(10.) In the present case the fee payable between party and party has been accepted without further question or examination in the Small Cause Court as the fair remuneration for the services rendered by the Pleader. This, as was pointed out in *Maolvi Zahurul Islam's case* (5), is clearly wrong. The amount of the proper remuneration is a question of fact which must be decided on proper evidence. Of such evidence there is already the amount of the party and party fee, the record of Suit No. 57 of 1915 in the Court of the Senior Subordinate Judge of Nagpur and the terms of the oral agreement between the Pleader and his client. The parties have stated that they do not wish for a remand, as neither has any further evidence to produce on the point. I, therefore, proceed to decide the issues myself.

(11.) The suit was filed by the applicant's husband for foreclosure on a mortgage in default of Rs. 3,129. The Pleader's fee on that sum is ordinarily Rs. 156-7 0. This suit ended in a compromise and only half this fee was allowed that is Rs. 78 3-6. The terms of the oral agreement between the parties were that the Pleader's fee allowed would be paid, that is, Rs. 78-3-6, and the claim is for Rs. 78. From the order sheet in the case it appears that the Pleader neither drafted nor presented the plaint. The applicant's husband, Vithal Atmaram, did that himself, and also put in an application for attachment before judgment with his plaint and later another for a temporary injunction. On 2nd February 1916 the non applicant, Mr. B. H. Pandit, appeared with him but the defendant in the suit did not appear, notice not having been served on him, so nothing was done. On 8th March 1916 when Vithal Rao appeared without his Pleader, the pleadings were recorded, documentary evidence was filed and the issues were framed. Mr. Pandit appeared with his client at the next four hearings. At the first of them six witnesses for the plaintiff were examined and one more at the next. At the third the defendant was examined as a witness, and it was stated that the parties had arranged a compromise. At the last, the statements of the parties were recorded and judgment was delivered. In the proceedings for making the decree absolute it seems that Mr. Pandit appeared only once, at the last hearing when a final

decree was passed *ex parte*.

(12.) In all then the Pleader appeared with his client at six hearings, at three of which nothing was done. He did not draft the plaint and was not present at several hearings when a good deal was done. A fee of ten or fifteen rupees is often allowed for a hearing in this Court involving a great deal more labour than the Pleader can have been called on to undergo. I think, therefore, that a fee of five rupees for each hearing at which he did anything at all will remunerate him amply for the services he rendered. He admits having received ten rupees already from his client, (a fact which may throw some doubt on the truth of the finding that there ever was any oral agreement to pay the full Pleader's fee, and may also perhaps, explain the filing of a suit by a Pleader on an alleged agreement which he must have known would be held invalid). He is entitled, therefore, to get a decree for five rupees only. The decree of the Small Cause Court will, therefore, be modified by the substitution of five repees for sixty eight rupees as the sum payable by the defendant to the plaintiff. Costs in the suit and in this Court will be paid in the proportion of the success and failure of the parties. The Pleader's fee here will be Rs. 15.

Application allowed in part.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1070 OF 1918.

May 11, 1920.

Present:—Mr. Justice Sultan Ahmed.

Musammat BIBI WASILA *alias* BATASHAN AND ANOTHER—APPELLANTS

versus

Syed Shah SHARAFAT HUSSAIN AND ANOTHER—RESPONDENTS.

Partition—House—Objection that another house, not included in hotchpot, whether fatal to claim.

In a suit for partition of a house the plaintiff obtained a decree, but it was objected in appeal that partition ought not to have been granted without bringing another house into hotchpot:

Held, overruling the objection, that the order granting partition was right. [p. 176, col. 2.]

Appeal from a decision of the District Judge, Bhagalpur, dated the 3rd August 1918, reversing that of the Munsif, 1st Court, Bhagalpur, dated the 25th January 1918.

Messrs. *Akbary* and *Khurshed Husnain*, for the Appellants.

Mr. *Mohamed Hussan Jan*, for the Respondents.

JUDGMENT.—The plaintiffs in the suit out of which this second appeal arises, instituted a suit for a declaration that a certain room belonged to the plaintiff and the defendant 1st party; that a certain other room belonged to the defendant No. 1 exclusively, and that a certain house belonged exclusively to the defendant No. 2 and that the courtyard, the latrine, the door for ingress and egress and the back door *khirki* were held *ijmal* by the plaintiffs and the defendants 1st and 2nd party. The plaintiffs prayed for certain other declarations, partition and possession.

The defendants raised various objections with respect to the title and possession of the plaintiffs. The Trial Court decided most of the issues in favour of the plaintiffs but held that the plaintiffs could not claim partition of the houses in dispute as they had not brought into the hotchpot another house and, therefore, dismissed the claim for partition.

An appeal having been preferred, the learned Judge, however, came to the conclusion that the claim for partition was one which could be granted. I agree with the learned Judge that there was no reason why the house could not be partitioned simply because another house had not been brought into the hotchpot. In my opinion, the order of the learned Judge on this point was proper. But the learned Vakil appearing on behalf of the appellants has contended that the learned lower Appellate Court omitted to make a declaration with respect to the courtyard, privy, the *darwaja*, the *khirki*, and staircase. It appears that this was, as I have pointed out above, especially asked for by the plaintiffs in relief No. 1 to the plaint, and, therefore, it was necessary for the lower Appellate

Court to decide whether the plaintiffs are entitled to that declaration or not. There being no finding by the lower Appellate Court in its judgment with respect to the courtyard, etc., it is necessary to remit the case to the lower Appellate Court for a finding whether the plaintiffs are entitled to the declaration which they have sought in relief No. 1 to the plaint; and I accordingly send the case back for that finding. The record of the case will be sent down as soon as possible and the learned Judge will please come to a finding on this point and return the record to this Court within a month after the receipt of it by him. Each party will bear his own costs of the hearing of this appeal up to date.

Case sent back.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 94 OF 1919.

May 20, 1920.

Present :—Mr. Justice Newbould and Mr. Justice Buckland.

BHUTNATH JANA—PLAINTIFF—DECREE-HOLDER—APPELLANT

versus

TARA CHAND JANA AND OTHERS—DEFENDANTS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2), O. XXII, r. 4—Mortgage, suit on—Order rejecting application to make preliminary decree final, whether "decree"—Preliminary decree, proceedings following, nature of—Death of sole judgment-debtor—Abatement of suit.

An order rejecting an application to make a preliminary decree in a mortgage-suit final, on the ground that the suit had abated owing to the death of the sole judgment-debtor is a "decree", and is open to appeal and second appeal. [p. 178, col. 1.]

Until a final decree is passed, all proceedings following a preliminary decree in a mortgage-suit are proceedings in a pending suit and an application made therein is not an application for execution. [p. 178, col. 1.]

Where, therefore, before the making of a final decree in a mortgage-suit the sole judgment-debtor dies, and the decree-holder fails to apply within six months of his death to have his heirs substituted, and made subject to the preliminary decree, the suit, under rule 4 of Order XXII of the Civil Procedure Code, will abate. [p. 179, col. 1.]

Appeal against the decree of the District Judge, Midnapore, dated the 27th of August 1918, affirming that of the second Court at Tamluk, dated the 26th of June 1918.

FACTS appear from the judgment.

Babu *Santosh Kumar Pal*, for Babu *Jyotish Chandra Hazra*, for the Respondents.—I take a preliminary objection that no second appeal lies against an order refusing to set aside an abatement under Order XXII, rule 4, of the Code of Civil Procedure. See section 104 and Order XLIII, rule 1 (*k*), Civil Procedure Code.

Dr. *Sarat Chandra Basak* (with him Babu *Monmothanath Roy*), for the Appellant:—The plaintiff obtained a preliminary mortgage-decree on the 6th of February 1915 under Order XXXIV, rule 4 of the Civil Procedure Code. On the 26th of January 1918 an application was made, under Order XXXIV, rule 5, to make the preliminary decree final. But the judgment debtor having died on the 19th of April 1916, the Courts below have held that the suit abated under Order XXII, rule 4, as no application for substitution was made within six months of the death of the judgment-debtor. My present appeal is not against an order refusing to set aside an abatement but is against an order rejecting the application to make the preliminary mortgage decree final. That order had the effect of finally dismissing the mortgage-suit and was, therefore, a decree. Consequently, both a first and a second appeal lay.

Coming to the merits, I submit that, after the preliminary decree was passed, the decree-holder had a right to apply to make the decree final. That right is not taken away by my failure to substitute the representatives of the judgment-debtor within six months of his death. Refers to *Nizam Uddin Shah* v. *Bohra Bhim Sen* (1). The case exactly in point is reported as *Mehari Bibi* v. *Yakub Ali* (2). The question has to be determined on principles. After the preliminary decree is passed, nothing really remains to be done except making an

(1) 43 Ind. Cas. 870, 40 A. 203; 16 A. L. J. 85.
(2) 11 C. W. N. 156.

application under Order XXXIV, rule 5 (2). The provisions of Order XXII, rule 4 do not apply after the preliminary decree is passed. There is no decision exactly in point under the present Civil Procedure Code. The case in *Munna Lal* v. *Sarat Chunder* (3) takes the same view as the case in *Amolak Chand Parak* v. *Sarat Chandra Mukherjee* (4). Order XXII, rule 4 applies only to cases where something remains to be adjudicated between the parties. Under the circumstances, the Courts below should not have applied the provisions of Order XXII, rule 4, Civil Procedure Code.

Babu *Santosh Kumar Pal*, for the Respondents.—I am entitled to succeed on the preliminary point.

As to the merits, the whole case turns on the question whether the application to make the preliminary decree final is an application in execution or is one in the suit. I submit that the application must be considered to be one in the suit and, therefore, Order XXII, rule 4 applies. Until the final decree is passed, the proceedings following the preliminary decree in the mortgage-suit must be looked upon as proceedings in the suit itself. The decree-holder may have three years to apply for making the preliminary decree final, but if the sole judgment-debtor dies within that period, the decree holder must come within six months of the death to have the heirs of the judgment-debtor substituted and then apply to make the decree absolute. Refers to Order XXII, rule 12, Civil Procedure Code, *Amolak Chand Parak* v. *Sarat Chundra Mukherjee* (4), *Munna Lal* v. *Sarat Chander* (3), *Madho Ram* v. *Nihal Singh* (5), *Muhammad Masih Ullah Khan* v. *Jarao Bai* (6).

Dr. *Sarat Chandra Basak* replied.

JUDGMENT.

NEWBOULD, J.—The plaintiff obtained a preliminary decree in a mortgage-suit against one Tara Chand Jana on 6th February 1915. This was a decree under Order XXXIV, rule 4, Civil Procedure Code. On 26th January 1918 an application was made for making this decree absolute. To this objection was taken that Tara Chand had died on 19th April 1916. The lower Courts have held that, as the application was not made within six months of Tara Chand's death, Order XXII, rule 4, Civil Procedure Code applied and the suit abated.

A preliminary objection has been taken that no second appeal lies. It appears that the lower Appellate Court wrongly treated the appeal to it as an appeal from an order refusing to set aside the abatement of the mortgage-suit. Had it been an appeal from such an order, there would have been no second appeal to this Court. But the lower Appellate Court was clearly wrong on this point. The order against which the appeal was preferred was an order rejecting the application to make the mortgage-decree absolute. That order had the effect of finally dismissing the mortgage-suit and was a decree, and the appeal to the lower Appellate Court should have been made in the form of an appeal from a decree. As the order dismissing that appeal was a decree, a second appeal lies to this Court.

As regards the merits, as was held in *Mehari Bibi* v. *Yakub Ali* (2), under the law before the passing of the new Code of Civil Procedure, the application would not have been liable to dismissal on account of the death of the defendants. There is no case directly in point decided since the passing of the present Civil Procedure Code, but the point was considered by the Allahabad High Court in *Nizam Uddin Shah* v. *Bohra Bhim Sen* (1). There the learned Judges remarked in a similar case that it would appear that, when the application to bring the heirs of the deceased defendant on to the record within six months from the date of her death had not been made, the suit had abated. They then added that it was not necessary for the decision of that case that they should decide that point. Having regard to the alterations made in law regarding mortgage-suits by the bringing of certain portion of the Transfer of Property Act into the Civil Procedure Code, I think there is no ground for holding that applications made in a mortgage-suit after a preliminay decree had been passed and before the final decree are exempted from the provisions of Order XXII

(3) 27 Ind. Cas. 683; 42 C. 776; 17 M. L. T. 120; 21 C. L. J. 118; 2 L. W. 282; 19 C. W. N. 561; 17 Bom. L. R. 408; 28 M. L. J. 470; 42 I. A. 88 P. C.
(4) 1 Ind. Cas. 948; 38 C. 913; 16 C. W. N. 49.
(5) 30 Ind. Cas. 494; 38 A. 21; 1 A. L. J. 985.
(6) 27 Ind. Cas. 774; 37 A. 226; 13 A. L. J. 307.

of the Code. From rule 12 of that Order it would appear that the provisions of rules 3, 4 and 8 do not apply to proceedings in execution of a decree or order, but there is nothing else in the Code which takes proceedings in a suit which has not been finally decided outside this Order. As was held by this Court in the case of *Amolak Chand Parak* v. *Sarat Chandra Mukherjee* (4), a decision which was affirmed on appeal by the Privy Council in *Munna Lal* v. *Sarat Chunder* (3), an application following on a preliminary decree for sale is not an application for execution. Until the final decree is passed the proceedings following the preliminary decree in a mortgage suit must be looked on as proceedings in a pending suit. The consequence is that, although the decree holder has three years to apply for making a preliminary decree final, yet if the sole judgment debtor has died within that period he will still have to come within six months of the death to have his heirs substituted and make them subject to the preliminary decree. We, therefore, uphold the order of the lower Appellate Court and dismiss this appeal with costs.

BUCKLAND, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 90 OF 1920.

August 16, 1920.

Present:—Sir Dawson Miller, KT, Chief Justice, and Justice Sir B. K. Mullick, KT.

DEOKI LAL AND OTHERS—APPELLANTS

versus

RAMANAND LAL—RESPONDENT

Patna High Court Rules, Ch VII, r. 2 Limitation Act (IX of 1908), s 12, applicability of, to appeal preferred under cl. 10 of the Letters Patent.

Rule 2 of Chapter VII of the Patna High Court Rules excludes the applicability of section 12 of the Limitation Act to appeals preferred under clause 10 of the Letters Patent. [p. 18, col .]

Letters Patent appeal against the judgment of Mr. Justice Das, dated 28th May 1920, in Second Appeal No. 1330 of 1918, affirming that of the Subordinate Judge, 2nd Court, Saran.

Mr. *P. C. Roy*, for the Appellants.

Mr. *H. P. Singh*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This application comes before us upon a reference to the Bench to determine a question of limitation. The memorandum of appeal was presented for filing on the 2nd July this year. The judgment from which it is sought to appeal was delivered on the 28th May. By the rules of this High Court, the appeal being one from the decision of a Single Judge brought under clause 10 of the Letters Patent, should have been presented within 30 days of the date of the judgment appealed from. That provision is contained in Chapter VII, rule 2, of the Patna High Court Rules. The presentation of the memorandum of appeal was, therefore, clearly out of time as provided by that rule. It is contended, however, that, under section 12 of the Limitation Act the time requisite for obtaining a copy of the judgment from which it is sought to appeal ought to be deducted from the limitation period. Section 12 of the Limitation Act provides for certain deductions in computing the period of limitation prescribed for appeals and certain other applications, and clause (3) of section 12 provides that where a decree is appealed from or sought to be reviewed the time requisite for obtaining a copy of the judgment on which it is founded shall be excluded. The judgment which was delivered on the 28th May was apparently not signed until some time later. On the 1st June the appellant applied in the ordinary course for a copy of the judgment and it was not until the 17th that he was notified by the office of the requisite number of folios and stamps. On the 22nd June he supplied part of the requisite folios and afterwards supplied the rest on the 27th and on the 30th obtained a copy of the judgment and, two days later, as already stated, he presented his memorandum of appeal to the Registrar of this Court.

The appellant contends that, at all events, the time between the 1st June, when he

made his application for a copy, and the 17th June, when he was notified by the office of the requisite number of folios, should be deducted from the limitation period and, if he is right in this contention, it follows that his appeal was presented in time. The first point which it is necessary to refer to in connection with the application of section 12 of the Limitation Act is, whether in a case like the present where it is not necessary to file with the memorandum of appeal a copy of the judgment appealed from, the time taken in obtaining that copy ought to be deducted from the limitation period at all. There have been certain decisions, many years ago, in the Allahabad High Court in which the view was taken that the section should not be applied except in cases where it was necessary to file the copies obtained with the application or memorandum of appeal. The words of the section themselves do not limit its application to cases in which it is necessary to file the documents obtained together with the memorandum of appeal, and, for myself, I think that there is much force in the argument that the section was not intended to be limited to that class of cases only. It is not necessary, however, for the purposes of this decision, to decide that question because, if the view which I take of the case is right then section 12 of the Limitation Act has no application to the present circumstances. By section 29 it is provided that: "Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India." The provisions of that section seem to me merely to give expression to a principle which has already been recognised by decisions of the highest tribunals, namely, that where there is a Statute or a special law laid down regarding particular and special cases the Legislature did not intend by an enactment of general import to interfere with the provisions already made by an earlier enactment in the special cases, and there is a further principle of the construction of Statutes of a similar kind that, where there is a Statute of general application followed by a subsequent enactment applying to special cases, one must look and see whether it was the intention of the special enactment to include or to exclude the general provisions laid down by the general enactment. For that purpose it is a very useful guide to consider whether the special enactment does in itself provide what has been called a code relating to the questions so far as they concern the special cases which it had to deal with. But it does not seem to me that the principle must be confined merely to cases in which it can be said that there is in fact a special code dealing with the whole subject. If it appears that, by the special law, it was not the intention to incorporate the provisions of the general law but to exclude them, then it is obvious that, applying the ordinary canons of construction to such a case, the Courts ought not to hold that the Statute of general import should be incorporated in the special law. It, therefore, becomes necessary to consider the provisions of clause 2 of Chapter VII of the High Court Rules, which prescribed the period of limitation in appeals under clause 10 of the Letters Patent. This rule provides that, "Every appeal to the High Court under clause 10 of the Letters Patent shall be presented to the Registrar within 30 days from the date of the judgment appealed from unless a Bench in its discretion on good cause shown shall grant further time. The Registrar shall endorse on such memorandum the date of presentation and, after satisfying himself that the appeal is in order and within time, shall cause it to be laid before a Bench for orders at an early date. It need not be accompanied by a copy of the judgment appealed against. But if it is admitted the appellant shall, within 10 days from the admission of the appeal, file a typed copy of the judgment for the use of the Court." Now, reading that rule it seems to me clear that the intention of the framers of that rule was to prescribe an absolute period of limitation of 30 days and the only case in which that period could be extended was a case which a Bench in its discretion considered should be extended upon good cause being shown. Any of the provisions in the Limitation Act applying to the extension of the periods of limitation prescribed therein might appear, apart from the Limitation Act itself, to furnish good reason to a Court, which had to decide the matter in its discretion

for granting an extension of that period and, therefore, it seems to me that the intention was that in all cases under that rule the question of granting or refusing further time was to be within the discretion of the Court upon good cause being shown and that the general provisions of the Limitation Act should not be binding on the Court. In fact, it may be said that the provisions of rule 2 of Chapter VII are even more comprehensive than the provision laid down in the different sections of the Limitation Act, but it does not necessarily follow that because certain provisions are laid down in the Limitation Act providing for an extension of limitation in certain cases that in all such cases good cause would necessarily be shown.

Having arrived at the conclusion that section 12 of the Limitation Act is excluded by the operation of rule 2, Chapter VII of the High Court Rules, the only question for determination is, whether, in the particular circumstances of this case, any good cause has been shown for extending the limitation period. It is quite true that when the appellant applied for a copy of the judgment it took from the 1st to the 17th of June before he was notified of the necessary folios for the copy of the judgment required, and, therefore, in the ordinary course, that period would under the Limitation Act be deducted and possibly might in a case of this sort also be deducted, but it was not necessary for him actually to file a copy of the judgment with his memorandum of appeal, and if he had been diligent and had supplied the necessary folios and stamps as soon as he was notified instead of, as he did, partly on the 22nd and the balance on the 25th, he would have had ample time in which to consider, if it was necessary for him to consider, the effect of the judgment after seeing it actually in writing. It seems to me, therefore, that if his delay in filing the memorandum of appeal was due in any way to the fact that he did not obtain a copy of the judgment early enough, that was entirely due to his own dilatoriness in not filing the requisite folios at the time when he ought to have done so. As I have already observed, the actual possession of the document in question was not necessary for the purpose of filing his appeal. He must have known what the effect of the judgment was and in all probability could have filed his memorandum of appeal without actually having a copy of the judgment before him; but, even if it were necessary for him to have it before filing his memorandum of appeal, he wasted a period of about 10 days and I do not think it can be said in the present case that any special cause has been made out why the period should be extended. In my opinion, therefore, the memorandum of appeal should be rejected. The value of the appeal in this case is small. There is no special provision for assessing the costs of the respondent. His costs cannot have amounted to very much and, therefore, we assess a sum of two gold *mohurs*, to include hearing fee and any other costs he may be entitled to.

MULLICK, J.—I agree.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 169 OF 1918.

February 5, 1920.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

JATINDRA NATH DUTTA—DEFENDANT—APPELLANT

versus

SURESH CHANDRA RAY CHOUDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Account, suit for rendition of—Papers necessary for preparing account with plaintiff and not produced, effect of—Suit, whether maintainable.

After the removal of a Naib of a Zemindar from his office the Zemindar brought a suit against him to render an account for a certain period of his management: it was proved that the papers relating to that period had been taken away by the Sadr Naib of the Zemindar, and the defendant urged that it was impossible to prepare the account without those papers which the plaintiff would not produce:

Held, that the suit was not maintainable. [p. 183, col. 2.]

Appeal against the decree of the Subordinate Judge, Rajshahye, dated the 25th of January 1918.

JATINDRA NATH DUTTA v. SURESH CHANDRA RAY.

Babus *Sarat Chunder Roy Chowdhury* and *Probodh Coomer Das*, for the Appellant.

Babu *D. N. Bagchi*, for the Respondents.

JUDGMENT.—This appeal is by the defendant and arises out of a suit for account. The Court below has passed a decree in terms of the prayers in the plaint and the defendant has been called upon to render an account for the period of his service, which means an account from the 12th Bhadra 1313 to the 10th of Jaistha 1320 B S. He has also been required to submit to the plaintiffs certain papers mentioned in Schedule *ka* of the plaint. The facts, so far as it is necessary to state them, seem to be these. The defendant was appointed Naib of the plaintiffs' Zemindari at Rangamatia. He executed a *kabuliyat* and entered into serivce on the 28th August 1906, or the 12th Bhadra 1313 B.S. He continued in service till his dismissal on the 11th Jaistha 1320, corresponding with 25th May 1913 There is no dispute as regards these facts. The defence of the defendant was that, as a matter of fact, he had rendered accounts till the year 1317 and that he was preparing his account for the other years when he was dismissed and the Sadder Naib came to his Cutchery and took possession of all the papers without giving him any receipt for the same. He said that it was not possible for him to render an account without having access to those papers which were in the possession of the plaintiffs. He also raised various other objections such as limitation, etc, as will appear from the issues framed in the suit. The more important of these objections have been urged before us on his behalf by his learned Vakil in support of the appeal Four questions have been raised and, if any one of these is decided in favour of the appellant, the plaintiffs' suit will have to be dismissed. It has been first argued that, after the appointment of the defendant, the plaintiffs appointed two successive *Jamanabishes* who were given independent powers and that, therefore, there was a renunciation or revocation of the contract within the meaning of sections 201 and 207 of the Indian Contract Act. It has been next argued that the plaintiffs not having produced the account papers made over to them cannot sue for any account and, in support of this contention, reliance has been placed on a decision of this Court [*Upendra Kishore Rai Chowdhury* v. *Ram Tara Debya Chaudhurani* (1)]. The next argument on behalf of the appellant is that the case is one governed by Article 89 of the Limitation Act and not by Article 116, and that there having been from time to time a demand for account and non-compliance with such demand on the part of the defendant, the claim for account previous to such demand must be held to have been barred. These are the principal points that have been urged in support of the appeal. We think it will be convenient to deal with the second point first.

The plaintiffs brought their suit about two years after the dismissal of the defendant. In the plaint they did not admit that any accounts had been rendered or any *nikash* papers filed by the defendant. Long after the defendant's written statement was filed, in which he alleged that he had rendered *nikash* up to 1317, the plaintiffs prayed for an amendment of the plaint. By that amendment, they admitted that the defendant had compiled a *nikash furdi* up to the year 1317 and had delivered it to the plaintiffs after signing it and they filed the *furdi* along with the petition for amendment. That shows that the plaintiffs did not come to Court with a straightforward case. It also appears that they claimed papers from the defendant which are mentioned in Schedule *ka* of the plaint, which were clearly in their possession. We have been referred by the learned Vakil for the appellant to a list of papers which were filed by the plaintiffs in the Balur Ghat Court in a suit against one of the *gomastas* serving under the defendant, some of which at least are identical with the papers claimed from the defendant. Circumstances such as these throw very considerable doubt on the *bona fide* of the plaintiff's claim.

Coming now to the evidence on the point, we find that, so far as the accounts are concerned, the only dispute between the parties was with reference to the *bilan jama kharach* and the *bilan jama kharach* only. A perusal of the numerous letters that passed

(1) 4 Ind. Cas. 542; 13 C. W. N. 696.

between the defendant and the plaintiffs' manager makes that matter perfectly clear. It also shows very clearly that all the *bilan jama kharach* up to the end of 1317 had been filed. If these papers have not been explained, the fact remains that the plaintiffs never gave the defendant an opportunity to explain them, and they have not up to this moment shown how these papers are in any way incomplete or incorrect although the vouchers in support of them are with the plaintiffs. The question, therefore, narrows down to the account for the period from 1315 till the defendant's dismissal in Jaistha 1320 B. S. As regards this period it seems to us that no question of limitation arises and the learned Vakil for the defendant has, so far as this part of the claim is concerned, argued that though his client is willing to render an account of the *bilan jama kharach* in respect of this period, it is impossible for him to render such an account until the papers which were in his possession and which he either made over to the plaintiffs' Sudder Naib or were seized by that officer and taken away by him without giving a receipt therefor are produced. The plaintiffs, on the other hand, say that this story of these papers having been made over or seized by the Sudder Naib is untrue. They rely upon certain discrepancies in the evidence of the defendant as to the date on which the papers are alleged to have been seized, whether it was on the 12th or the 14th. These discrepancies lie within a very narrow compass. The witnesses were deposing about more than four years after and discrepancies like these do not necessarily throw any doubt on the truth of the evidence given by them. In support, however, of the story that the papers were seized by the Sudder Naib, Kali Prosonno, we have two strong circumstances in favour of the defendant. In the first place, it appears that, immediately after the occurrence, the defendant not only lodged an information at the *thana* about the seizure of those papers but also sent a petition to the plaintiff's manager stating the facts and expressing his inability to prepare an account without having access to those papers. The two most important witnesses on the point were the Sudder Naib, Kali Prosonno and Debi Pursad the *jamanabish*, but they have not been examined, the reason assigned being that they are no longer in the service of the plaintiffs and one of them, Debi Pursad, has taken service under the Chota Taraf with whom the Bara Taraf is in terms of enmity. That may or may not be so, but if the plaintiffs had brought the suit earlier, probably the evidence of these witnesses would have been available. Besides, it is not likely that the defendant would be allowed, when he was dismissed and the dismissal was in the presence of the Sudder Naib, to take away to his own house cart-loads of papers from the Cutchery as is now alleged on behalf of the plaintiffs. That is a story which it is difficult for us to believe. On the whole, having regard to the conduct of the plaintiffs in exaggerating their claim and in suppressing facts which they ought to have admitted, we think the balance of probability is on the side of the story told by the defendant and his witnesses and we are of opinion that it is impossible for the defendant to render an account for the years 1318 and 1319 without the plaintiffs producing the papers that it has been proved are with them. They have through their learned Vakil expressed their inability to produce those papers on the ground that they are not in their possession. That being so, we think it would be useless to direct an account being taken from the defendant. In this view of the case, it is not necessary to decide the other points raised by the learned Vakil for the appellant. We accordingly decree the appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2386 AND 2388 TO 2395 OF 1917.

March 8, 1920.

Present :—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

PALAYAKAYAL SWAMI SANGUMUGESWARAR, THROUGH ITS TRUSTEE PILLAIMUTHU PILLAI—PLAINTIFF—APPELLANT

versus

VEYINRAMUTHU PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Religious endowment—Resumption by Governmen

PALAYAKAYAL SWAMI SANGUMEGESWARAR v. VEYIMBAMUTHU PILLAI.

—*Fresh grant to Committee—Committee, power of, to appoint trustee.*

The Government, finding that endowments to a temple by previous rulers were mismanaged, resumed the endowments and made a fresh grant to the temple by donating the lands to the Temple Committee, and asked them "to make satisfactory arrangements for the due performance of the service, etc." The Committee appointed the plaintiff as the trustee, and the question was whether he had been validly appointed:

Held, that the Government, as grantor, had given ample power to the Committee not only to see that the services were properly conducted but also to appoint competent men to supervise the performance of those services, and that the appointment of the plaintiff by the Committee was a valid appointment. [p. 185, col. 1.]

Second appeals against the decrees of the District Court Tinnevelly, in Appeal Suits Nos. 236 to 244 of 1916, respectively, preferred against the decrees of the Court of the District Munsif, Tuticorin, in Original Suits Nos. 297 to 299, 303 to 305, 307, 300 and 306 of 1913.

FACTS appear from the judgment.

Mr. *O. V. Anantha Krishna Aiyar*, for the Appellant.—The appointment of plaintiff as trustee is valid. The powers of Government in respect of Crown grants are higher than that of private donors. When Government donated the lands to the Committee on condition of their doing the temple services properly, the Committee impliedly had the power to appoint competent men to do the services.

Mr. *Krishnaswamy Aiyar*, for the Respondents.—The order of Government donating the lands to the Committee on condition of their performing the services properly had the effect of appointing the Committee members themselves as trustees. It was *ultra vires* of the Committee to delegate that function to others.

JUDGMENT.—The main question for decision in all these second appeals is, whether the plaintiff, who claims to be the trustee of the temple, has been validly appointed. The history of the negotiations that preceded the transfer of management by the Government to the Siva Temple Committee of the Tinnevelly District is this. There were no regular trustees for the temple previously and, *ex concessio*, the temple was not managed by the Board of Revenue under Regulation VII of 1817. Apparently, the temple would not come under section 3 of Act XX of 1863. The *archakas* of the temple were doing the duties of the *dharma kartas*, as is the case even to day in many temples. That they grossly neglected the affairs of the temple, and allowed others to trespass on the property are clear. Government, in the year 1910, resolved to put an end to this state of affairs and resumed the lands from the *archakas*, Exhibit BB. In respect of the *ryoti* lands, they converted them into *ryotwari* holdings and resolved to give the temple by way of a *dastik* allowance, the assessment fixed on them. As regards the bulk of *pannai* lands, they granted *pattas* to the temple, Exhibits K and K1. The order of resumption is in these terms :—

"The *inam* lands covered by title-deeds Nos. 1129 and 1246 in the Ottapidaram Taluq of the Tinnevelly District will be fully assessed. *Ryotwari pattas* will be issued in favour of the persons who possess the occupancy rights therein.

"2. The Board of Revenue is requested to ascertain whether the District Temple Committee is willing that the net assessment on the *inam* lands should be assigned to it on condition that it makes satisfactory arrangements for the due performance of the service in the Sunkumaheswaraswami Temple at Pazhayakayal in the Srivaikuntam Taluq."

Upon this, the Temple Committee made inquiries in the neighbouring villages and appointed plaintiff as the trustee. We are inclined to think that this appointment must have been communicated to the Government through the Collector, as Exhibit S, the order, refers to directions from the Collector on the subject.

The question is, was the appointment of the plaintiff by the Temple Committee valid? We think it was. It can hardly be doubted that, if the Temple Committee were themselves appointed trustees and if that appointment was by a private donor, the donees would not be competent to delegate their functions. It would offend the rule against the alienation of public offices, and the principle *delegatus non potest delegare*. But the present case is not within their mischief. The proper way to look at the action of the Government is this. The Government, as the supreme authority, found that endow-

ments made by previous rulers were mismanaged. They resumed the endowments, as they had power to do, and themselves made a fresh grant of the assessment on the suit lands and on other lands to the temple. They, no doubt, donated the lands to the Committee and asked them "to make satisfactory arrangements for the due performance of the service, etc." This is the weakest point in the Government order and Mr. Krishnaswami Aiyar was not slow to take advantage of it. His contention was that the Government appointed the Committee as trustees and that, therefore, the appointment of trustees by this body was *ultra vires*. We are of opinion that the language of Exhibit BB should not be so narrowly construed. In our opinion, the Government, as the grantor, gave ample power to the Committee not only to see that the services were properly conducted, but also to appoint competent men to supervise the performance of those services. The fact that the appointment of a trustee, was made under instructions from the Collector strengthens this view of Exhibit BB. The next question is, was it competent to the Government to delegate such powers. Under the Crown Grants Act, the restrictions under which private donors labour are not binding on the Government. As pointed out in *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar* (1), the Government can make a grant to which objections based on the rule against perpetuities cannot apply. Therefore, it was within the power of the Government to give the property to the Committee and to invest them and their successors-in-office with the power of nominating successive trustees. The matter can be looked at from another point of view. It was held in *Annasami Pillai* v. *Ramakrishna Mudaliar* (2) that a person holding the office of trustee can prescribe to appoint future trustees by Will. What can be acquired by prescription against a private owner, is certainly *ultra vires* of a grant from Government. It is open to the Government to clothe the donee and his successor-in-office with powers to appoint trustees. The fact that the power is not to appoint successors, but persons during the lifetime of the donee cannot make a difference in principle. We must, therefore, hold that the trustee was properly appointed and that the suit by him was sustainable. We have purposely refrained from basing our judgment on the very narrow ground that the temple did not come within section 3 of Act XX of 1863 which was the view taken in the Courts below, because, as was pointed out by Mr. Krishnaswami Aiyar, they do not seem to have realised the difference between management of trust and ownership of property.

On this conclusion, we proceed to deal with each of the second appeals separately. In some of them, there is a finding by the District Munsif that the lands in suit are not included in Exhibits K. and K1., granted to the Committee. The lower Appellate Court has expressed no opinion on that question. There must be a finding by it whether the lands claimed in the suit are included in the *patta* granted to the temple by Exhibits K. and K1.

We must, therefore, ask for a finding on the evidence on record on the above point in Second Appeal No. 2386 of 1917; as regards Item No. 1, in 2388 of 1917; as regards the entire property, in Second Appeal No. 2392; as regards 1 acre and 62 cents not lost by prescription. Findings will be submitted within six weeks and seven days will be allowed for filing objections.

In pursuance of the order contained in the above judgment the District Judge of Tinnevelly submitted the following

FINDING.—These three appeals have been remanded for a finding on the question whether certain lands concerned in them are included in the *patta* Exhibits K. and K1. granted to the temple.

* * * *

In the result, therefore, I find that the plaintiff has failed to prove that Item No. 1 in Original Suit No. 297, (*i. e.*, 39 c7, 35·54), the land concerned in Original Suit No. 298 and the portion of Survey No. 58 concerned in Original Suit No. 305 are included in the *pattas* (Exhibits K and K1) granted to the temple. I would, therefore, answer the issue

(1) 48 Ind Cas. 213; 45 I. A. 134; 21 O. C. 106; 24 M. L. T. 282; 5 O. L. J. 401; 8 L. W. 570; 40 A. 470; (1918) M. W. N. 841; 28 C. L. J. 456; 23 C. W. N. 101; 20 Bom. L. R. 1075 (P. C.).

(2) 24 M. 219; 11 M. L. J. 1.

sent to me in the negative, in all three suits.

JUDGMENT.—We accept the findings and dismiss these second appeals with costs, except in Second Appeal No. 2392 of 1917.

Appeals dismissed.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 213 OF 1919.

May 21, 1920.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

RABIUDDIN—JUDGMENT-DEBTOR—APPELLANT

versus

RAM KANAI SEN—DECREE-HOLDER—RESPONDENT.

Execution of decree—Decree capable of execution but not executed within three years, effect of—Amendment of decree, whether revives decree.

A decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment. [p. 189, col. 2.]

Anandram v. *Nityananda Barham*, 32 Ind. Cas. 744, followed.

Mahamaya Prasad Singh v. *Abdul Hamid*, 21 Ind. Cas. 616; 18 C. W. N. 266 at p. 268, distinguished.

Appeal against the order of the Subordinate Judge, 1st Court, Chittagong, dated the 1st of April 1919, affirming that of the Munsif, 3rd Court, at Chittagong, dated the 4th of June 1918.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Chandra Sekhar Sen*), for the Appellant.—The judgment-debtor is the appellant. The appeal arises out of an application for execution of a mortgage-decree. The plaintiff-decree-holder is the mortgagee of defendant No. 1. The defendant No. 1 who is the brother of the plaintiff mortgaged the properties for the discharge of debts to the joint family. After the mortgage, the plaintiff sold some of the properties to the defendant No. 3. Owing to defendant No. 1 having defaulted in paying Government revenue the defendant No. 7 purchased the property at the revenue sale. It was subsequently found that the sale was fraudulently procured. During the pendency of the suit, a compromise was effected by which the whole burden of the debt was thrown on the property purchased by my client The decree was contested. Both the Courts have found that the application for execution was made out of time. After the filing of the application the plaintiff, who is the *sheristadar* of the Court, filed a petition for the amendment of the decree. No notice of the application, however, was given to my client. The Court held that the plaintiff was entitled to get the decree amended as prayed for. The Courts now hold that the present application is not barred by the law of limitation. My submission is the application is clearly barred, it being made more than three years after the date of decree. The preliminary decree was dated June 1912. The final decree was made on the 6th February 1915. The present application was made on the 25th March 1919. Further, the amendment made was unsubstantial. The prayer was for variation of costs awarded by the decree. It was not their case that the previous decree was incapable of execution. I submit, the mere fact of an application for amendment of a decree would revive a dead decree. The decree was already gone when the amendment was sought to be made. The case reported in *Anandram* v. *Nityananda Barham* (1) bears directly on the point. The case in *Mahamaya Prasad Singh* v. *Abdul Hamid* (2), relied upon by the lower Court is clearly distinguishable. On principle, the amendment of a very unsubstantial nature cannot revive a barred decree. Refers to *Tarsi Ram* v. *Man Singh* (3). In the present case the decree was dead already. Refers to *Goluck Chunder Mussant* v. *Gunga Narain Mussant* (4). Once the execution is barred there nothing to revive the decree.

(1) 32 Ind. Cas. 744.
(2) 21 Ind. Cas. 615; 18 C. W. N. 266 at p. 268.
(3) 8 A. 492; A. W. N. (1886) 156; 5 Ind. Dec. (N. S.) 224.
(4) 20 W. R. 111.

Babu *Narendra Kumar Das*, for the Respondent.—The real controversy in the suit was as to which property would be sold. The most important part, therefore, was omitted from the final decree. Under the amended decree directions as to sale were given. Refers to *Mahamaya Prasad Singh* v. *Abdul Hamid* (2). The previous decree was incapable of execution without the amendment. As regards notice they were issued but not properly served. Further, no notice is at all necessary. The application is, therefore, not barred.

Dr. *Sarat Chandra Basak* replied briefly.

JUDGMENT.—The question involved in this appeal is, whether the application for execution of the decree was barred by limitation.

The preliminary decree was dated the 28th June 1912 and the final decree was dated the 6th February 1915. The application for execution was made on the 25th March 1918, that is more than three years after the date of the final decree.

It appears that subsequent to the 25th March 1915 an application for amendment of the decree was made on behalf of the decree-holder. That application was allowed without any notice to the judgment-debtors. After the amendment was made the judgment-debtors were served with notice and then they appeared and raised objection to the execution on the ground that it was barred by limitation. The Courts below have overruled this plea and the judgment-debtor-defendant No. 3, has appealed to this Court.

As stated above, the decree was barred on the day the application for execution was made which was more than three years after the date of the final decree, and the mere fact that an application for amendment was made or that the decree had been amended would not have the effect of reviving a dead decree or giving a fresh start to the decree-holder unless the decree was incapable of execution before the amendment. See the case of *Anandram* v. *Nityananda Barham* (1) (Miscellaneous Appeal No. 291 of 1915 decided by Sharfuddin and Teunon, JJ., on 31st January 1916).

The lower Court has relied upon the case of *Mahamaya Prasad Singh* v. *Abdul Hamid* (2). But in that case the decree did not specify the reliefs granted and was incapable of execution unless it was amended; and it was, therefore, held that the application for execution of the decree after the amendment was not barred by limitation. In the present case the decree was capable of execution.

It is contended that in the preliminary decree it was stated that the order in which the properties would be sold, would be determined hereafter. That appears to be the direction in the judgment and there is no discrepancy between the judgment and the decree. The application for amendment merely stated that the preliminary decree and the final decree had been erroneously drawn, that the preliminary decree was not in accordance with the judgment nor was the final decree in accordance with the preliminary decree. The Court by its order of amendment stated that the order in which the properties would be sold, would be determined in the execution proceedings. We do not see how, if the decree was incapable of execution before the amendment, it became capable of execution by the order of amendment when it was made.

There was also some variation of a few rupees with regard to the amount of costs. That did not render the decree incapable of execution before amendment.

We was accordingly of opinion that the decree as it stood, was capable of execution and not having been executed within three years from the date of the final decree, was dead, and could not be revived by a subsequent application for amendment.

The appeal must accordingly be allowed and the application dismissed with costs in all Courts. We assess the hearing fee in this Court at one gold *mohur*.

Appeal allowed.

ABDUL WAHID *v.* HALIMA KHATUN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 873 OF 1918.

January 5, 1920.

Present :—Mr. Justice Tudball and Mr Justice Rafique.

ABDUL WAHID—PLAINTIFF—APPELLANT

versus

HALIMA KHATUN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption—Sale of right to receive certain allowances, whether subject to pre-emption.

The custom of pre-emption does not apply to a sale of the right of a *zemindar* to receive certain allowances from the *muafidars* of a village.

Second appeal from a decree of the Additional Subordinate Judge, Moradabad, dated the 82th of January 1918 confirming a decree of the Additional Munsif, Amroha, dated the 29th of November 1916.

FACTS.—In parts of the District of Moradabad there are two classes of proprietary rights, namely, *zemindari* rights and *muafidari* rights. The *muafidar* is really the proprietor and pays *nazarana* to the Government, the *zemindar* being entitled to receive a very small allowance from the *muafidars* and one of the *zemindars* sold this right, and another *zemindar* sued to pre empt the sale. The lower Court dismissed the suit on the ground that the custom of pre emption could not be applied to the sale.

The Hon'ble Saiyid *Raza Ali*, for the Appellant.

Mr. *S. A. Haidar*, for the Respondents.

JUDGMENT.—We think that the decision of the Court below was obviously correct. The right in respect of which pre emption is claimed is clearly one to which no custom of pre-emption could possibly apply. We dismiss the appeal with costs.

Appeal dismissed.

DHAR & CO. *v.* SIB NARAYAN SINGH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1466 AND 1554 OF 1918.

May 13, 1920.

Present :—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

IN No. 1466 OF 1918

MESSRS. DHAR AND COMPANY—PLAINTIFFS—APPELLANTS

versus

SIB NARAYAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN No. 1554 OF 1918

MESSRS. DHAR AND COMPANY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SIB NARAYAN SINGHA—PLAINTIFF—RESPONDENT.

Execution of document—Proof, method of—Civil Procedure Code (Act V of 1908), s. 102—Suit to recover price of coal, nature of—Appeal, second.

The ordinary mode of proving the execution of a document where the executant denies that he wrote it, is by calling some one who saw him write, or who knows his handwriting or by a comparison of his signature with his signature on other documents written by him. [p. 189, cols. 1 & 2.]

A suit to recover the price of coal supplied under an agreement is in the nature of a Small Cause suit, and where the amount sought to be recovered therein is below Rs. 500 a second appeal is barred under section 102 of the Civil Procedure Code. [p. 189, col. 2.]

Appeals against the decrees of the Additional District Judge, Hooghly, at Howrah, dated the 25th of April 1918, reversing that of the Munsif, 2nd Court, at Howrah, dated the 25th of September 1917.

FACTS appear from the judgment.

Babu *Mohendranath Roy* (with him Babu *Lalit Mohun Mitra*, Babu *Monmotha Kumar Pal* for Babu *Bipin Behary Ghose* (*Sr.*), for the Appellant.—Second Appeal No. 1463 of 1918 arises out of a suit by the appellants for recovery of damages from the defendant on the ground that the latter had failed to supply coal in accordance with an agreement evidenced by the letter (Exhibit 1). The lower Appellate Court has dismissed my suit on the ground that there was no direct evidence as to the signature of the defendant on Exhibit 1.

My only point is that the genuineness of a document embodying a contract can be proved by evidence other than

ERACHSHAW DOSABAI v. BAI DINBAI.

direct evidence is not the only mode of proving the genuineness of a contract. There are several papers on the record which bear the admitted signatures of the defendant; so when the defendant denied execution, the Court could have compared the signature on the letter (Exhibit 1) with those admitted signatures. Under these circumstances, I pray for a remand.

Dr. *Dwarkanath Mitra* (with him Babu *Satindranath Mookerjee*), for the Respondents—The letter (Exhibit 1) is the basis of the contract. It is alleged to be in the handwriting of the defendant. The handwriting, therefore, ought to have been proved. See section 67 of the Evidence Act. When the defendant denied that he wrote the document, his handwriting should have been proved by calling some one who saw the defendant write, or who knew his handwriting. The plaintiff having failed to do this, his suit has been rightly dismissed.

As regards Second Appeal No. 1554 of 1918, the appeal is clearly barred under section 102 of the Code of Civil Procedure.

Babu *Mohendranath Roy* replied.

JUDGMENT.—These two appeals arise out of two suits in one of which, *viz.*, in Second Appeal No. 1466 of 1918, the appellants Dhar and Co. claim Rs. 500, odd, as damages from the defendant on the ground that the latter had not supplied coal in accordance with the agreement entered into between them. In the other suit, Shib Narain Singh claimed Rs. 229, annas 6 from Dhar and Co. being the balance of the price of coal supplied by the former to the latter.

The Court of first instance decreed both the suits. On appeal, the learned District Judge dismissed the suit of Dhar and Co. and decreed the suit of Shib Narain Singh.

Dhar and Co. have appealed to this Court in both the cases.

In the first case, the learned Additional District Judge has held that as there was no direct evidence as to the signature of Shib Narain on the letter (Exhibit 1), the suit must fail.

No doubt, where an executant denies that he wrote a document, the ordinary mode of proving the execution is by calling some one who saw such person write, or who knows his handwriting. But that is not the only mode in which it can be be proved. For instance, in the present case there are several papers on the record which bear the admitted signatures of Shib Narain and the Court could have compared the signature on the letter with those signatures.

It has been pointed out to us that the judgment of the Munsif proceeded upon several grounds on the question whether the letter was written by Shib Narain, and none of those grounds have been taken into consideration by the lower Appellate Court.

In these circumstances, we think that the case (Second Appeal No. 1466) should be sent back to the lower Appellate Court in order that the question as to the genuineness of Exhibit 1 may be considered by it on the evidence on the record and the case disposed of according to law.

Costs to abide the result.

The other appeal (Second Appeal No. 1554 of 1918) arises out of a suit, as already stated, for recovery of Rs. 229, annas 6 being the balance of the price of coal supplied by the plaintiff to the defendant.

The suit being of the value of less than Rs. 500 is clearly of the nature of a suit cognisable by a Small Cause Court.

The appeal is accordingly dismissed with costs.

Appeals dismissed.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 227 OF 1919.

July 2, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr Justice Fawcett.

ERACHSHAW DOSABHAI TODDIWALA—DEFENDANT—APPLICANT

versus

BAI DINBAI—PLAINTIFF—OPPONENT.

Presidency Small Cause Courts Act (XV of 1882)

ERACHSHAW DOSABAI *v.* BAI DINBAI.

s. 19 (h)—*Arbitration—Reference by husband and wife to settle amount of maintenance payable to wife in case of separation, legality of—Award—Suit to enforce award, maintainability of—Jurisdiction of Small Cause Court.*

An agreement between a Parsi husband and wife to live separately is a lawful and binding agreement, and a reference to arbitration of the question as to the amount of the wife's maintenance, in the event of their separation, is quite legal. [p. 191, cols. 1 & 2.]

If an award is given on such reference the wife can sue to enforce the award and to recover arrears of maintenance under the award Such a suit is not barred from the cognisance of a Small Cause Court by clause (*h*) of section 19 of the Presidency Small Cause Courts Act, the suit not being one for the specific performance of a contract. [p. 191, col. 1.]

Appeal from the decision of the Acting Chief Judge, Small Cause Court at Bombay.

Mr. *K. N. Koyajee*, for the Applicant.

Mr. *S B. Dadyburjor*, for the Opponent.

JUDGMENT.—In this Civil Extraordinary Application we are asked to interfere with a decree passed by the Chief Judge of the Presidency Small Cause Court, awarding the opponent certain sums, on the ground that that Court had no jurisdiction to entertain the claims on which that relief was given. One of the claims relates to a question of costs regarding which we need only say there is no reason to differ from the view taken by the Full Court that there was jurisdiction.

Regarding the other claim, the main facts are as follows :—The applicant and opponent are husband and wife. It appears that, within six months of their marriage, they quarrelled and separated, and in November 1916 the wife obtained a decree for restitution of conjugal rights from the Parsi Matrimonial Court. For a short time thereafter they lived together, although it is alleged this was only by way of show, and then they separated again, which separation continues till now. A few months after the decree for restitution, the wife sued the husband in the Small Cause Court for return of certain articles of furniture and a Government promissory note, or their value. The suit was referred to arbitration and, along with it, certain other disputes were also referred to the same arbitrators. In the reference a list is given of matters in dispute between the parties to be decided by the arbitrators, and the first of these included the question what monthly allowance should be given to the wife by the husband for her maintenance, and from what time, in case the husband declines to live with his wife or *vice versa*. On this point the arbitrators in their award decided that the husband should pay Rs. 25 to the wife every month in advance as her monthly allowance. This award is dated the 8th of April 1918, and in 1919 the opponent sued the applicant in the Small Cause Court for the enforcement of the award. One of the prayers was for an order to the applicant to pay Rs. 275 as arrears of maintenance at the rate of Rs. 25 per month determined by the arbitators. The applicant in the suit urged that the award for payment of a maintenance allowance in case the husband and wife lived separate was against public policy, and, therefore, invalid. But this contention was disallowed by the Court. The Full Court also saw no reason to think that the reference or the award was illegal on that point.

For the applicant it is contended that the dispute was a matrimonial one in regard to which the Small Cause Court had no jurisdiction, and in support of this contention reliance is placed upon *Bai Gulbai* v. *Behramsha* (1). I shall refer to that case later on. I will first deal with the position as it appears to me. The suit out of which this application arises was one for the enforcement of an award, in which certain sums were claimed as being payable under the award. Such a suit is recognised by the Civil Procedure Code, Schedule I, Appendix A of which contains a Form, No. 10, for the plaint in such a suit, and many such suits have been filed in this country. Thus, in *Simson* v. *McMaster* (2) it was held that such a suit was cognizable by the Provincial Small Causes Court. It has further been held in *Fardunji* v *Jamsedji* (3) that a suit on an award to recover a certain sum of money allowed by the arbitrator is not a suit for a specific performance of the award, but a suit for the recovery of money and for relief incidental thereto. This is in accordance with the English Law, under which the

(1) 23 Ind Cas 441; 16 Bom. L. R 211; 33 B. 615.
(2) 13 M. 344; 4 Ind. Dec. (N. S.) 952.
(3) 5 Bom. L. R. 705; 28 B. 1.

plaintiff may either claim the amount awarded as the sum directed to be paid by the agreement to refer, in which is implied an agreement to perform the award or may claim damages for breach of the agreement. See Russell on Arbitration and Award, 10th Edition, page 265. Similarly, in *Bhajahari Saha Banikya* v. *Behary Lal Basak* (4) Mookerjee, J., says that when the Court orders the payment of a certain sum of money in such a suit, it really directs payment of compensation for non-compliance with the provision of the award and that it cannot be correctly maintained that pecuniary damages, in the case of a breach of contract for the payment of money, are equivalent to the specific performance of a contract. It follows that the suit cannot be treated as one for specific performance of a contract so as to be beyond the cognizance of a Presidency Small Cause Court. It has also been decided in *Kawasji* v *Sirinbai* (5) that an agreement between a Parsi husband and wife for their living separate is a lawful and binding agreement. That being so, the reference to arbitration of the question as to the amount of the wife's maintenance in the event of their separation was, in my opinion, quite legal. In Halsbury's Laws of England, Volume I, page 444, Article 945, in dealing with the nature of the disputes that may be referred to arbitration, it is expressly stated that a husband and wife may refer to arbitration the terms on which they should separate, because they can make a valid agreement between themselves on that matter; but they cannot refer to arbitration the question whether or no their marriage was a nullity or should be dissolved, because on those matters they cannot make any agreement between themselves. In view of the ruling in *Kawasji* v. *Sirinbai* (5), to which I have already referred, this passage plainly applies to the present case. If the reference of this dispute was legal, the award also was within the powers of the arbitrators.

The decision in *Bai Gulbai* v. *Behramsha* (1) is not, in my opinion, relevant to the question of the jurisdiction of the Small Cause Court to entertain this suit and pass a decree for arrears of maintenance. That decision merely says that if a Parsi wife sues for permanent alimony she must do so in a particular manner and in a particular Court. It does not in any way affect the ruling in *Kawasji* v. *Sirinbai* (5), that an agreement between a Parsi husband and wife in such a case is a legal one. The ordinary rule in regard to a suit to enforce an award is that "every award is enforceable by action in every Court of competent jurisdiction"—see Halsbury's Laws of England, Volume I, page 475, Article 592. The Small Cause Court had jurisdiction to entertain the suit in the form in which it is framed, and the fact that the wife, in the absence of any agreement between herself and her husband, or any award such as has been proved in this case, could only sue for alimony in the Parsi Matrimonial Court, cannot, in my opinion, affect the jurisdiction of the Small Cause Court in this case. It might be different if the award were being filed in this Court under section 15 of the Indian Arbitration Act, for section 2 of the Act limits the awards which can be dealt with under that Act to awards in matters which could form the subject of a suit. Here the opponent's suit is one which the law allows, and which has been brought in the proper Court for the adjudication of a monetary claim such as that which was the subject-matter of the suit. In my opinion, therefore, the application fails and the Rule should be discharged with costs.

Rule discharged.

(4) 33 C. 881 at p. 886 4 C. L. J. 162.
(5) 23 B. 279; 12 Ind. Dec. (N. s.) 185.

CALCUTTA HIGH COURT.
CIVIL RULE No. 265 OF 1920.
May 17, 1920.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

Srimati BHAGABATI DEBYA CHOWDHURANI AND OTHERS—PETITIONERS

versus

Babu NILKANTHA CHATTERJEE, COMMON MANAGER, BHITARBANDA ESTATE—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of B.C. 1885), s. 99, appli-

cation under, for restoration of management of estate to co-owners—Common manager appointed by District Judge, whether party to proceedings.

The common manager of an estate, appointed by the District Judge under the Bengal Tenancy Act, is not and cannot be made a party to a proceeding by the co-owners under section 99 of the Act for restoration of the management of their estate.

Rule against the order of the District Judge, Rangpur.

Babus *Surendra Ch. Sen, Hemendra Ch. Sen* and *Surendra Nath Bose* (No. 1), for the Petitioners.

Babus *Girija Prasanna Sanyal* and *Nilratan Banerjee*, for the Opposite Party.

JUDGMENT.—This is a Rule to show cause why certain orders of the District Judge of Rangpur passed in connection with an application for restoration of the estate to the co-owners should not be set aside.

It has been contended before us that the common manager, having been appointed by the District Judge on the ground that there was a dispute between the co-owners, and the owners having now joined in making a petition for the restoration of the estate, the Court has no power to inquire into the question whether the restoration can be made without inconvenience to the public or injury to private rights.

We are unable to go into these questions at the present stage, as the learned District Judge has not passed any final orders in the matter.

It is further contended on behalf of the petitioners that the common manager has practically been made a party to the proceedings because he has been allowed to engage a Pleader and is going to adduce evidence against the petitioners.

All that we need say is, that the common manager cannot be made, and is not, a party to the proceedings. We cannot give any directions as to the manner in which the inquiry is to be conducted by the Court below, except that the common manager cannot be made a party to the proceeding.

We do not express any opinion upon the other prayers in the petition.

With these remarks, the Rule is discharged.

Rule discharged.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 636 OF 1919.

June 17, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

RAJACHARYA SHESHACHARYA SHIRHATTI—APPELLANT

versus

CHEMANNA GURUSHANTAPPA MAGAVI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102, O. XXI, r. 71—Application to recover deficiency from defaulting purchaser—Amount sought to be recovered less than Rs. 500—Appeal, second, whether lies.

Where the amount sought to be recovered from a defaulting purchaser by an application under Order XXI, rule 71 of the Civil Procedure Code is less than Rs. 500, an order passed on the application is not subject to second appeal

Second appeal against the decision of the District Judge, Dharwar, in Appeal No. 135 of 1918, dismissing the appeal from the decision of the Subordinate Judge, Haveri, in Darkhast No. 226 of 1917.

Mr. *H. B. Gumaste*, for the Appellant.

Mr. *Nilkant Atmaram*, for the Respondent.

JUDGMENT.—The plaintiff-applicant applied under Order XXI, rule 71, to recover the deficiency of price from a defaulting purchaser. His claim has been disallowed in two Courts. The question arises whether a second appeal lies. The claim is for Rs. 260. But for the provisions of rule 71, a suit would have had to be filed for that amount. It would have been a Small Cause Court suit. But under the provisions of rule 71 the decree holder or the judgment debtor can proceed in execution to recover the deficiency as if there had been a decree already passed for the payment of that amount. We think, therefore, that we must treat the application made by the plaintiff as one made in execution of a Small Cause Court decree, and there is no second appeal from such an application. There is no reason why we should treat it as an application under section 115 of the Civil Procedure Code. The appeal is dismissed with costs.

Appeal dismissed.

BINDESHRI DUBE *v.* EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 387 OF 1920.

August 13, 1920.

Present :—Mr. Justice Gokul Prasad.

BINDESHRI DUBE AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—District Magistrate, power of, to direct re-trial by himself—Further inquiry, when to be directed.

A District Magistrate has no power, when acting under section 437 of the Criminal Procedure Code, to direct a re-trial by himself.

Where no fresh evidence is forthcoming, and the circumstances and the evidence are such that two different Courts might take a different view of the evidence, an order of discharge should not be interfered with by directing a further inquiry.

Criminal revision from the order of the District Magistrate, Basti, dated the 2nd June 1920.

Messrs. *S. C. Mukerji*, *Kamuda Prasad* and *Badri Narain*, for the the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application to revise an order of the District Magistrate of Basti directing, as he says in his judgment, a re trial of the applicants under section 437 of the Code of Criminal Procedure. He further says that "the trial will take place in his Court." Perhaps, the District Magistrate was thinking of a further inquiry and has confused the re-trial with what the law allows a further inquiry. Of course, he could not under the law direct a re trial by himself. The order, as it is put down, strictly speaking, is without jurisdiction, but taking the order to be as one passed under section 437 of the Code of Criminal Procedure there are serious difficulties in the way of the Magistrate's order being confirmed. Before proceeding to discuss the circumstances of the case one has to bear in mind some of the general principles which have to be considered and applied in deciding a matter like the present one. One of those is that, if the circumstances and the evidence are such that two different Courts might take a different view of the evidence, no further inquiry should be directed ; *vide Chandan* v. *Kallu* (1). Another principle has to be borne in mind that no Court is to pass an

(1) 9 Ind. Cas. 274; 8 A. L. J. 45; 12 Cr. L. J. 45.

GOVIND PANDURANG, *In re.*

order to the prejudice of an accused person without giving him a notice to show cause against it. It is unnecessary to enter into the question of want of notice for the purposes of deciding this application. I have been taken through the judgment of the presiding officer of the first Court and it seems to me a well considered and reasoned judgment which can, under no circumstances, be said to be either perverse foolish or *prima facie* incorrect. There is no suggestion in this case that any further evidence is forthcoming and it is difficult to understand on what grounds the District Magistrate has set aside the order of discharge passed by the first Court and directed, what he calls, a re trial. I, therefore, set aside the order of the District Magistrate directing a re-trial or a further inquiry if that word means that and direct that no further action be taken against the accused.

Re-trial ordered.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 194 OF 1920.

August 24, 1920.

Present :—Mr. Justice Shah and Mr. Justice Crump.

In re GOVIND PANDURANG—COMPLAINANT.

Penal Code (Act XLV of 1860), ss. 192, 193—Criminal Procedure Code (Act V of 1898), s. 195 (b)—Fabricating false evidence—Execution proceedings, whether judicial proceedings—Judicial proceeding not pending—Sanction, whether necessary.

Execution proceedings are judicial proceedings for the purpose of sections 192 and 193 of the Penal Code. It is not essential for the purpose of these sections that the judicial proceeding in which the person intends to use the false evidence must be pending at the date of the fabrication. [p. 194, col. 1.]

In the absence of any proceeding, pending or disposed of, in which or in relation to which an offence under section 193 of the Penal Code is said to have been committed no sanction under section 195 (*b*) of the Criminal Procedure Code is necessary. The clause cannot apply to any future judicial proceeding for which the false evidence may have been fabricated. [p. 194, col. 2.]

Criminal application from an order passed by the Acting Fifth Presidency Magistrate, Bombay.

MAZHAR HUSAIN *v.* EMPEROR.

Mr. *A. R. Gadkari*, for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—This is an application by the complainant for the revision of the order dismissing the complaint and discharging the accused. The Trial Magistrate was of opinion that the execution proceedings would not be judicial proceedings, and that, therefore, the alleged fabrication of false evidence could not fall under the first part of section 193 of the Indian Penal Code. He was also of opinion that the allegations in the complaint did not bring the case under the second part of that section. It was urged on behalf of the accused that the sanction of the Court at Rajapur, which had passed the decree in favour of the complainant, was necessary under section 195 (*b*), Criminal Procedure Code. The learned Magistrate apparently thought that his view that the execution proceedings were not judicial proceedings was decisive of the complaint, and he expressed no opinion on the question of sanction. He overruled the contention of the complainant that the complaint would be covered by the second part of section 193 of the Indian Penal Code.

We are of opinion that the learned Magistrate is wrong in his view that the execution proceedings are not judicial proceedings for the purpose of sections 192 and 193 of the Indian Penal Code. It is not essential for the purpose of these sections that the judicial proceeding in which the person intends to use the false evidence must be pending at the date of the fabrication. It is clear, therefore, that the complaint cannot be dismissed on the ground that the execution proceedings are not judicial proceedings.

It is urged, however, on behalf of the accused, and the contention is supported by the Crown, that the sanction of the Court at Rajapur is necessary under section 195 (*b*), Criminal Procedure Code. It is difficult to understand why any sanction of that Court under section 195 is necessary in this case. There was a decree passed by that Court; and payment is said to have been made by the accused outside the Court to the complainant. The complaint is made with reference to certain acts of the accused relating to the alleged payment. There was no execution proceeding actually pending in that Court at the time of the alleged payment. It has been stated before us on behalf of the complainant, and not challenged on behalf of the accused, that no execution proceeding is pending. Nor is it asserted that the judgment-debtor has made any application to that Court to have this payment certified in accordance with the provisions of the Code of Civil Procedure. Despite the statement in the complaint that a judicial proceeding is pending in the Court at Rajapur, it must be taken, for the purpose of the present application, that there was no proceeding pending at the date of the alleged offence before that Court. It is clear, therefore, that no sanction of that Court is necessary. In the absence of any proceeding pending or disposed of, in which or in relation to which the offence under section 193, Indian Penal Code is said to have been committed, no sanction under section 195 (*b*) is necessary. The clause cannot apply to any future judicial proceeding, for which the false evidence may have been fabricated.

The question raised on behalf of the complainant as to whether the offence would be covered by the second part of section 193 does not arise. We, therefore, make the Rule absolute, set aside the order of discharge and send back the case to the Trial Court in order that the complaint may be dealt with according to law.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 621 OF 1920.

September 23, 1920.

Present:—Mr. Justice Gokul Prasad.

MAZHAR HUSAIN—APPLICANT

versus

EMPEROR, THROUGH ABDUL KARIM—OPPOSITE PARTY.

Workman's Breach of Contract Act (XIII of 1859)—Contract entered into where Act not in force, effect of—Minor, contract with, or for more than one year, validity of.

A contract entered into under the Workman's Breach of Contract Act at a place where that Act is not in force cannot be enforced, and the con-

tracting workman is not liable for any breach of the contract.

A contract under the same Act for a period exceeding one year, or by a person under the age of 18 years, is void.

Criminal reference made by the Sessions Judge, Allahabad, dated the 19th August 1920.

ORDER OF REFERENCE.—A Magistrate of the first Class has passed a certain order, against the applicant Mazhar Husain to return to work, under Act No. XIII of 1859 as amended by Act No. XII of 1920. Action was taken against Mazhar Husain under the Act after the amendment. Mazhar Husain has applied to this Court that the order of the lower Court should be discharged. It was represented on behalf of the opposite party that no higher Criminal Court had jurisdiction to interfere by way of revision. I think, however, that there is an inherent power in the Hon'ble High Court to revise the proceedings of all Subordinate Criminal Courts and, if I consider action in the case necessary, a reference could be made to the High Court. The order of the lower Court does not appear to me to be justified for the following reasons:—

(1). The contract for service was executed by the applicant Mazhar Husain in Najibabad and the contract does not contain any specific condition of his liability to work in Allahabad. Action was taken against Mazhar Husain for refusing to work at the Glass Factory in Allahabad where the Act is prevalent. The Act, however, has no operation at Najibabad where the contract was entered into, so Mazhar Husain was not liable to action under the Act.

(2) Though the contract was entered into prior to the passing of the Amending Act, I am of opinion that the Act prevalent at the time of action would apply. Under the Amending Act the operation thereof is barred with reference to contracts where the period of performance exceeds one year. The contract in question is for three years and so the Act is not applicable.

(3). It appears that the applicant's age at the time of the execution of the contract was under 18, and the applicant being a minor at the time could not enter into any contract. Under the provisions of section 4 of the Amending Act which defines contract to be contract within the meaning of the Indian Contract Act, 1872, the contract is void, and the Act is not applicable thereto. The record shall be submitted to the Hon'ble High Court with a recommendation that the order of the lower Court be discharged Before the submission is made, the lower Court's explanation, if any, shall be obtained.

JUDGMENT.—For the reasons stated at length by the learned Sessions Judge, I discharge the order of conviction passed by the Trial Court.

Order discharged.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 321 OF 1920.

August 16, 1920.

Present:—Mr. Justice Shah and Mr. Justice Crump.

CHANGOUDA PIRGOUDA—ACCUSED

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 238—Trial for offence with aid of assessors—Conviction for minor offence triable by jury, legality of.

Section 238 of the Criminal Procedure Code empowers a Court trying an accused person for an offence with the aid of assessors to convict him for a minor offence triable by jury. [p. 196, col. 2.]

Criminal appeal from conviction and sentence passed by the Sessions Judge, Belgaum.

Mr. *G. B Chitale*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

CRUMP, J.—This appeal raises a point of law which is not entirely free from difficulty. It may be stated as follows:—By virtue of Government Notification No. 7087, dated October 1915 published at page 257 of the *Bombay Government Gazette*, Part I, for 1915, the offence of murder, punishable under section 302 of the Indian Penal Code, is triable before the Court of Session of Belgaum with the aid of assessors: and the offence of causing grievous hurt by a dangerous weapon punishable under section 326 of the Indian Penal Code is triable before the same Court by a jury. In the present case the accused stood charged with murder and with no other offence, and the offence was, therefore, triable by the Sessions Court with the aid of asses-

sors. That offence was so tried up to and including the stage of the trial at which the two assessors recorded their opinions. After those opinions had been recorded the Sessions Judge adjourned the case for judgment. He held that the facts were within the scope of section 326 and not section 302 and, therefore, convicted the accused of the former offence.

It is urged in appeal that the conviction is illegal. The argument is that the offence under section 326 was triable by a jury and not with the aid of assessors, and that, as it was not tried by a jury, the Sessions Judge could not convict the accused under that section.

Apart from the question of procedure, it cannot be doubted that the terms of section 238 of the Code of Criminal Procedure, as interpreted by this High Court, are wide enough to permit a Court to convict an accused person charged with murder of an offence under section 326 of the Indian Penal Code, if, for instance, the Sessions Judge had in this case held the accused guilty of an offence punishable under section 304 of the Indian Penal Code, which is also triable with the aid of assessors, the conviction would clearly be permissible by virtue of section 235 of the Code of Criminal Procedure.

I am unable to find that the exact point now before us has ever been the subject of judicial consideration. There are many decisions as those cases where the trial has been wrongly held *ab incepto* either before a jury or with the aid of assessors as the case may be. But those decisions do not assist us here. As I have said the procedure was strictly in accordance with law up to and including the stage when the assessors gave their opinions. Nor is there any specific direction by the Legislature on the point. In enacting section 536 of the Code of Criminal Procedure the Legislature must be taken to have had in mind cases where the procedure has been wrong through out. Literally read, clause (2) of that section covers the present case but here it is obvious that there was no opportunity to take objection and it is, therefore, difficult to hold that the defect (if any) is cured by that clause.

But, in my opinion, there is no defect here. The powers given by section 238 to convict of a minor offence are not controlled by those sections which prescribe the procedure to be followed in trying the offence charged. Here the charge was of murder and the trial was regular in point of procedure. The Court, therefore, before which the trial was held had power to convict of a minor offence. This view finds support in the case of *Pottikadan Ummaru* v. *Emperor* (1). In that case the jury had power to try the offence charged but the conviction was for a minor offence which was not charged and which the jury were not empowered to try. I agree with the remarks of Bhashyam Ayyangar, J., as to the scope of section 238, with reference to such cases and those remarks are applicable here for in this case the Court had power to try the offence charged but the conviction was for a minor offence which was not charged and which the Court had no power to try. I agree that section 238 invests the Court trying the offence (however constituted) with authority to find as an incident to such trial that certain facts only are proved in the trial which facts constitute a minor offence though such minor offence is not triable by the Court as constituted.

Upon the facts of the case, I am satisfied that the guilt of the accused is proved. I would, therefore, confirm the conviction and sentence and dismiss the appeal.

SHAH, J.—The appellant before us was charged with the murder of his uncle Vomgouda committed at Rajapur in the Chikodi Taluka about an hour before dawn on the 23rd November 1919. He was tried by the Sessions Judge of Belgaum with the aid of assessors. No other charge was framed. The assessors were asked their opinions only as to the charge of murder. They found that the accused was not guilty. The Sessions Judge was satisfied that the accused caused injuries to the deceased; but on the medical evidence he was of opinion that the injuries caused amounted to grievous hurt and that the accused was guilty of an offence punishable under section 326, Indian Penal Code. This being a minor offence he convicted the accused of it, though no charge was framed. He observed in his judgment that this view of the nature of the offence was not put forward in defence and that it occurred to no one except himself

(1) 26 M. 243; 2 Weir 388 & 463.

and only at the time of his final consideration pending judgment. The accused was sentenced to rigorous imprisonment for five years.

In the appeal it has been urged on his behalf that in the District of Belgaum an offence punishable under section 326, Indian Penal Code, when tried in the Court of Session is triable by a jury under the Government Notification No. 7087, dated 19th October 1915 (published in the *Bombay Government Gazettee*, Part I, 1915, p. 2579 and in the Criminal Circulars, as supplementary Criminal Circular No. 5); that the course followed by the Sessions Judge has deprived him of an opportunity to claim to be tried by a jury for the offence under section 326, Indian Penal Code, and that there should be a fresh trial by a jury on the charge under that section. On behalf of the Crown it is urged that the trial was valid as no objection was taken under section 536, sub section (2), Criminal Procedure Code; that the irregularity, if any, is condoned by section 537, Criminal Procedure Code, and that under section 238 the Sessions Judge was well within his powers in convicting the accused of the minor offence even though no charge was framed, and even though the minor offence would be triable by a jury if a charge was framed.

It is clear that the present case is not covered by section 536 of the Code. The trial proceeded on the charge of murder, which was triable with the aid of assessors. In the absence of any charge under section 326, Indian Penal Code, it is difficult to say that an offence triable by a jury was tried with the aid of assessors within the meaning of the section. In the present case the view taken by the Sessions Judge came to be known to the accused when he recorded his finding; and it is difficult to attach any significance to the omission on the part of the accused to raise any objection. Until the judgment was delivered, there was nothing to object to. I do not think that a case of this type is contemplated by section 536.

Section 537 of the Code also seems to me to be inapplicable. In view of the express provisions of section 536, I doubt whether the point as to the validity of the conviction based on the ground of the form of the trial is intended to be covered by section 537. Assuming that the words of the section are wide enough to cover such a case, I should hesitate to hold that an omission to try the accused by a jury has not occasioned a failure of justice. Section 536 indicates that a trial by a jury is treated as a valuable right, which the parties concerned can insist upon by raising an objection in time to a trial with the aid of assessors. Some of the judgments in *King-Emperor* v. *Parbhushankar* (2) clearly indicate that, under the scheme of the Code the trial by a jury, is a valuable right: I am concerned with what is indicated by the scheme of the Code and, having regard to the importance of the form of the trial, I should be slow to allow the omission to be condoned by section 537.

It is clear, however, that, under section 238 of the Code, the accused could be convicted of the minor offence. That section provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence he may be convicted of the minor offence although he is not charged with it. In the present case the trial was perfectly valid, and the Trial Court had power under the section to convict the accused of the minor offence. This section has nothing to do with the form of the trial nor with the convicting authority. It provides that an accused person may be lawfully convicted of a minor offence although he is not charged with it. Ordinarily a charge ought to be framed under the provisions of the Code: but in the case of a minor offence a conviction can be recorded without the charge being framed. It seems to me to follow, if the provisions of this section are to be given effect to, that the Court which is competent to try the accused for the higher offence is competent to convict him of the minor offence. If, in the case of the minor offence, the form of the trial is different from that for the higher offence, as is the case here, and if the Tribunal as constituted for the trial of the higher offence is unable to deal with the minor offence on that ground, it seems to me that the operation of section 238 would be unduly curtailed. No doubt, where a charge for the minor offence is framed there can be no difficulty. The proper form

(2) 25 B. 630; 3 Bom. L. R. 278.

of the trial can be adopted; and section 269, sub-section (2), provides for dealing with the trial of offences, some of which are triable by a jury and some with the aid of assessors. But where no charge is framed, if there is to be a re trial, if the minor charge happens to be triable by a jury, it seems to me that the provisions of section 238 would be nugatory in such cases. The necessary implication of section 238 appears to be that there need be no separate trial with reference to the minor offence. According to the section, even the charge is not required to be framed.

The only authority that could exercise the power under the section could be the authority trying the higher offence. There is on express provision in the Code providing for a case of this type. In the absence of any provision indicating the intention of the Legislature to the contrary, I am of opinion that the Sessions Judge was competent to convict the accused under section 326, Indian Penal Code, even though the offence was triable by a jury.

At the same time, where the form of the trial depends upon the charge in respect of the minor offence being framed, I think care should be taken to frame the charge, where the facts indicate a reasonable possibility of the minor offence being made out, so that, from the beginning, the trial may proceed according to the provisions of the Code, and the parties concerned may have an opportunity to object to the trial with the aid of assessors, if so advised. In the present case the observations of the learned Trial Judge show that the minor offence was not anticipated and that no charge in respect of it could have been framed.

As regards the merits, I am satisfied that the Sessions Judge is right in his conclusion. I agree that the conviction and sentence should be confirmed and the appeal dismissed.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 535 OF 1920.

October 1, 1920.

Present:—Mr. Justice Gokul Prasad.

Syed SAKHAWAT HAIDAR—PETITIONER—APPLICANT

versus

EMPEROR, THROUGH DHOMMI SINGH—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 193—Perjury—Promissory note—Accused denying receipt of consideration—Prosecution, duty of, to prove passing of consideration.

The rule of law contained in the Negotiable Instruments Act that the presumption is that a promissory note was passed for consideration, does not necessarily apply to a criminal trial. Therefore, in a prosecution for perjury, under section 193 of the Penal Code, arising out of a civil suit upon a promissory note in which the accused denied the receipt of consideration, it is for the prosecution to prove that consideration did pass, and not for the accused to prove the contrary. [p. 199, col. 1.]

Criminal revision against the order of the Sessions Judge, Meerut, dated the 8th of May 1920.

Messrs. *S. N Banerji* and *Kumuda Prasad*, for the Applicant.

Mr. *S. C. Mukerji*, for the Opposite Party.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The facts of this case briefly are these:—That Dhommi Singh brought a suit for sale on a mortgage against the accused. Part of the consideration of the mortgage consisted of two promissory notes. The defence by the accused was that those promissory notes were without consideration. This defence was repelled by the Trial Court which passed a decree for the full amount claimed. Dhommi Singh then put in an application for sanction to prosecute the accused. The sanction was ultimately granted and the accused was tried under section 193 of the Indian Penal Code and has been convicted. The conviction has been confirmed by the learned Sessions Judge of Meerut. The chief point taken before me is that the lower Appellate Court has erred in throwing upon the accused the burden of proving that he had not received the consideration for the promissory notes and had, therefore, committed perjury punishable under section 193 of the Indian Penal Code. There is no doubt that the learned

EMPEROR, *v.* ALIBHAI ABDUL VORA

Judge seems to have taken this view. For the purposes of the Civil Courts the Negotiable Instruments Act lays down that the presumption is that a promissory note has been passed for consideration. That rule of law would not necessarily apply to a criminal trial in which every element which goes to constitute a particular offence has to be proved by the prosecution. In the present case it was necessary for the prosecution to prove that the promissory notes were for consideration and it was not for the accused to prove the contrary. A perusal of the judgment of the trying Magistrate, however, shows that all the circumstances connected with this case went conclusively to prove that the promissory notes were for consideration. There were, at least, the admissions of the accused himself which, coupled with the evidence of the complainant, clinched the case against him and showed that his statement made in the civil suit that the promissory notes were without consideration was false. Having regard to the social position of both the parties I think the Trial Court exercised a sound discretion in awarding the punishment it did. I see no reason to interfere in revision and dismiss the application.

Application dismissed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 39 OF 1920.

July 13, 1919.

Present:—Mr. Justice Shah and Mr. Justice Crump.

EMPEROR—PROSECUTOR

versus

ALIBHAI ABDUL VORA—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 345—Composition of offence with one of several accused persons, whether operates as acquittal in respect of all.

Where an offence is compounded with one of several accused persons, the composition does not necessarily have the effect of an acquittal in the case of all the accused. [p. 200, col 1]

Criminal reference made by the District Magistrate, Kaira,

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

CRUMP, J.—This is a reference from the District Magistrate of Kaira recommending this Court to set aside an order passed under section 250 of the Code of Criminal Procedure directing compensation of Rs. 30 to be paid to accused No. 1 in the case, on the ground that the complaint was frivolous and vexatious. It appears that the complaint in this case was originally lodged against three persons. Process was issued against two of them and as regards accused No. 2 the complainant presented an application for compromise and an order was made acquitting that accused under section 345 of the Code of Criminal Procedure. The case proceeded against accused No. 1 alone with the result that has already been stated.

The District Magistrate bases his recommendation upon the ground that, where there are more than one person against whom the complaint has been made, the offence cannot be compounded as regards one such person only. Our attention has been invited to a decision [*Chandra Kumar Das* v. *Emperor* (1)] which supports this view. There is, on the other hand, a reported decision of the Madras High Court [*Muthia Naik* v. *Emperor* (2)] in which the contrary view is taken. In my opinion, the view of the Madras High Court is correct. The policy of the Legislature is that, in the case of certain minor offences, where the interests of the public are not vitally affected, the complainant should be permitted to come to terms with the party against whom he complains and those offences are specified in section 345 of the Code of Criminal Procedure. There is nothing to my mind in the words of the section itself which supports the view taken by the Calcutta High Court. I do not think that the word 'offence' necessarily connotes all the offenders; that is to say, all the persons against whom the complaint is made. It appears to me that the offence for the purposes of this section is the offence of each offender. A composition is an arrangement or settlement of differences between

(1) 7 C. W. N. 176.

(2) 43 Ind. Cas. 592; 41 M. 323; 19 Cr. L. J. 176.

the injured party and the person against whom the complaint is made, and it may well happen that where there is more than one such person, a satisfactory settlement may be possible with one of them and may not be arrived at with another. It would be easy to quote instances in which this might be the case, and, as I read the section, there is nothing to prevent such a composition with one accused, nor is there any reason why that composition should necessarily have the effect of an acquittal in the case of another accused as between whom and the complainant no satisfactory settlement has been arrived at nor is there anything in the policy of the Legislature to which I have alluded which points to any such intention. It would, indeed, in my opinion, be inconvenient if such an interpretation were adopted and that is a further reason for following the decision of the Madras High Court on this point.

For these reasons, therefore, I am of opinion that the point of law upon which this reference is based is not a good point of law and, therefore, it follows, as that is the only point before us, that the order of compensation which we are asked to set aside was a proper order and should be maintained.

I would, therefore, discharge the Rule and return the proceedings with these remarks.

SHAH, J.—I concur. I desire to add that, in view of the difference of opinion between the two High Courts on this point, I have felt some difficulty in coming to a conclusion in this case. On general consideration it seems to me that there is much to be said in favour of either view; but on the whole I am satisfied that the correct view of section 345 is the one which has been taken by the Madras High Court in *Muthia Naick* v. *Emperor* (2) and which has been accepted by my learned brother.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 450 OF 1920.

September 3, 1920.

Present:—Mr. Justice Gokul Prasad.

ABDUL GHAFOOR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 464—Using forged document—Offence.

Where an insolvent uses a forged document with the intention of supporting his claim to be declared insolvent, he is liable to conviction under section 464 of the Penal Code. [p. 201, col. 2.]

Criminal revision against an order of the Sessions Judge, Mirzapur, dated the 14th of June 1920.

Mr. *S. N. Mukerjee*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The facts which have given rise to this revision are as follows:—

The accused, Abdul Ghafoor, was declared an insolvent by the District Judge of Allahabad. He wanted to take some contract from the Municipal Board and found that his application would not be considered until he obtained an order to the effect that he was solvent. He thereupon went to the Official Receiver who told him that he could not give him a certificate of solvency, until he, the accused, proved to his satisfaction that all the outstanding debts against him had been paid up. There was an amount of Rs. 73-12 due from the accused on account of arrears of rent to the Cantonment authorities. This had been written of as bad debt, the Official Receiver having had no funds in hand to pay it. The accused then went away and returned a few days later with a receipt showing that the aforesaid amount had been paid up. An application was then put in by the accused accompanied by the said receipt and other receipts for the purpose of being declared solvent and annulment of the adjudication order. The suspicions of the District Judge were aroused about the genuineness of this receipt and he directed the prosecution of the accused under section 476 of the Criminal Procedure Code. The accused has been tried and convicted under section 465, 471 of the Indian Penal Code for fraudulently using as genuine the receipt aforesaid, knowing it to be forged.

He was sentenced to one year's rigorous imprisonment. He appealed and the conviction and sentence have been upheld. He comes in revision to this Court. It is contended on his behalf that it has not been shown that the forged receipt was used dishonestly or fraudulently as defined by the Indian Penal Code. None of the findings of fact of the Court below has been challenged before me. It is admitted that the receipt is a forged one and the whole argument has proceeded on the assumption that it is so. Mr. Saila Nath Mukerji for the applicant has addressed a very long and elaborate argument, but, put in short, it comes to this that the accused only wanted to be declared solvent, there was no injury to the public or any person intended, there was no dishonest intention, the accused was not entering into a contract with the District Judge and there was no intention to commit fraud. A large number of cases have been cited: *Queen Empress* v. *Sheo Dayal* (1), *Queen-Empress* v. *Girdhari Lal* (2), *Queen Empress* v. *Haradhan* (3), *Jan Mahomed* v. *Queen-Empress* (4), *Queen-Empress* v. *Soshi Bhushan* (5), *Queen Empress* v *Muhammad Saeed Khan* (6), *Kotamaraju Venkatarayudu* v. *Emperor* (7), *Ali Husan* v. *King-Emperor* (8). I do not think it necessary to discuss every one of these rulings in detail. The case put briefly comes to this, that the accused, by means of a forged receipt, wanted to obtain an order declaring him to be solvent so as to enable him to apply for a contract to the Municipality. He was, because of his insolvency, under a disability and, in order to get it removed, he intended to obtain an order from the Court by practising deceit on the Court, an order which the Court would never have passed if the real facts had come to its knowledge; or, in other words, he intended to obtain a wrongful gain to himself, *i. e.*, the profits from the contract with the Municipality, *vide* section 23 of the Indian Penal Code. It is unnecessary for the purposes of the present case to enter into a consideration whether such wrongful gain would have of necessity entailed wrongful loss to another person, although it might be said that the person who would have suffered wrongful loss might have been a rival applicant for the contract who might have failed because of the success of the applicant's petition for the contract. I deem it unnecessary to pursue this matter further, having regard to the express wording of section 24 of the Indian Penal Code, which runs as follows:—"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly" Therefore, the case falls under section 464 of the Indian Penal Code. It was a forgery because the intention which the accused had was to support his claim to be declared a solvent person, *vide Kotamaraju Venkatarayudu* v. *Emperor* (7). In the case of *Queen-Empress* v. *Muhammad Saeed Khan* (6), referred to above, Banerji, J. says at page 115, "Where, therefore there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud, and if a documen is fabricated with such intent, it is a forgery. This was held by this Court in *Queen-Empress* v. *Soshi Bhushan* (5). A somewhat wider interpretation has been placed on the word 'fraud' by the Bombay High Court in *Queen-Empress* v *Vithal Narayan* (9), which was followed by the Calcutta High Court in *Lolit Mohan Sarkar* v. *Queen Empress* (10). In the case in the Bombay High Court the learned Judges accepted the interpretation of LeBlanc, J., in *Haycroft* v. *Creasy* (11) "that by fraud is meant an intention to deceive, whether it be from any expectation of advantage to the party himself or from ill-will towards the other is immaterial." So that in this case, looked at from any point of view, the accused is guilty of the offence of using as genuine a forged document

(1) 7 A. 459; A. W. N. (1885) 85; 4 Ind. Dec. (N. S.) 720.

(2) 8 A. 653; A. W. N. (1886) 264; 5 Ind. Dec. (N. S.) 393.

(3) 19 C. 380; 9 Ind. Dec. (N. S.) 698.

(4) 10 C. 584; 8 Ind. Jur. 569; 5 Shome L R. 158; 5 Ind. Dec. (N. S.) 391.

(5) 15 A. 210; A. W. N. (1893) 96; 7 Ind. Dec. (N. S.) 853.

(6) 21 A. 113; A. W. N. (1898) 197; 9 Ind. Dec. (N. S.) 781.

(7) 28 M. 90 (F. B.); 1 Weir 538 (*a*).

(8) 3 A. L. J. 149; A. W. N. (1906) 48; 3 Cr L J. 249; 28 A. 368.

(9) 13 B. 515 *note*.

(10) 22 C. 313; 11 Ind. Dec. (N. S.) 210.

(11) 2 East 92 at p. 108; 6 R. R. 380; 102 E. R. 303.

knowing it to be such and has been rightly convicted. A good deal has been said to me about the sentence passed on the accused and it has been brought to my notice that he is the only adult male member of the family who earns the family bread and that the forgery was such a clumsy one that it could never have deceived any one and that, having regard to the circumstances of the whole case, the sentence passed is unduly severe. The idea of the accused was not to cheat the Cantonment authorities who had already written off the amount of the tax but it was to get the stain removed from his character which unfitted him from taking contracts and thus earning an honest living. Under these circumstances, I think the sentence should be reduced to one of six months' rigorous imprisonment and I so direct. In other respects, the application is dismissed.

Sentence reduced.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 117 OF 1920.

July 7, 1920.

Present :— Mr. Justice Shah and Mr. Justice Crump.

ALEX PIMENTO AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—PROSECUTOR.

Penal Code (Act XLV of 1860), s. 499—Defamation—Harm, actual, to reputation, whether necessary—Criminal Procedure Code (Act V of 1898), ss. 537, 540—Prosecution evidence recorded after defence evidence closed—Irregularity.

In order to render the offence of defamation complete, there must be an imputation with reference to a person intending to harm, or knowing, or having reason to believe that such imputation will harm the reputation of the person against whom the imputation is made Proof of actual harm to the reputation of the person defamed is not necessary. [p 203, col. 2; p. 203, col. 1.]

The special powers conferred upon a Court by section 540 of the Criminal Procedure Code may be exercised under proper circumstances, but the recording of evidence on behalf of the prosecution after the defence evidence is closed cannot be justified. It is an irregularity which ought to be avoided. [p. 203, col. 2.]

Criminal application for revision from convictions and sentences passed by the First Class Magistrate, Salsette, confirmed on appeal by the Sessions Judge, Thana, in Criminal Appeal No. 105 of 1919.

Mr. *G. N. Thakor*, for the Applicants.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—Two points have been raised in support of this application: first that the offence of defamation of which the petitioners have been found guilty, is not complete as there is no proof in this case that the defamatory words actually caused harm to the reputation of the person with reference to whom they were used; and, secondly, that certain evidence on behalf of the prosecution was improperly admitted by the Trial Court after the defence evidence was closed.

As regards the first point, Mr. Thakor has relied upon Explanation 4 of section 499 of the Indian Penal Code and upon the judgment of Mr. Justice Davar in *Anandrao Balkrishna* v. *Emperor* (1). Apart from the decisions, it seems to me that the words of the section lend no support whatever to the contention urged on behalf of the applicants. The words of the section material to the point under consideration are that "Whoever...makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said...to defame that person." Explanation 4 points out as to when an imputation is said to harm a person's reputation within the meaning of this section. But what is necessary to complete the offence is that there must be an imputation with reference to a person intending to harm, or knowing, or having reason to believe that such imputation will harm the reputation of the person against whom the imputation is made. The expression used in the section is "intending to harm or knowing or having reason to believe that such imputation will harm" and not "harming". There is an obvious difference between the meanings of these two expressions and the argument based upon

(1) 27 Ind. Cas. 657; 17 Bom. L. R. 82; 3 Bom. Cr. C. 15; 16 Cr. L. J. 177.

Explanation 4 involves the result that there is no difference between the two expressions. Such a result cannot be accepted. If the Legislature intended that it was an essential part of the offence of defamation that harm should be caused to the reputation of the person against whom the imputation was made, the words "intending to harm or knowing or having reason to believe that such imputation will harm" could have been omitted and the word "harming" could have been easily substituted therefor to convey the meaning which is now sought to be put upon the section.

I do not say that the question of actual harm to the reputation of a person can never be relevant in determining the question of intention or knowledge or belief required by the section. In some cases it may be very useful to know whether any actual harm has resulted in determining whether the person making the imputation had the necessary intention or knowledge. But the proof of actual harm is not essential.

All the decided cases, except the one which has been relied upon by Mr. Thakor, are against his contention. In the case relied upon by him undoubtedly Mr. Justice Davar took the view which is in his favour. Mr. Justice Heaton took a different view in that case; and I expressed no opinion on the point as I did not consider it necessary for the purpose of the decision in that case to do so. The point, however, has been raised now and the view which found favour with Mr. Justice Davar has been relied upon before us. I have carefully considered all the reasons stated by Mr. Justice Davar in his judgment. With great respect, I am unable to agree with Davar, J., and agree with Heaton, J., on this point I think that the offence in this case was complete without any proof of actual harm to the reputation of the person defamed.

The words used in this case are clearly defamatory. The words found to have been used by the first petitioner are these: "What a liar you are, you are a worthless chap, you are a shameless priest, a robber, you have cheated Government." The second petitioner is found to have used these words: "You have cheated Government you have robbed Rs. 500 from Juvam." There can be no doubt that the person who used the words intended to harm the reputation of the person with reference to whom they were used.

The second point relates to the recording of evidence after the defence was closed in this case. It does not appear from the record whether this evidence was called by the Court under section 540, Criminal Procedure Code, and it must be taken for the purposes of the point which has been urged before us that it was adduced on behalf of the prosecution and not called for by the Court under the powers vested in the Court under section 540 of the Code of Criminal Procedure. Taking that to be the fact, it is not shown from the nature of the evidence recorded that it has any bearing upon the question as to whether the defamatory words were in fact used. Both the Courts in this case have found that the defamatory words were used by the accused; and it is difficult to see how the recording of this additional evidence at the stage at which it was recorded can be said to have prejudiced the accused. It is also important in connection with the point of prejudice to remember that no objection was taken at the time on behalf of the accused. There is no allegation that this evidence was recorded in the absence of the accused. No objection was taken in the lower Appellate Court as regards this evidence. These facts support the inference that there was no prejudice in this case to the accused from the evidence thus recorded. At the same time, I desire to point out that the procedure laid down in the Code with regard to the trials must be strictly followed. In the present case the procedure applicable was that provided for the trial of warrant cases by Magistrates and the scheme of the provisions relating to such trials must be followed subject to the special provisions of section 540 of the Code of Criminal Procedure. The special powers under section 540 may be exercised under proper circumstances. But I do not think that the recording of evidence on behalf of the prosecution after the defence evidence is closed can be justified. It is undoubtedly an irregularity; and, though in this particular case it is condoned under section 537, Criminal Procedure Code, it is desirable to remember that it is an

irregularity, which may at times necessitate a re-trial and which ought to be avoided.

I would discharge the Rule.

CRUMP, J.—So far as concerns the interpretation of section 499 of the Indian Penal Code it appears to me that the interpretation contended for in this case leads to a contradiction between the body of the section and the 4th Explanation appended thereto. According to the body of the section, an imputation made with the intention to cause harm amounts to defamation, but if Explanation 4 is to be given the force which has been given to it in the decision relied upon, the result would be that it would be necessary to prove that harm was actually caused, whereas the intention to cause harm is sufficient under the first portion of the section. It is a cardinal principle of statutory interpretation that a section should be read as a whole and that contradictions between portions of it should be avoided if possible. It seems to me that the meaning is really plain and that Explanation 4 is, what its name implies, an explanation and nothing more, being intended to define within certain limits the meaning of the words "an imputation intended to harm". Therefore, I agree with the judgment of Heator, J., in *Anandrao Balkrishna* v. *Emperor* (1) and also with the decision of the Allahabad High Court in *Queen Empress* v. *McCarthy* (2). It follows that the first point which is based upon the fact that no evidence has been adduced to prove actual harm must necessarily fail.

As to the second point, I have litte to add to the observations of my learned brother. It is, I think, sufficient for the purposes of this case to say that the irregularity, such as it was, is cured by the provisions of section 537 of the Code of Criminal Procedure, and even if it be not so cured the result, if we expunge from the record the evidence which was improperly admitted, will be precisely as it is so far as concerns the point before us. The conviction of the accused would, so far as we are concerned, rest upon precisely the same footing as if that evidence had been taken into consideration.

(2) 9 A. 420; A. W. N. (1887) 39; 5 Ind. Dec. (N. S.) 715.

For these reasons, I concur in the order proposed.

Rule discharged.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 71 OF 1920.

April 20, 1920.

Present :—Mr. Justice Walmsley and Justice Sir Syed Shams-ul Huda, KT.

ASIMUDDIN SARDAR AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), s. 289—Trial by Jury—Evidence insufficient—Duty of Judge—Misdirection—Penal Code (Act XLV of 1860), ss. 396, 412—Criminal Procedure Code (Act V of 1898), s. 110—Result of proceeding under s. 110, whether admissible in prosecution for dacoity—Evidence Act (I of 1872), s. 114, presumption under, extent of.

In a trial by jury the Judge in discussing the evidence against the accused in his summing up to the jury pointed out that one fact, even if believed, had very little weight; that another fact, if believed, did not show that accused took part in the offence, and that a third fact amounted to nothing in itself:

Held, that, although the Judge clearly invited the jury to acquit, yet he ought to have gone further and told the jury there was no evidence against the accused, and his omission to do so amounted to a misdirection sufficient to entitle the accused to an acquittal. [p. 205, col. 1.]

Where an accused person is on his trial for an offence under section 396 of the Penal Code, the fact that in proceedings under section 110, Criminal Procedure Code, he had been required to give security and had been unable to give it, is not admissible. [p. 207, col. 1.]

Accused was convicted under section 412 of the Penal Code, and, the Judge holding that he must, under section 114 of the Evidence Act, be presumed to have known the atrocious nature of the dacoity by which the goods were obtained awarded him the maximum penalty:

Held, that, as the presumption alone would not justify fixing the accused with more than knowledge that the goods recovered from him had been obtained by dacoity, the sentence was excessive. [p. 207, col. 1.]

Criminal appeal against the order of the Sessions Judge, Rajshahi, dated the 2nd December 1919.

Moulvi *Wahed Hossein* and Babu *Manindra Kumar Bose*, for the Appellants.

Mr. *Orr*, for the Crown.

JUDGMENT.

WALMSLEY, J.—A dacoity was committed on the night of February 25th, 1919, in the house of Kali Das Lahiri of Namkani, a

large quantity of property of various kinds was taken away, and Kali Das was killed. The Police made a few arrests during March and on April 1st, a man, named Jaba Sardar, appeared before the investigating officer and made a statement, as the result of which numerous arrests were made. In the end twenty two men were placed on their trial before the Court of Session, and the jury were unanimous in finding fourteen of them guilty under various sections. These fourteen appealed and the appeal was admitted in the cases of four of them, *viz.*—Asimuddin Sardar, Abjan Sardar, Sobandi Paramanik and Mofizuddin Paramanik, and in regard to sentence only in the cases of Jamin Sheikh and Jadulla Sardar, while it was dismissed summarily as regards the other eight.

It is convenient to deal first with the case of Abjan Sardar; he is brother of Jaba Sardar, the man who made a statement to the Police on April 1st, and was afterwards examined as a witness. In dealing with the evidence against him in particular the learned Judge pointed out how little there was against him. The approver said that he turned back on the way to the dacoity and took no part in it; or, rather, in the first Court he said that Abjan turned back on the way, and in the Sessions Court that he took no part, a suspicious discrepancy as was pointed out to the jury. Of the other evidence, the Judge remarked that one fact, even if believed, had very little weight, that another fact, if believed, did not show that Abjan was in the dacoity, and that a third fact amounted to nothing in itself. I think it is clear that the Judge invited the jury to acquit Abjan. The jury, however, did not do so, and it is contended that the Judge ought to have gone further and said that there was no evidence against him. I think that view is correct, and Mr. Orr, for the Crown, admits that he cannot press the case against Abjan. The result is that his appeal is allowed, and the conviction and sentence set aside so far as he is concerned.

I turn next to the case of Sobhandi: the position regarding him is quite different, for he is named positively by the approver, and a glass containing a large number of rupees was found underground near his house. The glass was identified by Kali Das Lahiri's widow and son, and if that identification is believed the discovery is very strong corroboration of the approver's story. The facts were placed before the jury correctly, and they found Sobhandi guilty. It is impossible for us to say that there was any misdirection, and his appeal must be dismissed.

The case of Mofizuddin stands on a rather similar footing. In consequence of a statement made by him, the Police went to his father in law's house, and there his mother-in-law made over Rs. 200 in notes. The learned Judge pointed out all the facts correctly: he reminded the jury that the notes could not be identified, that there was nothing to connect them with Kali Das Lahiri, and that the accused's father-in-law was in well-to do circumstances. It is impossible for us to say that there was any misdirection. As the jury found Mofizuddin guilty we must dismiss Mofizuddin's appeal.

Now I come to the case of Asimuddin. The learned Judge dealt with him last, and, as I read his words, I think he recommended the jury to acquit him. The case against him, as made by the approver, is that he abetted the dacoity, but did not himself take any part in the commission of it, and the charges framed against him were under sections 396, 109, Indian Penal Code and section 120 B, Indian Penal Code The Judge said that the latter section was not applicable. The jury found him guilty under sections 396, 109, Indian Penal Code and did not return a verdict on the charge under section 120-B, Indian Penal Code. So far as he is concerned, three points are made, namely, (1) that the Judge's charge as to what is needed to prove abetment of dacoity with murder is incorrect; (2) that as the jury acquitted the appellant of an offence under section 120-B, they could not find him guilty of abetment by conspiring to commit dacoity, and (3) that irrelevant evidence was admitted, in the shape of the evidence about proceedings under section 110, Criminal Procedure Code.

There is no substance in the second point. Rightly or wrongly, the Judge said that section 120-B was not applicable and asked the jury to deal only with the charge

under sections 396, 109, Indian Penal Code. The jury did not acquit Asimuddin of the charge under section 120 B but they abstained from returning a verdict in respect of that charge.

On the first point, I am disposed to think that the learned Judge ought to have suggested on any view of the case the evidence did not do more than show that Asimuddin was guilty of abetting simple dacoity. I need not say more, however, because such a misdirection, if there was one, could be dealt with by altering the section from section 396 to section 395, Indian Penal Code, and because the third point seems much more weighty.

The evidence about the proceedings under section 110, Criminal Procedure Code, was introduced for a two-fold reason. The first was to show a motive for the murder and the second was to corroborate Jaba Sardar in one detail of his story, and to show that some of the accused were going about together just before the dacoity.

The facts about these proceedings are as follows: An inquiry was begun in July 1918 by the Police about the desirability of starting proceedings under section 110, Criminal Procedure Code, and on August 4th, 1918, the Magistrate drew up formal proceedings against two sets of men; one against nine *karigars*, none of whom were accused in this dacoity case, and one against Asimuddin, Dariulla, Asgar Mandal, Abu Fauzdar, Karim Mondal, and three others. The investigating Sub-Inspector made Kali Das Lahiri's house his head-quarters during his inquiry into those cases, and on one occasion stones were thrown at the house. For a time an armed Head Constable and two constables were stationed there for his protection, and later one constable only, who was withdrawn after a time. The Magistrate tried the cases locally, and Kali Das Lahiri was cited as a witness in both cases, but he arrived too late to depose in the case against Asimuddin and others, and was examined only in the case against the *karigars*. Those are the facts bearing on the proceedings as evidence of hostile feelings between Asimuddin and Kali Das Lahiri. I think they must be regarded as admissible for showing a motive for the savagery with which the dacoity was carried out. No objection appears to have been taken to this evidence being given. Instead, cross-examination was devoted to showing that, prior to the proceedings under section 110, Criminal Procedure Code, Asimuddin brought a charge of corruption against the senior Sub-Inspector Nazir Ali, and the suggestion was that the proceedings under section 110, Criminal Procedure Code, were the outcome of Nazir Ali's desire for revenge, and that the present charges are due to the same cause.

Regarding the second reason, Jaba Sardar said that Asimuddin announced his intention before-hand of creating *alibi* evidence by going to a *mukhtear* at Rajshahi. The *mukhtear* Hem Kanta Moitra (prosecution witness No. 74) was examined and he deposed that Asimuddin did come to him on February 24th and that he was probably at Rajshahi on the 25th also. The order sheet of the case was also put in. Again, I think that this evidence could not be excluded. If evidence of the nature of the proceedings had not been given for the first purpose, the *mukhtear's* evidence should have been confined to showing that Asimuddin came to him only in connection with a criminal case, but that was impossible. So far, I think that the evidence was admissible and I find that the Judge warned the jury again and again not to be influenced by the evidence regarding those proceedings except so far as they showed motive, and the movements of some of the accused persons on February 24th. He repeated the warning in the case of Asimuddin in particular. Scrupulously careful as he was, however, in these respects, he began his summary of the evidence against Asimuddin by saying: "Asimuddin was convicted in a section 110 case in Rajshahi on the 7th of April and from that date he was in jail here and was produced in Court here from jail." That is, it seems to me, the real point in the objection raised on behalf of Asimuddin. The Judge had told the jury in almost every case when each man was arrested, apparently because most of them were said to have absconded, but there was no reason for doing so in the case of Asimuddin because he had appeared in Court more than once during March. Possibly, Asimuddin had been sent to Court in jail clothes or perhaps, the Judge assumed

that the jurors knew what had been the result of proceedings. Whatever be the explanation, I think that the fact that Asimuddin had been required to give security and had been unable to give it, was not admissible, and on that ground I think that the verdict against him is vitiated, and that the conviction and sentence must be set aside. Further, having regard to the tenour of the learned Judge's remarks, I think we should say that Asimuddin must not be tried again.

Four more of the accused were concerned in those proceedings under section 110, Criminal Procedure Code. One of them, Abu Fauzdar, was acquitted by the jury, and the appeals of the other three were dismissed. I think I ought to say why the objection does not hold good in their case. Darinlla appeared on January 24th but not again until he was arrested in April, and then the proceedings against him were dropped. Karim was not present when judgment was delivered, and, so far as I can see, the record does not show what order was passed on him. Certainly, the Judge did not tell the jury that he was convicted. Asgar, the *mukhtear* says, was present to hear judgment delivered, but I do not think that the result of the judgment is mentioned, and again the Judge did not say anything about it. Against all three men there was the evidence of the approver, and in addition other evidence on which the jury could come to the conclusion that they were guilty.

Regarding Jamin Sheikh and Jadulla Sardar, whose appeals were admitted on the ground of sentence only, they were convicted under section 412, Indian Penal Code and the learned Judge in awarding punishment says: "I consider the case a fit one for the imposition of the maximum penalty as they knew the property was transferred by the commission of such an atrocious crime." It is to be regretted that he does not give his reason for this statement: their conviction is based, as I read the evidence and charge, on the presumption permitted by section 114 of the Evidence Act, but I do not think the presumption alone would justify fixing them with more than knowledge that the goods had been obtained by dacoity, and, that being so, the sentences passed on them are excessive. The sentences on Jamin Sheikh and Jadulla Sardar are, therefore, reduced to imprisonment for five years each.

The result is, that the appeals of Sobhandi and Mofizuddin are dismissed; the appeal of Abjan is allowed and he is acquitted; the appeal of Asimuddin is allowed and the conviction and sentence are set aside: and the appeals of Jamin Sheikh and Jadulla Sadar are allowed in part and the sentences reduced as ordered above.

SHAMSUL HUDA, J.—I agree.

Appeal of some of the accused allowed.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 81 OF 1920.

November 5, 1920.

Present:—Mr. Justice Jwala Prasad.

MAKSUDDAN HISTRY—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403—Autrefois acquit, principle of, applicability of—Penal Code (Act XLV of 1860), s. 338—Motor Vehicles Act (VIII of 1914), s 16—Acquittal under s. 338, Indian Penal Code, whether bars trial under s. 16 of Motor Vehicles Act.

The acquittal of a person charged under section 338 of the Penal Code with having caused grievous hurt by rashly driving a motor car, on the ground that it is not proved that he was driving the car, is, under section 403, Criminal Procedure Code, a bar to the trial of that person under section 16 of the Motor Vehicles Act for driving the car without a license so long as his acquittal on the same facts for a diffrent offence remains in force, as, applying the principle of *autrefois acquit*, he cannot be tried a second time on the same facts cognate to, or involved in the offence with which he was previously charged. Section 403 of the Criminal Procedure Code does not depend for its application upon additional evidence being available or not, that fact is altogether irrelevant. [p. 208, cols. 1 & 2.]

Mr. *M. N. Sinha*, for the Petitioner.

JUDGMENT.—The Rule must be made absolute. The petitioner was tried for an offence under section 338, Indian Penal Code, on a charge of having caused grievous hurt to the driver of an *ekka* and its occupants by rashly driving a motor car. He was convicted by the Magistrate, but on appeal was acquitted by the Sessions Judge on the ground that "there was no direct evidence to prove that the accused drove the car,"

MAKSUDDAN HISTRY *v.* EMPEROR.

The petitioner has now been summoned under section 16 of the Motor Vehicles Act (VIII of 1914) for driving the car without a license at the time when the incident, in respect of which he was tried and acquitted, happened. The question, therefore, for determination in the present proceeding under the Motor Vehicles Act against the petitioner is the same as was in the criminal trial under section 338, Indian Penal Code. This is conceded. The Magistrate also in his explanation admits it.

It will thus appear that the petitioner is now called upon to be prosecuted on the same facts which were investigated into in the former trial. The charge under the Motor Vehicles Act could very well have been framed in the former trial either as a substantive one or, in the alternative, under section 236 of the Code of Criminal Procedure. He could also have been convicted under section 16 of the Motor Vehicles Act when he was tried for the offence under section 338, Indian Penal Code (*vide* section 237 of the Code of Criminal Procedure).

It would thus appear that section 403 of the Code of Criminal Procedure bars the trial of the petitioner for an offence under section 16 of the Motor Vehicles Act so long as the acquittal under section 338, Indian Penal Code on the same facts remains in force. The principle of *autrefois acquit* does clearly apply to the present case. The petitioner cannot be tried a second time on the same facts cognate to, or involved in the offence with which he was previously charged.

In the case of *Manhari Chowdhury* v. *Emperor* (1) it was held that the acquittal of the petitioners under sections 380 and 411, Indian Penal Code was a bar to their prosecution under the cognate section 54 (*a*) of the Calcutta Police Act. Section 403 of the Code of Criminal Procedure was applied in that case. The principle of that case can very well be applied to the present case.

The learned Magistrate in his explanation says that the Court Inspector is about to adduce additional evidence to show that the petitioner was driving the car. If that is no reason for trying him again for the offence under section 338, Indian Penal Code of which he has been acquitted, it cannot be a ground for trying him for the cognate offence under section 16 of the Motor Vehicles Act.

It, however, appears from the judgment of the learned Sessions Judge that the witnesses examined on behalf of the prosecution made a different statement altogether to what they had made on the question in issue before the Police and that was a good reason for disbelieving the witnesses.

Again, it was in evidence that there were two persons occupying the front seat and the learned Sessions Judge accordingly observed as follows:—"It cannot, therefore, be safely inferred whether the accused was occupying the right hand seat, *i. e.*, the seat of the driver, or that he was on the left side of the driver."

The evidence was thoroughly gone into in that case, and I do not think that the prospect of getting additional evidence is a ground for overriding the principle of *autrefois acquit* In the case of *Manhari Chowdhury* v. *Emperor* (1) no doubt there was nothing to show that additional evidence was available, as was mentioned in the judgment, but that fact to my mind is irrelevant, for the application of section 403 does not depend upon additional evidence being available or not, and, as a matter of fact, that point has not been decided in that case. Authorities are numerous on the subject. I need not, however, refer to them [*vide Emperor* v. *Mian Jan* (2), *Emperor* v. *Sonalal* (3). Section 403 goes to the root of the jurisdiction to take cognizance of an offence so long as acquittal or conviction in a previous trial on the same facts, though of a different offence, remain in force. If section 403 does not apply, then there will be no bar to the trial whether additional evidence is available or not. In the present case, as held above, section 403 does apply and is, therefore, a complete bar to the criminal proceedings under the Motor Vehicles Act now instituted against the petitioner.

For these reasons, the order of the Magistrate summoning the petitioner and the proceeding started in consequence thereof are set aside.

Rule made absolute

(1) 43 Ind. Cas. 614; 22 C. W. N. 199; 19 Cr. L. J. 198; 27 C. L. J. 434; 45 C. 727.

(2) A. W. N. (1906) 22; 3 Cr. L. J. 207; 28 A. 313.

(3) 20 Ind. Cas. 613; 37 B. 658; 15 Bom. L. R. 694; 14 Cr. L. J. 453.

BINAYAK DAS *v.* SAMINUDDI.

CALCUTTA HIGH COURT.
APPEALS FROM APPELLATE DECREES
Nos. 1314, 1482 TO 1488 OF 1918.
May 6, 1920.
Present :—Mr. Justice Newbould and
Mr. Justice Panton.
BINAYAK DAS ACHARJA CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SAMINUDDI *alias* SAKI MATBAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 3 (9), 30, 182—"Holding" meaning of—Undivided share in tenancy, whether holding.

An undivided share of land is not a "holding" within the meaning of section 3 (9) of the Bengal Tenancy Act, and the phrase "a parcel or parcels of land" in that clause means an entire parcel, or entire parcels of land. Consequently, section 30 of that Act has no application when the tenancy of a *raiyat* is an undivided share of land, it being immaterial how the tenancy was created, or whether the parcel held jointly with others is a small or large portion of the land of the tenancy, or that the undivided parcel which is part of the tenancy is homestead, and not agricultural, land; it is sufficient if there is some land which is not held entirely by the tenant. [p. 210, cols. 1 & 2.]

Appeals against the decrees of the Subordinate Judge, 1st Court, Bakarganj, dated the 13th of March 1918, affirming that of the Munsif 1st Court, at Bhola, dated the 26th July 1916.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Prakash Chandra Mazumdar*), for the Appellants refers to *Baidya Nath De* v. *Ilim* (1). I shall show that the present cases can be distinguished from the cases cited by the lower Appellate Court. Here I am 16-annas owner, the tenants are in exclusive possession of the holding. Only the tank and homestead are undivided, of which, too, I am the sole owner. All these cases are about co-sharer landlords. *Haribole Brohmo* v. *Tasimuddin Mondul* (2) was also a case of several landlords. *Parbatty Debya* v. *Mathura Nath Banerjee* (3) is exactly of that nature, being a case of joint landlords. Here I am not a co-sharer-landlord. I am entire owner. Here the whole of the agricultural holdings are in exclusive possession. Refers to section 30, Bengal Tenancy Act. Can you say here that the holding is undivided? The principle of these cases has no application here. Refers to section 182, Bengal Tenancy Act. But that section would not preclude me from enhancing rent for agricultural lands. Section 30, Bengal Tenancy Act, has reference to whole holding undivided. This section refers to agricultural lands. We can't enhance the rent of homestead. 'Holding' means entire holding. Refers to *Baidya Nath Mondal* v. *Sudharam* (4) and *Safaruddi* v. *Fazal Huq* (5).

Babu *Surendra Chandra Sen* (with him Babu *Hemendra Chandra Sen*), for the Respondents.—The question has long been settled. It is not a holding at all. An undivided share of land does not come within the definition of 'holding.' When a landlord grants an undivided share of land which is comprised in a tenure and if there is an agreement for enhancement or ejectment, then it is a tenure. Refers to section 3, clause 8, Bengal Tenancy Act. This is not a holding. It cannot come within the terms 'entire parcel' by any stretch of language. Legislature does not contemplate the enhancement of rent of a part of a holding. Refers to *Harnandan Rai* v. *Kesho Prasad Singh* (6).

Babu *Jogesh Chandra Roy* replied.

JUDGMENT.—These eight appeals arise out of eight suits for enhancement of rent under section 30 of the Bengal Tenancy Act.

The suits have been dismissed by both the lower Courts on the ground that the interest of the tenant in the land in respect of which enhancement is claimed are not holdings as defined by section 3 clause (9) of the Bengal Tenancy Act. The suits have been dismissed solely on this ground and other suits brought by the same landlord and heard together on the same evidence were decreed in part.

The nature of the tenancies found is as follows:—

The Settlement *Khatians* show that the defendant's tenancies comprise undivided parcels of homestead land forming parts of agricultural holdings. A statement has been given to us, which is not disputed, showing that the lands held by the defendants in

(1) 25 C. 917; 2 C. W. N. 44; 13 Ind. Dec. (N. S.) 597.
(2) 2 C. W. N. 680.
(3) 15 Ind. Cas. 453; 40 C. 29; 16 C. W. N. 877; 16 C. L. J. 9.
(4) 8 C. W. N. 751.
(5) 30 Ind. Cas. 414; 21 C. L. J. 592.
(6) 40 Ind. Cas. 585; 2 P. L. J. 553; 1 P. L. W. 798.

undivided shares form part of each tenancy and each of the defendants holds as part of his tenancy a separate parcel of agricultural land. There is abundant authority to support the views of the lower Courts that section 30 does not apply when the tenancy of a *raiyat* is an undivided share of land, and that a parcel or parcels of land in clause (9) section 3 of the Bengal Tenancy Act mean an entire parcel or entire parcels of land and that, therefore, an undivided share of land comprised in a tenancy is not a "holding." It is unnecessary to give a list of the many rulings on this point. Several of them will be found collected in what we are told is the most recent decision. It is one of the Patna High Court cases,—see *Harnandan Rai* v. *Kesho Prasad Singh* (6). In that case the facts were similar to those of the present case, as it was there a separate tenancy in each case consisting of a specific area of land held together with undivided share in certain other areas of land.

On behalf of the appellant, the main principle laid down by these decisions is not disputed. It is contended that they can be distinguished on the ground that in those cases it was a co sharer landlord who had let out his undivided share in a separate tenancy.

It seems to us that it is immaterial how the tenancy was created. The case turns on the meaning of the word "holding." If the tenancy is a holding, section 30 is applicable. If the tenancy is not a holding, the section is not applicable. Obviously, the case of a tenant holding an undivided share in a parcel of land would most frequently arise when a lease is granted by a landlord owning an undivided share. But the law remains the same whether the undivided interest is created by a landlord holding a fractional interest, or by a landlord holding the whole of the interest, or where, as in the present case, the original tenancy has not been proved and is merely based on the result of Settlement proceedings under the Bengal Tenancy Act. If in one of the several parcels of land held by a *raiyat* and forming the subject of a single tenancy, the *raiyat* has an undivided share, that tenancy, according to the decisions of this Court, cannot be a holding. It is immaterial whether the parcel held jointly with others is a small or large portion of land of the tenancy. It is sufficient that within the tenancy there is some land which is not held entirely by the *raiyat*. Also the provisions of section 182 make it immaterial that the undivided parcel which is part of the tenancy is homestead land and not agricultural land. It is also suggested before us that this interpretation of the definition of a holding in clause (9) of section 3 is repugnant in the subject or context and that, therefore, the preamble of section 3 excludes this interpretation. That argument was adduced before the Patna High Court in the case referred to above and we agree that it is not possible to say, in the present case, that there is any repugnancy in the subject or context in section 30.

It is also said that all the cases cited relate to the sub division of a whole holding. But this is not so as we have already stated when referring to the Patna case: there also there was a specific area of land held together with undivided shares in certain other areas of land.

We, therefore, hold that the decision of the lower Appellate Court is right and these appeals are dismissed. The respondents, who have appeared, will get their costs.

Appeals dismissed.

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 161 OF 1919.
June 15, 1920.
Present :—Mr. Justice Shah and
Mr. Justice Crump.
SHEKH HASAN GULAM MOHIDIN—
PLAINTIFF—APPELLANT
versus
MAHOMED ALI SHEKH MAHOMED
—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 107, O. XXIII, r. 1—Appellate Court, power of, to allow withdrawal of suit.

An Appellate Court has jurisdiction to allow a suit to be withdrawn with liberty to bring a fresh suit on the same cause of action. [p. 212, col. 2.]

SHEKH HASAN GHULAM MOHIDIN *v.* MAHOMED ALI.

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 386 of 1917, confirming the decree passed by the Subordinate Judge, at Dapoli, in Civil Suit No. 47 of 1917.

Mr. *P. V. Kane*, for the Appellant.
Mr. *P. B Shingne*, for the Respondent.

JUDGMENT.

SHAH, J.—The plaintiff filed the present suit for redemption and he was met with the plea of *res judicata*. This plea has succeeded in both the lower Courts, and in this second appeal the plaintiff has urged that both the lower Courts are wrong in the view which they have taken as to the plea of *res judicata*.

The facts relating to the previous suit are that the present plaintiff had filed the suit for redemption of the same mortgage in the year 1914 That suit was decided on the merits against him. He appealed to the District Court. The appeal was admitted and notices were served upon the then respondents, who are the present defendants. In the course of the appeal an application was made by the plaintiff to the Appellate Court asking for leave to withdraw from the suit with permission to bring a fresh suit in respect of the same subject matter. The order made on the application runs as follows:—"The opposite party has no objection. Plaintiff is allowed to withdraw the suit and to sue *de novo*. Costs on plaintiff in both the Courts". This order, it is contended on behalf of the plaintiff, has the effect of setting aside the decree that was passed by the Trial Court in the first instance and is binding upon the parties to the appeal. On the other hand, it is urged that the Appellate Court had no jurisdiction whatever to make this order allowing the plaintiff to withdraw from the suit with permission to file a fresh suit, that the order having been made without jurisdiction, the decree of the Trial Court in the case subsists, and that the issues tried and heard in that suit must be treated for the purposes of the present suit as having been heard and determined.

Apart from the decisions bearing on the question, to which I shall presently refer, it seems to me that the order was made not without jurisdiction as contended by the respondents. Under section 107 of the Code of Civil Procedure, subject to such conditions and limitations as may be prescribed, the Appellate Court has the same powers and shall perform, as nearly as may be, the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. When the appeal was admitted and notices were served upon the respondents, it seems to me that the whole case was before the Appellate Court and that Court had, in virtue of the powers referred to in sub section 2 of section 107, jurisdiction to deal with the application made to that Court by the plaintiff. The respondents having raised no objection, the question whether there were, under the circumstances, sufficient grounds disclosed in the application for an order contemplated by Order XXIII, rule 1 does not appear to me to be of any practical importance now. It is sufficient that the Court had jurisdiction to deal with the application. The sufficiency of the grounds contemplated by clause (*b*) of sub-rule (2) of rule 1 of Order XXIII, must depend upon the circumstances of the case. The one important circumstance in the case is that the respondent's Pleader then raised no objection. It is not necessary in this case to attempt to define what constitutes sufficient grounds other than a formal defect within the meaning of clause (*b*) of rule 1, sub-rule (2) of Order XXIII. The expression may be construed strictly; and I am prepared to assume in favour of the respondents that if they had sought to have the order set aside by an application to the High Court under the extraordinary jurisdiction they would have succeeded. But the order was allowed to stand and is binding upon the parties. The order must be taken to have been made with jurisdiction; and, in plain terms, its effect is that the decree of the Trial Court is set aside and the order allowing the plaintiff to withdraw from the suit with permission to institute a fresh suit is substituted for that decree. That is the order which was ultimately passed in the previous suit; and if that order is held to be not without jurisdiction, it is clear that there is no adjudication and no basis for the plea of *res judicata*.

Mr. Shingne for the respondent, however, has relied upon the decision in *Eknath Ranoji* v. *Ranoji Bawaji* (1), and *Kali Prasanna Sil* v. *Panchanan Nandi* (2). We have also referred to the two cases which have been referred to in the Calcutta case and which are reported in the 11th Volume of the Calcutta Law Journal. As against these decisions the appellant's Pleader has relied upon the case of *Balide Kamayya* v. *Pragada Papayya* (3) and upon the recent decision of this Court in *Ohhanubhai* v. *Dahyabhai* (4). We have considered the decisions cited on both sides and, if I may say so with respect, the view taken by the Full Bench in the Madras case as to the power of the Appellate Court is right. That is the view accepted in the decision in *Chhanubhhi* v. *Dahyabhai* (4) by which we are bound.

I have carefully considered the *ratio decidendi* in the case of *Kali Prasanna Sil* v. *Panchanan Nandi* (2). It is undoubtedly true, as pointed out by Mr. Shingne, that the *ratio decidendi* is in favour of the view which he has pressed upon this Court though the order made by the Appellate Court in that case, which was held in the subsequent proceedings to have been made without jurisdiction, was in form somewhat different from the order in the present case. The order in that case has been quoted at page 371* of the report and may be distinguished from the order made in the present case. But I do not think that the decision in the case can really be distinguished on that ground. There is really a conflict of views and, with great deference to the learned Judges who decided the case, I am unable to follow that decision. The other two decisions reported in the 11th Volume of the Calcutta Law Journal, and referred to by Sanderson, C. J., do not present any difficulty to my mind, as in those cases objection was taken in time to the orders under Order XXIII, rule 1, by the Appellate Court and they were set aside on the merits of those cases. But I do not read those cases as laying down that the Appellate Court can have no jurisdiction whatever to make such orders. The decision in *Eknath Ranoji* v. *Ranoji Bawaji* (1), which has been relied upon, is easily distinguishable. In that case the order was made by the Appellate Court before the appeal was admitted and before any notice was issued on the appeal to the respondents. Such an order was clearly without jurisdiction and could have no effect upon the decision of the Trial Court in that case which was arrived at after hearing the parties and in their presence. The observation in this decision at page 263* of the report, which has been strongly relied upon by Mr. Shingne, must be taken to have been made with reference to the facts of the case; and it cannot be read as indicating the opinion of the Court that the Appellate Court could never have jurisdiction to make an order allowing the plaintiff to withdraw from the suit with permission to bring a fresh suit. Whether in a particular case the Appellate Court should exercise that jurisdiction is a matter which must depend upon the facts and circumstances of that case. But I do not think that the decision in *Eknath Ranoji* v. *Ranoji Bawaji* (1) could be construed as laying down the broad proposition which Mr. Shingne has contended for, that the Appellate Court could never have such jurisdiction.

The Appellate Court, in my opinion, had jurisdiction to make the order which it did make on the application of the plaintiff, and, in view of the fact that no objection was raised and that the order was acquiesced in, it cannot be said to be an order made without jurisdiction. The question whether there were sufficient grounds for making the order is not relevant now.

I would, therefore, allow the appeal, set aside the decrees of the lower Courts and remand the suit for disposal according to law to the Court of first instance.

All costs up to date to be costs in the suit.

CRUMP, J.—I agree in the judgment just pronounced, and, in view of the importance of the point and the divergence of judicial opinion, I should like to add a few words.

It would, I think, be a matter for regret

(1) 10 Ind. Cas. 813; 35 B. 261; 13 Bom. L. R. 237.

(2) 33 Ind. Cas. 670; 44 C. 367; 20 C. W. N. 1000; 23 C. L. J. 489.

(3) 37 Ind. Cas. 414; 40 M. 259; 21 M. L. T. 82; (1917) M. W. N. 217 and 246; 5 L. W. 558; 32 M. L. J. 477.

(4) 57 Ind. Cas. 530; 22 Bom. L R. 774; 44 B. 598.

*Page of 44 C.—*Ed.*

*Page of 35 B.—*Ed.*

if we were compelled to come to the conclusion to which the argument of the respondent's Pleader would compel us. The facts, briefly, are that the plaintiff, whose suit had been dismissed in the Court of first instance, appealed to the lower Appellate Court, and, in the course of the hearing in the presence of the respondents, he applied to that Court for leave to withdraw with liberty to bring a fresh suit on the same cause of action. To this no objection was taken by the respondent's Pleader. When this fresh suit was filed, he was met by a plea of *res judicata* which has prevailed in the original and in the lower Appellate Court. But, though I feel the hardship of the appellant's position, I do not wish to rest my decision upon that ground. I rely, in the first instance, upon what, with all deference to the views of those who hold otherwise upon this point, appears to be the plain meaning of the provisions of the Code of Civil Procedure. It appears to me impossible to read section 107, clause (2), of that Code without coming to the conclusion that, generally speaking, the Appellate Court is empowered in the case of appeals to exercise all the powers which the original Court could have exercised. In the words of the section, the Appellate Court has that power "subject to such conditions and limitations as may be prescribed," and I am unable to find any conditions or limitations which could prevent an Appellate Court from exercising the power conferred by Order XLIII, rule 1. Not only does that appear to me to be the plain meaning of the Code, but it is supported by a recent decision of this Court in *Ohhanubhai* v. *Dahyabhai* (4) and none of the decisions of this Court properly interpreted really conflicts with that exposition of the law. The case of *Eknath Ranoji* v. *Ranoji Bawaji* (1) does not in reality touch upon the point now before us. For, in so far as it contains any pronouncement upon this matter, it must clearly be held to be *obiter*.

It is hardly necessary to say that no case is an authority except upon its own facts, and the facts of *Eknath Ranoji* v. *Ranoji Bawaji* (1) are undoubtedly different from those in the case now before us. Therefore, I feel in no way constrained by any decision of this Court to adopt the view suggested in that decision, and the recent decision to which I have referred appears to me to support the view taken by my learned brother.

There is also a Full Bench decision of the Madras High Court [*Balide Kamayya* v. *Pragada Papayya* (3)] which entirely supports the view which I take as to the powers of Appellate Courts in this matter. I prefer the view taken in that case to that which has found favour in the Calcutta High Court in *Kali Prasanna Sil* v. *Panchanan Nandi* (2). With all deference to the Judge who decided that case, I feel some doubt as to whether the two decisions cited in support of their view of the law really go the length of deciding that there is, in the fullest sense of the term, no jurisdiction in an Appellate Court to allow the withdrawal of a suit with liberty to file a fresh suit on the same cause of action. Those decisions appear to me to go no further than holding that the orders made in those cases by the Appellate Court were orders which ought not to have been made, and though in one of them the word "jurisdiction" is used I do not think the Court meant to convey that there was no power to make the order but rather that the order was an improper order upon the facts. Here we are considering a question of jurisdiction in the strict sense of the word. Therefore, from the decisions of this Court and on the Full Bench decision of the Madras High Court, as well as on the wording of the Code itself, I concur in the judgment pronounced by my learned brother.

Some attempt has been made in argument to distinguish between cases in which a withdrawal has been allowed on the ground that the evidence in favour of the party asking for leave is insufficient, and those cases which it is suggested more properly fell within the terms of Order XXIII, rule 1. From what has been said, it must follow that an Appellate Court and an original Court stand upon the same footing in this matter, and, without endeavouring to lay down any exhaustive definition of what are sufficient grounds within the meaning of this rule—for I do not think it is necessary to do so here—I find it enough to say upon this point that if a Court, applying its mind to the facts before it, is of opinion that those facts constitute sufficient grounds, then I find it impossible to hold, even though the Court might be mistaken in

its view, that the Court had no jurisdiction to make an order within the terms of Order XXIII, rule 1.

On these grounds, therefore, I concur in the judgment pronounced and in the order proposed.

Appeal allowed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 672 OF 1919.
February 25, 1920.
Present :—Justice Sir William Ayling, Kt., and Mr. Justice Coutts Trotter.
KANDAIYA PILLAI, *alias* KANDASWAMI PILLAI (MINOR) AND ANOTHER, BY THEIR NEXT FRIEND VENKATA CHALAM PILLAI—PLAINTIFFS—APPELLANTS
versus
CHOKKAMMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Dancing girl, adoption by, nature of—Estoppel, whether can be relied on to validate adoption.

An adoption by a dancing girl for purposes of prostitution is nothing more than the going through of certain forms and does not affect the status of any one When such an adoption is challenged, the doctrine of estoppel cannot be resorted to in order to validate the adoption, which, being opposed to public policy, is void.

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 64 of 1918, preferred against the decree of the Court of the Subordinate Judge, Tuticorin, in Original Suit No. 61 of 1916.

Messrs. *T. R. Venkatarama Sastri* and *M. S. Vaidyanatha Aiyar*, for the Appellants.

Mr. *T. M. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—There is really only one point open to the appellant on this second appeal. The learned Judge below found as a fact that there had been an adoption of the two women through whom the plaintiffs claim, and that such adoption had been made for the purposes of prostitution. The defendants claim under those who took the girls in adoption for that purpose and they plead that such an adoption is against public policy and, therefore wholly nugatory and void. That is conceded, but it is said that the defendants are estopped from setting up this against the plaintiffs whose ancestors were not in *pari delicto*. It is clear law that an estoppel cannot be relied upon to defeat a statutory prohibition [see *per* Parke, B., in *Hill* v *Manchester and Salford Water Works Co.*, (1)]. "It was for the Company, if they disputed their liability, to open the estoppel arising from their own admission, by showing that the consideration of the bonds was illegal or inconsistent with the Statutes under which they acted; or that there was no consideration. But that would not be so if, for instance, the Company had given these bonds by way of payment to a person who had executed works for them under the second Statute instead of raising money by bonds for the purpose of paying such person."

Nor can it be relied upon against one who fills a public capacity charged with duties in the performance of which other persons are interested, *e. g.*, the Vicar of a parish, *MacAllister* v. *Bishop of Rochester* (2). It is clear that a prohibition on the ground of public policy would on these analogies not be capable of being evaded by the doctrine of estoppel. But it is said here that the act itself does not fall within the mischief of the rule, for adoption by dancing girls is recognised by law and only a particular intent with which it is done is prohibited, and that the estoppel can attach itself to the setting up of the intent only. It is obvious that such a result would entirely defeat the rule; and we think, moreover, that it is based on wholly fallacious reasoning. What is prohibited is not the intent; any one can harbour an intent, so long as he does nothing to carry it into execution; what is prohibited is the act done with that intent. The act is one, just as the act of murder is one, though it can be analysed into killing with a certain intent. Moreover, such an 'adoption' is not really adoption at all; it is a mere going through of certain forms which, when gone through by persons with an untainted purpose, would result in an adoption; as actually gone

(1) (1831) 2 B & Ad. 544 at p. 553; 1 L. J. (N. S.) K. B. 230; 36 R. R. 658; 109 E. R. 1245.
(2) (1880) 5 C. P. D. 194; 49 L. J. C. P. 114; 42 L. T. 22.

through they result in nothing, and affect the status of no one. It is no more an adoption than bigamy is 'a marriage' and in finding that the adoption in fact is proved the learned Judge means no more than that he finds it proved that the form was gone through.

The second appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1717 OF 1918.

June 2, 1920.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

ATUL CHANDRA KUNDU—DEFENDANT—APPELLANT

versus

SARAT CHANDRA LAHA—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Purchaser, failure of, to complete contract—Earnest-money, whether forfeited.

Where a contract of sale specifically provides that the whole of the earnest-money deposited by the vendee shall be forfeited in the event of his failing to pay the balance of the consideration-money within a stipulated period, and it is found that not only was he not in a position to pay that money, but that he never offered to pay, either within the time fixed or at any time afterwards, the balance of the purchase-money, he is not entitled to recover the earnest-money paid by him. [p. 216, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Hooghly, dated the 31st of July 1918, reversing that of the Munsif, 3rd Court, at Howrah, dated the 5th of April 1917.

FACTS appear from the judgment.

Babu *Jogendra Nath Mukerjee* (with him Babus *Paresh Nath Mukerjee* and *Kanai Dhan Dutt*), for the Appellant—The defendants are appellants. This appeal arises out of a suit for refund of Rs. 700 only paid as earnest-money for the purchase of certain land by the plaintiff to the defendant. The defendant executed a document in 1914, November, whereby he made an agreement to sell the plaintiff one *bigha*, 4 *cottas* of land together with permanent structures thereon for Rs. 4,400. Out of the purchase money so settled the plaintiff paid Rs. 700 as earnest-money and it was agreed that on receipt of the purchase money within three months, the deed of conveyance would be executed. The transaction fell through owing to the failure of the plaintiff to pay the balance. There was an express provision in the agreement that if the plaintiff failed to pay the balance within the time fixed, he would forfeit the money advanced. The first Court dismissed the suit. The lower Appellate Court reversed the decision of the first Court on equitable considerations.

My first point would be that the lower Court erred in law, in that it failed to appreciate the essence of the contract. The famous decision of the Judicial Committee in *Soper* v. *Arnold* (1) shows "the deposit serves two purposes—if the purchase is carried out it goes against the purchase-money but it is also a guarantee that the purchaser means business." See also Fry on Specific Performance, 5th Edition, paragraph 1473.

The test in each case is, whether the parties mutually agreed, expressly or impliedly, that the sum paid was to be treated not merely as part-payment but as a guarantee for the performance of the contract. See *Habibullah* v. *Arman Dewan* (2).

The lower Court has erroneously relied upon the case reported in *Jamshed Khodaram* v. *Burjorji Dhunjibhai* (3).

That case has no application here. I submit that the plaintiff is not entitled to get back the earnest-money.

Dr. *Dwarkanath Mitter* (with him Babu *Hira Lal Chakarvarti*), for the Respondent. I submit that the amount advanced as earnest-money is more than what is ordinarily done in these cases. All the cases show that the earnest money advanced must not be more than 7 per cent. The Court should treat it as a case of penalty and the defendant must shew that he has suffered substantial loss.

(1) (1889) 14 App. Cas. 429 at p. 435; 59 L. J. Ch. 214; 61 L. T. 702; 38 W. R. 449.

(2) 53 Ind. Cas. 875; 30 C. L. J. 113; 24 C. W. N. 40.

(3) 32 Ind. Cas. 243; 40 B. 289; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 84; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 43 I. A. 26 (P. P.)

I submit I am entitled to protection on equitable grounds.

JUDGMENT.—This appeal arises out of a suit for refund of Rs. 700 paid by the plaintiff to the defendant as earnest-money for the purchase of certain land.

It appears that under a *bainapatra*, dated November 1914, the defendant agreed to sell to the plaintiff, 1 *bigha*, 4 *cottas* of land together with permanent structures thereon for Rs. 4,400. Out of the purchase-money so settled, Rs. 700 was paid by the plaintiffs to the defendant as earnest-money and it was agreed that on receipt of the purchase-money within three months, the *kobala* would be executed. There was an express provision in the agreement that in case the plaintiff failed to pay the balance of the purchase-money within the time fixed he would forfeit the earnest-money and would have no right to claim a refund of the same.

The defendant pleaded that the transaction fell through owing to the failure of the plaintiff to pay the balance of the purchase-money. It is found that the plaintiff was not in a position to pay the balance of the purchase-money, namely, Rs. 3,700 within the time fixed, and the plaintiff never offered to pay the balance of the purchase-money to the defendant.

The Court of first instance dismissed the suit but on appeal the learned Subordinate Judge was of opinion that, as time was not of the essence of the contract in the present case, the plaintiff was entitled in equity to obtain a refund of the earnest-money although he failed to pay the balance of the purchase-money within the time fixed.

The learned Subordinate Judge relied upon the case of *Jamshed Khodaram* v. *Burjorji Dhunjibhai* (3). But we do not think that that case has anything to do with the present. There, in a suit for specific performance of a contract for sale of certain property, the Judicial Committee held that time was not of the essence of the contract and the plaintiff was entitled to specific performance. Here it is found that not only was the plaintiff not in a position to pay the money but that he never offered to pay, either within the time fixed or at any time afterwards, the balance of the purchase-money and to complete the contract.

The question, therefore, is whether, under these circumstances, the plaintiff is entitled to a refund of the purchase-money.

As pointed out by Lord Macnaghten in *Soper* v. *Arnold* (1): "The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a gaurantee that the purchase means business." The law on the point is thus stated in Fry on Specific Performance, 5th Edition, paragraph 1478:—"The deposit unless paid on special terms is not merely part payment but is an earnest: so that if the contract is performed, it is brought into account as part-payment: On the other hand, if the purchaser makes default, it may be retained by the vendor. The deposit is, therefore, a security for the performance of the purchaser's part of the contract. The authorities have not been uniform on this question but the weight of authority is in favour of the statement above made." It is pointed out in the case of *Habibullah* v. *Arman Dewan* (2) "The test in each case...is did the parties mutually agree expressly or by implication that the sum paid was to be treated not merely as part payment but as a guarantee for due performance of the contract."

It was contended that the amount paid (Rs. 700) was a large sum of money and is more than what is usually advanced as earnest-money, that, therefore, the Court should treat it as a case of penalty, and that the defendant is not entitled to get anything unless it is found that he has suffered any loss.

No hard and fast rule, however, can be laid down as to what constitutes "earnest-money." In the present case, it is about one sixth of the amount agreed upon to be paid. We have also to consider the fact that the defendant had not a title to the whole of 1 *bigha*, 4 *cottas* which he agreed to convey to the plaintiff and had to purchase 1 *cotta* of land from his brother to whom it belonged.

In these circumstances, we are unable to hold that there was any equitable consideration in favour of the plaintiff and we are of opinion that the plaintiff is not entitled to recover the earnest-money, the result being that the decree of the lower

Appellate Court is set aside and that of the Court of first instance restored.

Each party to bear his own costs throughout.

Decree set aside.

BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 107 AND 1021 OF 1916.

June 15, 1920.

Present:—Sir Norman Macleod, KT, Chief Justice, and Mr. Justice Fawcett.

GURUNATH KESHAV KALKUNDRI —DEFENDANT—APPELLANT

versus

SADASHIV BALKRISHNA DESHPANDE—PLAINTIFF—RESPONDENT.

BALARAM GOPAL KALKUNDRI —DEFENDANT—APPELLANT

versus

SADASHIV BALKRISHNA DESHPANDE—PLAINTIFF—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13—Advance, fresh, taken before payment of prior advance—Series of transactions—Accounts, mode of taking.

Where a debtor takes a fresh advance before a prior advance is paid off, an account should, under section 13 of the Dekkhan Agriculturists' Relief Act, be taken as if both the transactions formed one entire transaction.

Second appeals from the decision of the Assistant Judge, Belgaum, in Appeal No. 274 of 1915, confirming that of the Joint Subordinate Judge, at Belgaum, in Civil Suit No. 74 of 1909.

Mr. *S. Y. Abhyankar*, for Gurunath.

Mr. *D. R. Desai*, for Sadashiv, respondent.

Mr. *D. R. Manerikar*, for *S. S. Patkar*, Government Pleader, for Balaram.

JUDGMENT.—In this case there was a mortgage in 188 for Rs. 3,000. It was stated in the mortgage deed that the mortgagee should be in possession and receive the profits in lieu of interest on Rs. 2,700 out of Rs. 3,000 leaving the balance of Rs. 300 to carry interest. In 1891 a fresh advance of Rs. 700 was made on a bond at 15 per cent. per annum interest. In the same way, in 1895 another advance of Rs. 200 was obtained on a third bond. The learned Judge in the Trial Court took an account under the provisions of the Dekkhan Agriculturists' Relief Act and found that nothing was due. He found as a fact that, when the second advance of Rs. 700 was made, the previous loan had not been paid off, and so, again, when the third advance of Rs. 200 was made in 1895, the transaction was still open between the parties. Therefore, he took an account under the provisions of section 13 on the footing that there was a series of transactions between the parties, which together amounted to one set of dealings of which an account should be taken.

In appeal this decision was confirmed with a slight variation which did not affect the result, as the learned Appellate Judge found that the mortgage had been paid off.

In second appeal it is urged that the accounts have been taken according to a wrong method. We have been referred to the case of *Vishnu Keshav Joshi* v. *Satvaji* (1). But in that case it was expressly found that before the second transaction was entered into, the first transaction had been completed. The money had been paid back. Therefore, there was not a series of transactions which could be connected together. The second transaction followed after the first when the first transaction had come to an end. That makes all the difference in our opinion. In this case the series of transactions between the parties was exactly the kind of series of transactions contemplated by section 13 of the Act, and it was intended that an account should be taken of the whole series of transactions between the parties as if they were one entire transaction. Therefore, we confirm the decree and dismiss the appeals with costs.

Appeals dismissed.

(1) (1897) P. J. 87.

CALCUTTA HIGH COURT.

Ordinary Original Civil Suit No. 1514 of 1919.

April 15, 1920.

Present :—Mr. Justice Rankin.

TIKAM CHAND SANTOKCHAND—Plaintiff

versus

SANTOKCHAND SINGHI—Defendant.

Injunction restraining defendant in pending suit from prosecuting action in foreign Court, when to be granted.

In order to obtain an injunction restraining a defendant in a suit pending in British India from prosecuting a suit on the same cause of action in a foreign Court an application for the injunction must be made at a very early stage of the proceedings. An application made after a considerable amount of time and trouble has been expended in the foreign Court will not be granted.

Mr. *B. C Ghosh*, for the Plaintiff.

Mr. *I. B. Sen*, for the Defendant.

JUDGMENT.—This case is a somewhat difficult one but I am convinced on the whole that the two cases which Mr. Sen has cited to me are applicable to the facts as I understand them. I think the case reported in *Hyman* v. *Helm* (1) and the case in which that case was referred to, reported in *Vardopulo* v. *Vardopulo* (2), are very strong authorities in favour of Mr. Sen's contentions.

The application before me is to restrain the defendant before decree from commencing or, rather, from prosecuting an action in a foreign Court about the same subject-matter. The first point I notice is that the application is entirely late. The action in Bikanir has been going on for a considerable time and I think it is an essential condition of such an order as I am asked to make that it should be applied for very promptly and that it should not be applied for after a considerable amount of time and trouble has been expended in the foreign suit. As regards the actual institution of the suits, it appears that the suit in this Court was instituted on 5th June but that the writ of summons was not served upon the defendant in the suit until somewhere about 12th July, *i. e.*, a week after the defendant in this suit had instituted the suit in the Court of Bikanir. It is said against that that before the action brought here the plaintiff had given notice to the defendant that he was about to bring the suit. The defendant went to Bikanir, it appears, sometime before the 5th July and started his suit there. He now comes and explains that the plaintiff in this suit has got property in Bikanir. He says that he thought that advisable for the reason that money due to him under a decree could be realised much more readily and more speedily against the present plaintiff if he brought the suit in Bikanir. I am not prepared to find against that contention and the circumstances of this case are not, I think, so strong as to induce me to do what, apparently, has never or very rarely been done, *viz*, to restrain a defendant sued in one country from bringing an action in another country where he believes himself to have a more convenient forum. If the matter had been a question between this Court and some other Court in Bengal, or even some other Court in British India, other considerations would apply. It is quite true that the partnership appears to have been carried on in Calcutta, but, on the other hand, the two parties appear both to be subjects of His Highness the Maharajah of Bikanir. On the whole, I think that I should be running the risk of impairing the very sound principle laid down in the two cases to which Mr. Sen has referred if, in this case, I were to give the injunction asked for. That being so, I shall dismiss this application but the costs of to-day will be reserved.

Application dismissed.

(1) (1883) 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258.

(2) (1909) 25 T. L. R. 518; 53 S. J. 469.

MADRAS HIGH COURT.

City Civil Court Appeal No. 1 of 1919.

March 12, 1920.

Present :—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Krishnan.

M. RAJAGOPALA NAYAGAR—Plaintiff—Appellant

versus

SPENCER & Co., Ltd. and another—Defendants—Respondents.

Malicious prosecution—Person expressing honest opinion and not conducting prosecution, whether prosecutor—Damages, suit for, maintainability of.

RAJAGOPALA NAYAGAR v. SPENCER & CO. LD.

No action lies for damages for malicious prosecution against a person who in no wise conducted the prosecution, but merely expressed his opinion to the Police that certain articles were stolen and appeared as a witness in obedience to the Police summons. [p. 220, col. 1.]

Gaya Prasad v. *Bhagat Singh*, 35 I. A. 189; 30 A. 525; 10 Bom. L. R. 1080; 4 M. L. T. 204; 18 M. L. J. 394; 5 A. L. J. 665; 14 Bur. L. R. 318; 11 O. C. 371; 8 C. L. J. 337; 12 C. W. N. 1017 (P. C.) and *Peria Gounden* v *Kuppa Gounden*, 52 Ind. Cas. 782; 10 L. W. 235; 37 M. L. J. 234; 26 M. L. T. 140; (1919) M. W. N. 577; 42 M. 880, explained and distinguished.

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 244 of 1917.

FACTS appear from the judgment.

Messrs. *V. C. Sesha Chariar* and *K. V. Sesha Aiyangar*, for the Appellant.—The defendants may be said to have initiated the prosecution. Though the prosecution was conducted by the Police it was the defendants that actively gave definite information to the Police that plaintiff stole the articles. An informant is as much liable in damages in an action for malicious prosecution as the complainant himself. See *Peria Gounden* v. *Kuppa Gounden* (1) and *Gaya Prasad* v. *Bhagat Singh* (2).

Messrs. *Short Bewes & Co.*, for the Respondents.—The respondents did not initiate the prosecution. The Police made the search and discovered the articles and when they were brought to the defendants they expressed their honest opinion that the articles must have been stolen from their premises. They did not even actively conduct the prosecution, but appeared in obedience to summonses as witnesses. Such an attitude is inconsistent with actively complaining or informing. The case in *Peria Gounden* v. *Kuppa Gounden* (1) is distinguishable. There the initiation of proceedings and the information was given by the defendant.

JUDGMENT.

WALLIS, C. J.—This is an appeal from the judgment of the learned City Civil Judge dismissing a suit brought by the plaintiff against Messrs. Spencer & Co, and Mr. Bovill, the Manager of Messrs. Spencer & Co., for damages for malicious prosecution of the plaintiff, on a charge of stealng certain articles which Messrs. Spencer & Co, kept not for purposes of sale but for distribution among possible customers and which they also were in the habit of distributing to some extent among their own subordinates.

The facts which gave rise to this case were, that two burgalaries were committed on Messrs. Spencer & Co.'s premises and the Police were advised of the facts. The Police came to Messrs. Spencer & Co., and proposed to arrest the plaintiff and another on suspicion. They were arrested and search warrants were granted and their premises were searched. Mr. Bovill had nothing to do with this so far. When the premises of the plaintiff and the other man were searched certain articles were found. In the plaintiff's premises a very large number of these advertisement articles were found. The Police produced these articles before Mr. Bovill and, I think, the City Civil Judge finds in the presence of the plaintiff. But it is not very material. Having regard to Mr. Bovill's recognition that a great number were advertisement articles which came from Messrs. Spencer & Co. and having regard to the quantities—there were 18 little mirrors—, he came to the conclusion that they could not have been acquired by the plaintiff from Messrs. Spencer & Co. in the ordinary course as presents, but that they must have been taken without permission, which amounted to theft. Therefore, he expressed his opinion that the articles must have been stolen. He subsequently wrote to the Commissioner of Police, a letter, Exhibit C., in which he says, "with reference to the articles placed before us by the Police this morning we have to say that the greater portion of the advertisement articles recovered from the house of Rajagopala Naicker were undoubtedly stolen from our premises. Some of the other articles are such as we have in stock and sell, but they bear no distinguishing marks.....Please take any action you think advisable in these cases." These proceedings were in no way initiated by Messrs. Spencer & Co, and Mr. Bovill. It was the Police that brought these things discovered on the premises of the plaintiff

(1) 52 Ind. Cas. 782; 10 L. W. 235; 37 M. L. J. 234; 26 M. L. T. 140; (1919) M. W. N. 577; 42 M. 880.

(2) 35 I. A. 189; 30 A. 525; 10 Bom. L. R. 1080; 4 M. L. T. 204; 18 M. L. J. 394; 5 A. L. J. 665; 14 Bur. L. R. 318; 11 O. C. 371; 8 C. L. J. 337; 12 C. W. N. 1017 (P. C.)

to them and all they did was to express what was clearly their honest opinion that these goods were stolen goods and they left it to the Police to take any action they thought advisable. They took no part in the conduct of the prosecution except that they appeared as witnesses in answer to summonses. In these circumstances, it appears to me quite unarguable to say that they prosecuted. I think the case is altogether distinguishable from the Privy Council case in *Gaya Prasad* v. *Bhagat Singh* (2) in which the defendant was the real instigator of the whole proceedings and, practically, took an active part in the prosecution. Similarly, it is unnecessary to consider the case in *Veria Gounden* v. *Kuppa Gounden* (1) which has been referred to. In that case the proceedings were undoubtedly started by the defendant who informed the Village Magistrate whose duty it was to report that the accused had been guilty of a particular offense and, therefore, he initiated the proceedings. Here, neither Messrs. Spencer & Co. nor Mr. Bovill did anything of that kind but they merely expressed their honest opinion and left it to the Police to take any action they chose. This conclusion is also supported by a very recent judgment of Lord Reading, L. C. J., on facts almost exactly similar, which has not yet been reported. This ground is sufficient for the disposal of the appeal. I am not, however, to be understood to be differing from the other findings both as to reasonable and probable cause and absence of malice.

The appeal fails and is dismissed with costs.

KRISHNAN, J.—I entirely agree.

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 126 OF 1920.

December 4, 1920.

Present :—Mr. Shadi Lal, Chief Justice, and Mr. Justice Leslie Jones.

HARI SINGH—CAVEATOR—APPELLANT

versus

Sardarni LACHHMI DEVI—APPLICANT—RESPONDENT.

Expert evidence, value of.

The evidence of a skilled witness, however eminent, as to what he thinks may, or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible Human knowledge is limited and imperfect. [p 226, col. 1.]

An expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides, it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests. [p. 226, col. 1.]

Letters Patent appeal against the following judgment of Mr. Justice Wilberforce, dated the 24th June 1920, in Probate Case No 28 of 1918, granting Probate :—

JUDGMENT.

WILBERFORCE, J.—In this case Sardarni Lachhmi Devi, mother of Sardar Krishen Dev Singh, asks for a Probate of the Will of her son, executed on the 23rd of October 1918. He was then suffering from influenza which he had contracted by the 18th of October and pneumonia which started on the 22nd, and he died on the 25th of October. The petition is opposed by Sardar Hari Singh, the uncle of the deceased, and with him *Musammat* Bhag Sudhi, his step-mother, has associated herself. The objections of Sardar Hari Singh were that the Will was not executed by the deceased, or that he had not a disposing mind, and that the Will, if executed, was executed under undue influence. This last objection has been abandoned (see my order of 15th June 1920). Therefore, there remains for consideration the question whether the Will was executed by Krishan Dev Singh, and, if so, whether he was of disposing mind. For practical purposes, the position of the caveator is, that the Will has been

proved to be a forgery or, if not, that there are such strong circumstances, pointing to its being a forgery, and that the evidence of the petitioner is so interested and untrustworthy that the Probate should not be granted.

The position taken up by Chaudhri Shahab ud-Din for the petitioner is, that, in the first place, the Will was in no way an inofficious one; Krishen Dev Singh was a boy who had been educated at the Aitchison College, and was just over 19 years of age, and had been under the care of his uncle, Sardar Hari Singh, since the testator had arrived at majority he had had constant quarrels with Hari Singh about his property and was on bad terms with him. For this reason it was natural that he should wish to leave the property away from his uncle and in favour of his mother. This position is not contested by Mr. Sheo Narain for the caveator, but the learned Counsel points out that, in any circumstances, the mother of the testator would have succeeded to a life-estate and that there was, therefore, no special reason to make a further provision for her.

The Will is stated to have been executed in the handwriting of Krishan Dev Singh at 5 A. M. on 23rd October 1918. This is clear from the statement of the attesting witness, Pir Bakhsh, taken by me on the 2nd June 1920. The testator is admitted to have been in a serious condition at the time, and the Will is said to have been written by him after propping himself up in bed. He is said to have raised his knees and to have written it on a book and to have taken about an hour over the performance. He then sent Pir Bakhsh, who was his servant, to fetch Mirza Jalal Din, Barrister, who had done legal business with him in his litigation with Hari Singh and was also his personal friend. Mirza Jalal Din, who lived about half a mile distant, arrived with little delay, and at the request of the testator signed the Will after which Pir Bakhsh also affixed his signature. Subsequently. Dr. Hira Lal visited the patient at about 9 or 10 A. M., and found him in a state bordering upon collapse, and, according to Mirza Jalal Din, was asked whether he would also attest the Will, but he refused as he did not wish to depress his patient. According to Dr. Hira Lal, Mirza Jalal Din did mention a Will and asked him either to hear it read out or to sign it. He states that he refused to have anything to do with the matter and did not see the Will. Chaudhri Shahab-ud-Din also refers to certain statements of witnesses produced by the other side which he considers are in his favour. One Partab Singh, a Granthi, says that he visited the patient on the 22nd, 23rd and 24th of October, and that on his second visit, namely, the 23rd, Mirza Jalal Din was speaking about getting a document executed by Krishan Dev Singh, but as the visit was between 10 and 12 A. M. in the morning, this statement hardly assists him. There is the statement of another witness produced by the opposite party on the same subject, namely, Jagan Nath, who states that on his second visit to the deceased his mother asked whether he was capable of executing a Will, and that he said that he was not. The witness says that he thinks that the testator died the day following his second visit, but his statement is too vague and indefinite to be of assistance to either party. There, therefore, remain on behalf of the petitioner the statements only of Mirza Jalal Din, Pir Bakhsh and Dr. Hira Lal and it has to be considered especially whether the statements of the two attesting witnesses are true. In their favour there is the fact that they would have been persons naturally called in to attest a Will. Mirza Jalal Din was not only the legal advisor, but the close friend of the testator, while Pir Bakhsh was a very old servant of the family. There is also some corroboration that a Will had been executed, afforded by the statement of Dr. Hira Lal. Against the truth of their statements, there is, first, the fact that Mirza Jalal Din has not had a particularly reputable career as a Barrister. In 1917 he was practising before the Karachi Courts, and on the 13th of July 1917 he was removed from the office of Pleader of the Judicial Commissioner's Court on the ground that he had taken fees in cases in which he did not appear, and it was remarked in one case that it was difficult to believe that he had any intention of filing a plaint when he sent for the money for that purpose, and that his statement that he had engaged a substitute was

false. The order, it is true, was passed in his absence, but the remarks of the Judicial Commissioner were based upon the statement put in by Mirza Jalal Din and other evidence; and up to this date, after one futile attempt to get the *ex parte* order set aside, the order remains in force, and Mirza Jalal Din, in consequence, on the 19th December 1918 gave an undertaking to practise no longer in the Punjab, until the order in question was set aside. It is also urged that he is, for practical purposes, a beneficiary under the Will, as, on the 9th of November 1918, *i.e.*, on the first day after the *kiria* ceremonies of the deceased, the widow executed a power-of-attorney in favour of Mirza Jalal Din giving him absolute control over her large property. He also made the extraordinary condition that he was not removeable from this post until all her affairs were settled up. As for Pir Bakhsh, he is an adherent of the deceased, and in this capacity had been proceeded against under section 145, Criminal Procedure Code, by Sardar Hari Singh; and it is urged that he may expect to be benefited if the Will is maintained. The evidence of Dr. Hira Lal is considered trustworthy by both sides, but it is pointed out that he did not see any Will and is vague in his memory as to what was said. In addition to these criticisms the caveator has produced two handwriting experts, Mr. Hardless, and Mr. Brewster, who both unhesitatingly pronounce the Will to be a forgery. The caveator has also adduced Captain Nelson and Lt. Col. Mackenzie to show that, on the day of the alleged execution of the Will, the testator was incapable of writing it. He has also produced Drs. Jagan Nath and Jai Chand to testify as to the condition of the patient.

I will first discuss the medical evidence regarding the possibility both from a physical and mental point of view of the Will having been executed as stated. Dr. Hira Lal was the regular attendant upon the patient. He states that he saw him on the 18th of October when he was suffering from influenza and again on the 22nd and 23rd. He had developed pneumonia on the 22nd, and was ordered perfect rest. On the 23rd he was still able to speak intelligently and his mental faculties appeared to be in ordinary state: "He was so weak that he could not sit up," but in re-examination the Doctor stated that it would have been possible for him to have sat up on the 23rd. He saw him on that date between 9 and 10 A. M. There is nothing on the record as to the qualifications or practice of Dr. Hira Lal, but both Counsel admit him to be efficient and trustworthy. It is obvious, therefore, that he is in a far better position to describe the patient's condition than Captain Nelson and Col. Mackenzie, who are merely deposing on information furnished by Dr. Hira Lal, or by prescriptions. In addition to Dr. Hira Lal, the patient was visited by Dr. Jai Chand, on the 20th and 21st He gave him prescriptions on both these days, although the second does not appear to have been dispensed. He says that on the 21st pneumonia had supervened, and this is possibly correct, although he appears to have made a perfunctory examination, and although his prescription, P. 20, does not necessarily indicate, according to Col Mackenzie, that the patient was suffering from pneumonia. His evidence, therefore, helps little to discover the exact situation on the 23rd. Dr. Jagan Nath helps still less as he refused to take over the medical treatment, as another doctor was in charge and he gave no prescriptions, and is also vague as to the actual dates on which he visited. There remain, therefore, the statements of Captain Nelson and Col. Mackenzie. They have based their opinions mostly on Dr. Hira Lal's prescriptions, and on their general knowledge of the course of pneumonia developing on influenza. I do not think their evidence of any value in the face of Dr. Hira Lal's statement. They base their opinions largely on prescriptions P. 17 and P. 18 which were written by Dr. Hira Lal on October 23rd. These prescriptions show that the patient was on the border of collapse, and that Dr. Hira Lal, therefore, prescribed very strong heart stimulants; but this was at 9 or 10 A. M. and cannot be held to prove that the patient's condition was similar at 5 A. M. In fact, it can reasonably be argued that the approaching collapse which Dr. Hira Lal feared at 9 or 10 A. M. was due to the exertion of writing the Will at 5 A. M. Captain Nelson was confident that it was impossible for the patient to have sat up in bed and written the Will on the 23rd at 9 or 10 A. M., and Col. Mackenzie thinks that it is improbable that he could

have done so. The latter opinion practically bears out the opinion of Dr. Hira Lal, but, as I have stated, the opinions of neither of these undoubtedly well-qualified Doctors, who did not see the patient, can be held in any way to affect the value of Dr. Hira Lal's statement, nor have they any importance, or even relevance, with regard to his condition at 5 A. M. I hold, therefore, that it is not shown that it was impossible for the Will to have been written at 5 A. M. nor even improbable if, as was presumably the case, the patient felt death approaching and thought that he should execute the Will at once. Even Col. Mackenzie admits that, in cases of influenza and pneumonia, there is sometimes a slight reduction of temperature in the morning. The petitioner's case is, therefore, not affected by medical evidence.

There has next to be considered the value of the statements of Mr. Hardless and Mr. Brewster, two well-known handwriting experts. This evidence is somewhat difficult to criticise as handwriting experts stand in an impregnable fortress of their own, and the value of their statements can, with difficulty, be tested by laymen or even by learned Counsel. A further difficulty in this case is that the only other admitted pieces of handwriting of the deceased, namely, seven letters with some envelopes addressed to Mirza Jalal Din, were written by the testator when in good health. Even handwriting experts admit that comparison under such circumstances is rendered more difficult (see Osborne on Questioned Documents, page 199 and page 21 *et seq*). In spite of this fact, however, the experts have found no difficulty in pronouncing the Will to be a forgery. Mr. Brewster states that in the document itself there is inherent evidence of forgery. His reasons are that the Will has been slowly and very carefully written with numerous pen pauses, pen lifts, and delicate re-touchings which are not found in genuine writing, nor are they found in the ordinary writing. He thinks the writing of the Will inconsistent in itself in many places inasmuch as two or three letters only are written at one operation, but later on the second page the slow method was forgotten and some words containing six or four letters were written without lifting the pen. He thinks that in at least two cases the strokes of the letters had been made wrong way round and he considers these inconsistencies delicate additions and re-touchings not compatible with the writer being in a condition of prostration. He also refers to the finger and hand movement and the different angle of pen presentation and careful joinings between the letters. It is difficult for me to express any opinion on Mr. Brewster's evidence, but the following remarks are not out of place. It appears to me only natural that a man in a condition of great weakness, as the testator undoubtedly was, should have written slowly and carefully with pen pauses and pen lifts. As for re-touchings, Mr. Brewster referred especially to the "*l*" of the word "last" in the first line, and the "*h*" of the word "have" in the fourth line. It appears, however, that the writer was accustomed in ordinary health to make similar re-touchings. I would refer to the "*b*" of the word "bearer" in page 7 and to five "*hs*" in the same letter, and also to two "*hs*" in page 13. These examined under a microscope all appear to have been made separate from the original letters. They all also appear to have been made from the top as the finish of the stroke is in lighter ink and the same is the case with the re-touchings in the Will. As for the inconsistencies in the writing in some cases on the first page more than three or four letters appear to have been written consecutively; (see for instance the words "inherited" and "acquired"). This matter also does not appear to me of vital importance as the writing of a man beginning to write in the state of exhaustion may easily improve as he goes on. As for the angle of pen presentation, it may be different, but cannot this be accounted for by the conditions under which the Will was written? I may finally refer to Mr. Brewster's own remark that a man, who is not accustomed to writing legal documents, may write such a document more slowly than he would write an ordinary document. Mr. Hardless's evidence was taken at greater length but most of the above remarks apply. He gave eight reasons. His first reason was an irregular movement in page 1, *i. e.*, the use of the simple finger movement in some places and the combined finger and wrist movement. This has also been referred to by Mr. Brewster. He next refers to pen scope, namely, the length of the writing without the change of pivot. He thirdly refers to pen presentation and next to pen pressure. The difference in this

respect may easily be accounted for by the conditions under which the Will was written. The same is the case with the alignment, the sizing and the spacing. He referred also to assumed tremulousness of the Will, and thought that the tremulousness would have been more uniform, if it had been natural. He referred especially to the word "Sardar" in the last line and he did not think that the addition of the "s" in the word "moveable" was natural, nor the change of the word "s" in "expenses." Among other features, he noticed the firmness of the under-stroke below the date, and that below the signature and of the cross-bars to the "T." There is little more that I can say regarding his evidence in particular.

The value of expert evidence in general on handwriting was also discussed at considerable length before me. On the one hand, two books by Mr. Hardless and his son were shown to me, as they contained a large number of instances in which the evidence of these undoubted experts has been accepted by Courts. In fact these two books are little more than advertisements of the writers. On the other hand Mr. Shahab-ud-Din refers to certain cases in which their evidence has not been acted upon:—

Srikant v. *Emperor* (1), *Ishar Das* v. *Emperor* (2), *Jalal-ud-din* v. *Emperor* (3), *Basrur Venkata Row, In re* (4), *Suresh Chandra Sanyal* v. *Emperor* (5), *Lalta Prasad* v. *Emperor* (6), *Punjab National Bank, Limited* v. *Mercantile Bank of India, Limited* (7). The general trend of these judgments is that it is unsafe to base a conviction merely on the evidence of handwriting experts. The value of such evidence has also been discussed in many commentaries on evidence, see, for instance, Field's Evidence Act, 6th Edition, page 194; Roger on Expert Testimony, pages 458 469; Best on Evidence, page 237; Taylor on Evidence, Volume I, page 63; Sanjiva Row's Evidence Act, page 889, and Wigmore's Principles of Judicial Proof pages 70 and 71 and page 417, 1913 Edition, in which he gives a caricature of the usual handwriting expert. I am in no way inclined to discredit the value of such expert testimony, which, in some cases especially, may be conclusive, or, at any rate, of great importance, but I cannot help thinking that it is extremely dangerous to generalise in the way the experts have done when the questioned writing has been executed during a state bordering on prostration. It appears to me most unsafe to accept the expert opinion regarding the shakiness, tremulousness, want of care or excess of care in a writer writing under such conditions, and it may be noticed in this case that neither of the experts has even stated that he possesses much experience regarding the writings of a sick man. After all, in such circumstances, it is the human factor which has to be taken into consideration and this human factor is capable of producing many variations and inconsistencies. At the most, I would hold that the handwriting expert evidence in this case has raised some slight suspicion as to the genuineness of the document; but this slight suspicion is of no moment unless strongly confirmed in other ways. I should also mention that two laymen, Mr. Kelly and Lala Bihari Lal, support respiotively the proponent and the caveator.

It, therefore, remains to consider whether the grounds which Mr. Sheo Narain has made out against believing the statements of the attesting witnesses are sufficient. It may be admitted that Mirza Jalal Din was interested in the making of this Will, and that Pir Bakhsh might also have agreed to give assistance, and it may also be admitted that it would have been more satisfactory if other persons had been called in to witness the Will, but it must be remembered that the testator was at the time a stranger in Lahore, and, as far as he was concerned, he may have thought that the signature of the two attesting witnesses was sufficient. Mr. Sheo Narain also points out that the Will shows a knowledge of legal phraseology which could not have been expected of the testator. He refers to the use of the words "bequeath," "moveable" and "immoveable," "inherited and acquired" but the testator was a well-educated man, and had had some experience in litigation, and was a great friend of a Barrister. I have already referred to the

(1) 2 A. L. J. 444; 2 Cr. L. J. 353.
(2) 18 P. W. R. 1908 Cr.; 8 Cr. L. J. 75.
(3) 15 Ind. Cas. 979; 18 P. W. R. 1912 Cr.; 147 P. L. R. 1912; 13 Cr. L. J. 563.
(4) 14 Ind. Cas. 418; 11 M. L. T. 97; 22 M. L. J. 270; (1912) M. W. N. 125; 13 Cr. L. J. 226; 36 M. 159.
(5) 14 Ind. Cas. 753; 16 C. W. N. 812; 39 C. 606; 13 Cr. L. J. 289.
(6) 5 Ind. Cas. 355; 13 O. C. 1; 11 Cr. L. J. 114.
(7) 8 Ind. Cas. 98.

statements of Partab Singh and Dr. Jagan Nath. The latter is vague and the former does not appear to be entitled to much belief. There is also the statement of Lala Nand Kumar, but it is also vague. On the other hand, there are many reasons for believing the Will to be genuine. Krishan Dev Singh himself would have been naturally inclined to make it. Dr. Hira Lal's statement that Mirza Jalal Din wished him to hear the Will read out or to sign it, is important as this strongly signifies that the Will was then in existence. I believe Mirza Jalal Din's statement on this point as he would hardly have bothered Dr. Hira Lal merely to hear the Will which would not have helped his case, and it is far more probable that he would have asked him to sign it. He could not have taken the risk of the forged Will being shown to Krishan Dev Singh in Dr. Hira Lal's presence. I think, therefore, that this evidence shows that the Will was in existence on the 23rd and was genuine. It is also remarkable that, if Mirza Jalal Din, or some other person connected with the testator's mother, wished to forge a Will, they should forge a holograph document. It would obviously have been infinitely easier for Mirza Jalal Din to have written out the Will himself and for the forger to have added merely the signature of the testator. Another point which may be noticed in connection with the medical evidence is, that the Will was dated the 23rd October when the testator was undoubtedly seriously ill. If it was intended to forge a Will surely it would have been simpler to have ante-dated it by a day or two. Again, why should the forger have inserted unnecessary words like "Sardar" before the signature. Finally, against the argument that Mirza Jalal Din was pecuniarily interested in the drawing up of this Will, there is the fact that his services to the son were gratuitous as is shown by the correspondence. All these considerations, in my opinion, outweigh the considerations advanced by Mr. Sheo Narain.

To sum up the case, therefore I consider that the statements of the attesting witnesses are entitled to belief, and that the suspicion cast upon the truth of their statements by general considerations, or the expert evidence, can be safely disregarded.

As for the issue whether the testator had a disposing mind at the time when he wrote the document, Mr. Sheo Narain admits that, if he actually wrote it with his own hand as stated by the proponent of the Will, there can be little doubt that he had disposing mind at the time. This appears to me obvious, especially as the Will was a natural one for the testator to have made, and it is not necessary, therefore, for me to discuss this matter at greater length.

I grant the Probate to the petitioner and the costs of these proceedings.

The Hon'ble Pandit *Sheo Narain*, R. B, and Sardar *Sewa Ram Singh*, for the Appellant.

Mr. *Zafrullah Khan* and Chaudhri *Shahab-ud Din*, for the Respondent.

JUDGMENT.—This is an appeal against an order of a Single Judge in Chambers who has granted Probate to Sardarni Lachhmi Davi of a Will propounded as that of her son, Krishan Dev Singh.

We have heard lengthy arguments from Pandit Sheo Narain, on behalf of Sardar Hari Singh, the caveator-appellant, who is the uncle of the deceased, but as the same arguments have already been dealt with in detail in the order of the learned Judge, we do not consider that it is necessary for us to re cover the whole ground.

The Will propounded is a holograph and it is conceded that if Krishan Dev Singh wrote it himself he must have had a disposing mind. It is further a Will of exactly the kind which, having regard to his feelings towards his uncle, he might have been expected to make. Expert medical evidence was produced with the object of showing that, in his then state of health, it would not have been possible for Krishan Dev Singh to write a holograph Will. But this evidence, which is indirect, is based mainly on a prescription given by Dr. Hira Lal some hours after the time at which the Will is alleged to have been written, and we agree with the learned Judge in preferring the statement of Dr. Hira Lal, who was in actual attendance on the patient and whose veracity is in no way impugned, to the effect that it was possible for the deceased to have written such a Will.

We are not impressed with the evidence of Dr. Jai Chand who, while saying that the patient had pneumonia on the 21st October, on that date wrote out a prescription which was not clearly one for pneu-

monia, and the statements of Partab Singh and Dr. Jagan Nath appear to us to carry their own reputation.

The appellant further relied on the evidence of two experts in handwriting, Mr. Hardless and Mr. Brewster, who have given emphatic opinions that the Will is a forgery. Both of these gentlemen have exceeded their functions as experts in stating that it was not possible for a man in a low state of health to have written the Will before us, and, when Mr. Brewster goes further and says that his opinion on the subject of this Will is absolutely infallible, he is making a claim which is, of course, wholly untenable. We cannot, perhaps, do better than quote the words of Normar, J., in the *Queen* v. *Ahmed Ally* (8), where he remarked that "the evidence of a medical man, or other skilled witness, however eminent, as to what he thinks may or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a mere matter of opinion. Human judgment is fallible. Human knowledge is limited and imperfect." Moreover, to quote Ryan on Criminal Evidence in British India, Edition 1912, page 127, "It must be borne in mind that an expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides, it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests." That, of course, is exactly what has happened in the present case.

The standards with which the Will has been compared are a number of letters produced by Jalal ud Din, one of the signatories to the Will, as letters written to him by the deceased, with whom he was on very friendly terms. In his order, the learned Judge in Chambers has spoken of these letters as having been admitted to be in the handwriting of the deceased. Counsel for the appellant has told us that no formal admission to this effect was ever made, but of the fact there can be no doubt, as, apart from the evidence produced by the propounder, the caveator himself produced a witness who swore that these letters are in the handwriting of the deceased, and Counsel himself admits that this is most probably the case. He further admits that, if these letters were not believed to be genuine it would have been quite possible for the caveator to produce other documents that were. At any rate, it is on these letters and envelopes that the criticisms of the handwriting experts are based.

We propose to discuss this question of handwriting from rather a different point of view. The deceased developed influenza on the 18th October; the Will is supposed to have been written early in the morning of the 23rd; some hours later he was very seriously ill, and he died on the 25th. Public reference to the existence of a Will was made on the 9th November and it was actually registered on the 14th November. Let us now suppose that, as alleged by the caveator, the deceased wrote no Will and that it became necessary to forge one. It is unlikely that the idea of forgery would have taken practical shape before the 25th, or, indeed, would have developed at all before the 23rd, as there can be no doubt that if the deceased had known he was likely to die. He would have made a Will of this kind while he was physically capable of doing so.

A decision to forge having been reached, the first thing necessary would be to make a draft of the Will which had to be produced. The man on whom this duty would have fallen is Jalal ud-Din, a Barrister, who was well acquainted with the deceased and knew his capacities. He could hardly fail to realise that it would be desirable to produce a Will, which, while complying sufficiently with legal requirements, was nevertheless couched in language which a young man of the attainments of the deceased was likely to have used. The propounded Will, however, as Counsel for the appellant himself urges, contains language and is written in a form of which the deceased, though he was well-educated, would most probably have been incapable, and it does not appear to us to be likely that if he had to draft a forgery,

(8) 11 W. R. 25 Cr.

Jalal ud Din would have been guilty of such an obvious and fundamental mistake. Moreover, apart from the question of the language used in the Will, it is written entirely without punctuation, as is the custom in English legal documents. Of that custom Jalal-ud-Din would be well aware, but the deceased would not. The standards show that the deceased was very careful about his punctuation and any one preparing a draft forgery would hardly be likely to make this unnecessary departure from the custom of the deceased as evidenced by the letters on which the forgery had to be based. We have no doubt that if Jalal-ud Din had set himself, as on this theory of forgery he must have done, to prepare a draft, having plenty of time to think over it, he would have drawn up something which would not have been open to these obvious criticisms.

Counsel for the appellant does not pretend to be able to say by whom the actual forgery was done, but the suggestion is that it was either Jalal-ud-Din or some, person, employed by him. Mr. Brewster, we notice, has given it as his opinion that the Will is neither good nor bad forgery, but in this opinion we are unable to concur. Mr. Kelly, the Principal of the Aitchison College, who was for many years well acquainted with the handwriting of the deceased, has stated that the Will is unmistakably in his handwriting. The result of our own observation is, moreover, that if the Will is a forgery, it would be a very remarkable piece of work.

The handwriting of the deceased was distinctive and full of character, and, as the learned Judge in the Chambers has pointed out, a decision to forge a holograph Will in such handwriting would have been very bold and attended with much risk. Assuming,however,that such a decision was taken, a forgery of the kind which is now supposed to be before us would have demanded much practice as well as great skill Even if the matter of punctuation did not strike the author of the draft, it can hardly have failed to strike the author of the forgery. There must have been numerous copies made before the final copy which was to be tendered in Court could be produced. The experts have laid stress on the fact that certain words in the Will show what they describe as "delicate re-touchings." These re-touchings are, however, few in number and show no signs of attempted concealment, being perfectly visible to the naked-eye. There is nothing in the least delicate about them and they are not the kind of re-touchings which an expert forger might have been expected to make. Thus, the forgery is in no way improved as such by the double stroke in the letter '*t*' in the word 'last' or by the lengthening of the letters '*b*' and '*e*' in the word 'bequeath', so as to bring them down to the level of the line. There is, we notice, another '*e*' in the word 'inherited' which is written well above the line, but, though the forger is supposed to have thought it necessary to make a clumsy addition to the first '*e*' in 'bequeath', he found himself under no such necessity with regard to the second '*e*' in 'inherited,' though if the one amendment was desirable, so equally was the other.

The experts appear to us to have given their evidence as if they thought that the forger was pressed for time and had to make all his corrections and re-touchings in his first and only effort. Thus, they think that the addition of an '*e*' right above the line in the middle of the word 'moveable' from which the first '*e*' had been omitted when the word was first written, is a distinct sign of forgery. To our minds, it indicates exactly the reverse. When we are considering the work of a supposed forger in making a final copy of his work, the only point of view, though this was not that of the experts, from which the insertion of this '*e*' can be regarded as a sign of forgery is that it was the deliberate amendment showing the very greatest astuteness. We need only add, as regards these re-touchings that the deceased, as the standards show, was in the habit of making them and it is obvious that in the conditions under which this Will is alleged to have been written, it would have been natural for him to make more of them than when he was writing at ease in a state of perfect health. There is, however, another point on which this forger, whose clumsiness the experts have been so ready to expose, has shown himself to be possessed of extraordinary cleverness Not content with making a forgery which is a first rate reproduction of the characteristics of the handwriting, he has

managed somehow to picture to himself the state of the health of the deceased at the time at which he is supposed to have written the Will and the very position in which he should have written. He has thus introduced into the forgery just those very differences which we should expect to find between the writing of a man sitting up at a table in good health and that of a sick man propped up in bed with his paper on a book on his knees. He has even been clever enough to bring into the forgery that more up-right style of handwriting which such position would actually induce. In fact, he anticipated in his imagination the very posture in which, according to the medical evidence the Will must have been written if it was written by the deceased at all.

These combinations of extraordinary cleverness and great but avoidable stupidity and clumsiness on the part of men who had ample time to think out the forgery in all its details and correct all obvious defects appear to us strongly to contra-indicate the theory of forgery.

As regards the direct evidence, the witness Jalal-ud-Din, is no doubt a man who was himself deeply interested in getting a Will made, and we do not believe him when he says that the deceased had no assistance in making it. We think, however, that this denial on his part, though it is, of course, nonetheless excusable, may be traced to the prominence given by the caveator in his pleas to a plea of undue influence. In the pleas, forgery was not clearly alleged and if the propounder and his friends knew that they had a genuine Will in their possession, they would naturally be inclined to regard their position on that point as unassailable and attach more importance to the allegation of undue influence. They would, therefore, try to make out that the deceased wrote the Will unaided. An issue was framed on this plea, and it was not abandoned until a late stage in the case.

Counsel for the appellant complains that a number of servants and the mother of the deceased ought to have been produced in support of the Will; but there is no reason to suppose that the servants referred to, though they were present in the house, were present in the room when the Will was written, and as to the non-production of the mother, who is said to have been present in the room, it has been explained to us by Counsel for the respondent that she was being kept in reserve in order to meet such evidence as the caveator might produce on the subject of undue influence. Afterwards, when her Counsel wished to produce her, the caveator objected and her evidence was not taken. Another offer to produce her was made during the course of the appeal before us and it was not accepted. The lady has been attending Court with Jalal ud Din and there can be no doubt as to the kind of evidence which she would have given. There is no reason to suppose that her production would have helped the caveator, or failed to help her own case.

The other direct evidence is that of an old servant, called Pir Bakhsh, who no doubt had reason to dislike the caveator, Hari Singh, but is otherwise uninterested. Counsel for the appellant has made a curious criticism of the description by this witness of himself which follows his signature to the Will. He says that, obviously, the witness was about to write that he was servant of Hari Singh but corrected the 'H' into 'K' and then wrote Krishen Dev Singh as the name of his master. There has no doubt been a correction which may have been what Counsel alleges it to be, but, if so, though it would be quite natural in a man who was suddenly called upon to attach his signature and description without having thought out carefully what he was going to write, it would be much less natural in the case of a signature to a forgery regarding which all the details had been carefully planned.

The direct evidence in support of the Will is, in our opinion, strongly corroborated by the statement of Dr. Hira Lal as showing that there was already a completed Will in existence when he visited the deceased on the morning of the 23rd. He did not see the Will but the impression left on his mind was that Jalal-ud-Din wanted either to read him the Will or to get him to sign it. The witness says that he tried to 'evade' Jalal ud Din's request, from which it appears that the matter was pressed on him though there was no reason why Jalal-ud-Din should have assumed such an unnecessary

risk if he had not got a Will ready to show to the witness.

We have no doubt that the Will propounded is genuine and was written by Krishen Dev Singh. No question other than that of the genuineness of the Will has been argued before us, and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.
APPEAL No. 41 OF 1919.
February 26, 1920.
Present:—Justice Sir Abdur Rahim, KT., and Mr. Justice Moore.
M. RAMIAH ASARI—DEFENDANT No. 2—APPELLANT
versus
P. N. CHIDAMBARA MUDALIAR, THROUGH HIS AGENT KRISHNA PILLAI—PLAINTIFF AND DEFENDANT No. 1—RESPONDENT.

Copyright in unpublished work - Sale of unpublished work, when complete—Purchaser, rights of.

P. purchased the right to publish and sell 90 songs in Tamil composed by *D.* Shortly afterwards, *D.* sold 47 songs to *M*, 40 of which were the same as those sold to *P*; *M.* published these 40 songs and sold them to the public. *P.* instituted the present suit to restrain *M.* from selling all or any of the 90 songs. It appeared that in respect of the sale to *P.*, *D.* undertook to correct and revise the songs, but that he had failed to do so, and it was contended that, owing to this, the bargain was incomplete, and that no rights of *P.* had been infringed:

Held, that the sale to *P.* was complete and its completeness was not affected by the mere fact of *D.* undertaking to revise some of the songs, or re-write some of them; that *P.* had acquired an exclusive right to publish or refrain from publishing the songs, and any one publishing them without his consent infringed his legal right, and that, consequently, he was entitled to restrain *M.* from infringing his rights therein. [p. 230, col. 1.]

Appeal against the decree of the District Court, Madura, in Original Suit No. 1 of 1918, dated the 20th December 1918.

FACTS appear from the judgment.

Mr. *T. R. Venkatarama Sastriar*, for the Appellant.—The plaintiff is not entitled to the injunction. The sale of the songs to him by the first defendant was not complete as there was something to be done by the first defendant according to the contract, *i.e.*, to revise the songs and correct them. This the first defendant did not do. The bargain was not complete and the plaintiff acquired no rights which he could complain of having been infringed. See section 80 of the Contract Act, the principle of which applies to this case.

The plaintiff had possession of the manuscripts sold to him and he it was who enabled the second sale to second defendant. He allowed access to them and cannot complain of any infringement of his legal right.

Mr. *T Ethiraja Mudaliar*, for the Respondent.—The law is the same in India as in England with regard to an author's rights in his literary productions. An author has the right to sell his right even in unpublished works. *Mansell* v. *Valley Printing Company* (1). After sale, no second purchaser, by publication, can claim a better right than that of the first vendee. The mere undertaking by the author, first defendant, to revise and correct the poems does not make the sale incomplete, as consideration had passed for the sale. Section 80 of the Contract Act will not apply to this case.

The fact that the manuscripts were in plaintiff's possession does not affect his legal rights. It does not matter how it was copied, there was an infringement of his rights. There is no evidence that he was guilty of laches.

JUDGMENT.—The plaintiff, who is the respondent in this appeal, purchased the right to publish and sell 90 songs in *Tamil* composed by the first defendant and paid Rs. 50 as the price. The second defendant, a few months afterwards, bought from the first defendant 47 songs, 40 of which, as found by the District Judge, are the same as those sold by first defendant to plaintiff and paid Rs. 40. He published those 40 songs and some others, two of which are found to be of an obscene character, and sold copies of them to the public. The plaintiff has instituted this suit in order to restrain the second defendant from publishing and selling all or any of the 90 songs which he had

(1) (1908) 1 Ch. D. 567; affirmed in 2 Ch. D. 441; 77 L. J. Ch. 742; 99 L. T. 464; 24 T. L. R. 802.

purchased and for damages. He got a decree from the learned District Judge.

The first question argued by Mr. Venkatarama Sastriar, who appears for the second defendant, is that, as a matter of fact, there was no completed sale of the 40 songs in question to the plaintiff. The basis of that argument is that, according to the case of the plaintiff himself, the first defendant, the author, was to make corrections and revise the songs sold to the plaintiff but that he failed to do so. We are asked to infer from that that the bargain was incomplete and, therefore, no rights of the plaintiff have been infringed. We cannot accept this contention as the contents of the two manuscript books were sold to the plaintiff who paid for them, and the mere fact that the first defendant, the author, undertook to revise some of the songs or rewrite some of them would, in no way, affect the completeness of the sale. So far as the 40 songs in dispute are concerned, we may take it upon the facts that they are substantially identical with those sold to the plaintiff, along with the other songs. Our attention was drawn to section 80 of the Contract Act which says that, "Where, by a contract for the sale of goods, the seller is to do anything to them, for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done." But, assuming that the section applies to the sale of a composition, such as a song or a poem, what the section contemplates is that where the parties intended that the contract was to be regarded as complete only when certain things were done, the contract could not be held to be complete until the act contemplated was done. This is borne out by the illustration to section 80. As to whether a contract was complete in a particular case depends upon the facts of that case. In this case the facts leave no doubt that the contract was complete.

The next question argued on behalf of the appellant is that, there was no infringement of any right of the plaintiff, if the author, that is the first defendant, sold the same songs to the second defendant being enabled by the plaintiff to do so. The facts found are that the manuscript remained in the possession of the plaintiff after the sale and the first defendant was to go over to the plaintiff's office to revise the manuscript. It does not appear how these disputed songs were copied from the manuscript, whether by the first defendant himself or by one Picha Pillai who was employed in the office of the plaintiff but was apparently a friend of the first defendant; whoever copied these songs for the purposes of sale to the second defendant, the facts do not enable us to say that this was due in any way to the laches of the plaintiff. The second defendant, we may take it, made his purchase without the knowledge of the fact that the property had been sold already to the plaintiff. But Mr. Venkatarama Sastriar has not contended, nor could he successfully contend, that mere absence of knowledge on the part of the second defendant would be sufficient to give him a title to the property. The first purchaser, in the absence of any equity depriving him of his right, would be entitled to the property.

This we may mention is not a case under the Copyright Act, because the songs were not published by the plaintiff. But there is no doubt that the author has an exclusive right to his own productions and he can also assign such right even if the production has not been published. This is well settled law in England and there can be little doubt that this is the law in this country also. It is laid down in *Mansell* v. *Valley Printing Company* (1), on the authority of a series of decisions, that "The Common Law does give a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition, after he has published it to the world, is a totally different thing." And then, quoting from Earle, J., the judgment states: "The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation, and which is the right of an author, to which the Statute

of Anne relates." Again, "the right of an author of an unpublished literary production or work of art is not confined to the paper or canvas or other material upon which the work is written or placed. His right is an exclusive right to publish or refrain from publishing it, as he may please, and any one who publishes it without his consent infringes his legal right, and does that which is actionable *per se*. It matters not how the wrong doer obtained the production which he publishes, whether he took away the author's original material, or whether he only copied it or whether some third person copied it, and passed the copy on to him." There can, therefore, be no doubt that the plaintiff acquired a valid right to the composition, and that he is entitled to restrain the defendants from further infringing his rights therein.

The learned Judge has also given damages against the first defendant, and rightly so. The first defendant's conduct in this case has been extremely blameworthy. He first sold the rights to the plaintiff and then surreptitiously purported to sell them again to the second defendant and received considerations from both.

The appeal is dismissed with costs of the first respondent (plaintiff.)

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1378 OF 19 9.

October 18, 1920.

Present :—Mr. Justice Abdul Raoof.

MOHAN LAL—PLAINTIFF—APPELLANT

versus

MAYA MAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Will in favour of widow, construction of—Estate taken.

Wherever expressions indicating the creation of a full proprietary right in favour of a widow are found in a Will she is to be treated as taking an absolute estate. [p. 232, col. 2.]

Second appeal from the decree of the District Judge, Kulu, at Dharamsala, District Kangra, dated the 3rd May 1919, reversing that of the Subordinate Judge, Kulu, dated the 1st March 1919.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Fakir Chand*, for Respondent No. 1.

Mr. *Gokal Chand Narang*, for Respondent No. 2.

JUDGMENT.—The facts giving rise to this second appeal are simple and are fully set forth in the judgment of the Court of first instance. In order to understand them, it is necessary to state the pedigree table of the parties. One Gheplia had two sons, Hushnaki and Dila. Hushnaki had two sons, Ragba and Siripat. Mohan, plaintiff, is the son of Ragba. Siripat had a son Pars Ram, who is said to have died in the life time of Siripat, leaving a widow, *Musammat* Rupan, who is the defendant No. 2 in this case. Dila, the other son of Gheplia, died childless, leaving two widows, *Musammat* Raunsu and *Musammat* Jai Wanti. Ragba died on the 23rd April 1896. Siripat died on the 8th July 1901. One day before his death, *i.e.*, 7th July 1901, he executed a Will which was unregistered. Under this Will he purported to assign his properties in Kulu, including the property in dispute, to *Musammat* Rupan, the widow of his pre deceased son Pars Ram, and the property in Paprola to his nephew, Mohan, the plaintiff. On the 17th December 1919 *Musammat* Rupan mortgaged certain shops other than those in suit to one Roda Mal for Rs. 400. On the 9th April 1918, *Musammat* Rupan sold two shops to the respondent, Maya Mal, for Rs. 500. The major portion of this consideration was Rs. 400 for which the previous mortgage, dated the 17th December 1909, had been made in favour of Roda. There were some minor items which amounted to Rs. 100. These are detailed in the judgments of the Courts below. The two shops alienated under the sale-deed are the subject-matter of this litigation. The plaintiff instituted this suit on the 22nd October 1918 to avoid the sale and get possession over the shops on the following allegations :—

(1). That the family to which the plaintiff and Siripat belonged was a joint Hindu family and that the widow of Pars Ram, namely, *Musammat* Rupan had only a right of maintenance.

(2). That the shops were ancestral property belonging to a joint Hindu family.

(3). That in any case there was no consideration and necessity for the sale.

The allegations in the plaint were denied by both the defendants Nos. 1 and 2 on the following allegations :—

(1). That the family had divided and that Siripat was in separate possession of his property.

(2). That the two shops did not form part of the ancestral property.

(3). That the shops along with other properties had been transferred by Siripat to *Musammat* Rupan by the Will dated the 7th July 1901.

(4). That as a separate member Siripat had a full right to make the transfer.

(5). That *Musammat* Rupan having acquired full proprietary right had the full power to make the sale in favour of Maya Mal, the respondent : and

(6). That the transfer by the widow was made for consideration and legal necessity.

By way of replication, the execution and the legality of the Will was challenged by Mohan. The Court of first instance on the evidence came to the following findings :—

That the shops had been acquired by Dila and were, therefore, ancestral property ; that the Kulu property, including the shops, was in the separate possession of Siripat and after him that of his son's widow, *Musammat* Rupan ; that the Paprola property was in the exclusive possession of Mohan, and that Siripat, being in separate possession of Kulu property, had the authority to transfer it by Will. The Will was, therefore validly executed. There was some dispute as to the construction of the Will and the Court of first instance was of opinion that it conferred only a life estate on *Musammat* Rupan. As to the actual execution of the Will, the Court found that the evidence as to its execution and subsequent conduct of the parties established its genuineness beyond any possible doubt. The consideration for the sale-deed in the opinion of the Court was proved. On the question of necessity for the sale the Court came to the conclusion that the widow was in possession of certain property, which yielded sufficient income, and that,therefore, legal necessity only to the extent of half the consideration had been established. Upon the above findings, the Court upheld the sale to the extent of half of the shops sold and *qua* the other half the sale was set aside.

Both the parties appealed to the lower Appellate Court with the result that the appeals of Maya Lal, the vendee, and *Musammat* Rupan the vendor were accepted while that of Mohan was dismissed. The suit, consequently, failed in appeal and was dismissed with costs.

Mohan has come up in second appeal to this Court. Mr. Tek Chand, the Counsel for Mohan has addressed a somewhat lengthly argument and has tried in second appeal to reopen the questions of fact decided by the lower Appellate Court. The crucial points upon which the decision of the suit rested were, whether as a matter of fact Siripat, the testator, was a separate member and as such had the right to execute the Will. Immediately connected with this question, was the question whether the two shops, the subject matter of the litigation, had been acquired by Dila and formed part of the ancestral property. According to the finding of the lower Appellate Court the shops were not shown to have been acquired by Dila, and that it was fully established that Siripat, as a separate member of the family, had been in exclusive possession of the same. On the question of the execution of the Will, the lower Appellate Court agreed with the finding of the Court of first instance, but as to its construction it took a different view It came to the conclusion that Siripat intended to confer a full proprietary right on *Musammat* Rupan. She was made a *malik*. The expression "*malik*" made use of in the Will clearly indicates that Siripat intended to confer a full proprietary right on *Musammat* Rupan. The following cases were cited and discussed, but a careful reading of those cases clearly leads to the conclusion that each case has to be decided upon its own particular facts. One thing further is clear from these decisions that, wherever expressions indicating the creation of a full proprietary right in favour of a widow are to be found in the Will, she is to be treated as the full owner. See *Naulakhi Kuar* v. *Jai Kishen Singh* (1), *Surajmani* v. *Rabi Nath Ojha* (2), *Ram Chand* v. *Dewan Chand*

(1) 46 Ind. Cas. 905; 40 A. 575; 16 A. L. J. 564.
(2) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.).

(3), *Gurmukh Singh* v. *Makhan Singh* (4) and *Ohidambaranatha Goundan* v. *Sellappa Reddi* (5).

On the question whether the family was a joint Hindu family the lower Appellate Court recorded the following finding :—

"There is nothing whatever to show that the family is a joint Hindu family, as urged before me, nor that Mohan Lal has merely allowed *Musammat* Rupan to possess and manage the Kulu property for the purpose of convenience."

As to this finding Mr. Tek Chand has argued that it is not quite clear on the question of separation and has pressed for a remand on this particular point. The finding is not so clear as it might have been, but, having regard to fact that the lower Appellate Court has upheld the finding of the Court of first instance on this question, I am of opinion that the judgments of the two Courts are to be read together.

Reading the two judgments together, there is no possible doubt as to what the lower Appellate Court found.

After a careful consideration of the arguments of Mr. Tek Chand, I have come to the conclusion that no good purpose will be served in remanding the case to the lower Appellate Court. On the whole, the findings upon which the decision of the case has been arrived at are findings of fact and I do not think that it will be proper for me in second appeal to interfere with those findings.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 13 Ind. Cas. 571; 65 P. R. 1912; 99 P. L. R. 1912; 209 P. W. R. 1912.

(4) 11 Ind. Cas. 846; 61 P. R. 1911; 147 P. W. R. 1911.

(5) 54 Ind. Cas. 524; 10 L. W. 620; 27 M. L. T. 37.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 10, 11 AND 12 OF 1917.

October 16, 1919.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Odgers.

Syed MAHOMED SIRAJUDDIN SAHIB THORIN THARAK KADIN AND OTHERS—RESPONDENTS—APPELLANTS

versus

Syed SHAH GULAM JAILANI SATAR SAHIB AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, O. I, r. 10, O. XXIII, r. 1—Scheme suit—Prayer, inter alia, for appointment of trustee—Withdrawal of suit—Court, power of, to transpose parties and adjudicate on merits.

In a suit instituted under section 92, Civil Procedure Code, where the plaintiff applies to withdraw the suit and it appears to the Court that his object is to prevent the Court from deciding the suit on the merits, the Court has power to allow the suit to proceed with some of the defendants as plaintiffs notwithstanding the withdrawal by the plaintiff from the suit.

The language of clause 2 of rule 10, Order I, Civil Procedure Code, is wide enough to give a Court power to add either as plaintiff or as defendant *any person*, that is, whether already a party, as defendant or plaintiff, so as to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. [p. 236, col. 2.]

Ashidbai v. *Abdulla*, 31 B. 271; 8 Bom. L. R. 758, explained and distinguished.

Letters Patent appeals against the judgment of Mr. Justice Phillips, dated the 22nd December 1916, in Civil Revision Petition No. 717 of 1916, for revision of the order of the Court of the Subordinate Judge Mayavaram, in Interlocutory Application No. 126 of 1916, in Original Suit 10 of 1919.

FACTS appear from the judgment.

Messrs. *A. Krishnaswami Aiyar*, *L. A. Govindaragha a Iyer*, and *R. Subramanya Iyer*, for the Appellants:—The suit was instituted under section 92, Civil Procedure Code, when the case first went on appeal to the High Court ; the High Court remanded it for appointment of a trustee from among the members of the founder's family. They directed that all the heirs of Rahimtullah, the original founder of the trust, should be made parties; when the case was taken up after remand the plaintiff withdrew the suit, his object being to prevent the Court from deciding on the merits. The plaintiffs' right to with-

draw cannot be disputed. But equally the Court has the power, especially in a suit under section 92, Civil Procedure Code, to transpose parties to deal out justice on the analogy of partition and administration suits. Order I, rule 10, Civil Procedure Code, is elastic enough. See *Brojendra Kumar Das* v. *Gobinda Mohan Das* (1), *Bhimanagowd* v. *Eswaragowd* (2) and *Rajah Bhaskara Sethupathi and Irulappa Nadan* v. *Narayanasamy Gurukkal* (3).

Mr. *T. Rangachariar*, for the Respondents:—There was only one plaintiff in this suit and when he withdrew it, under Order XXIII, rule 1, Civil Procedure Code, the suit was at an end and there was nothing more for the Court to do, except to give directions as to costs. There is a significant difference between the language of Order XXIII, rule 2 (1) "which permits a plaintiff to withdraw his suit" and clause 2 (*b*) wherein the words used are "withdraw from such suit".

Under Order I, rule 10, Civil Procedure Code, persons on record as defendants cannot be transposed as plaintiffs. There is a difference between section 32 of the old Code and the language used in Order I, rule 10. The word "person" used in section 32 means, as distinguished from the word "party", a stranger to the suit. In *Ashidbai* v. *Abdulla* (4), in a partition suit where the Court held that the plaintiff was not entitled to a share, it did not deem it necessary to determine the defendant's share as there was no longer any suit for partition.

JUDGMENT.

SADASIVA AIYAR J.—These three appeals are by different sets of defendants against the judgment of a learned Judge of this Court, passed in Civil Revision Petition No. 717 of 1916, that petition having been filed under section 115 and 151 of Act V of 1908 and section 15 of the Charter Act. The suit itself out of which these proceedings have arisen was filed in May 1908 when the former Civil Procedure Code was in force. The learned Judge from whose decision these appeals have been filed interfered under section 115 and set aside the order of the Subordinate Judge of Mayavaram. One of the contentions in these appeals is that the Subordinate Judge neither acted without jurisdiction nor acted illegally or with material irregularity in the exercise of jurisdiction and that, therefore, the learned Judge ought not to have interfered with his order. While I do not say that this might not be a sufficient ground for allowing these appeals, I think that, having regard to the fact that this suit is almost $11\frac{1}{2}$ years old, and that the whole question has been fully argued before us, it is desirable to set at rest, as much as possible, the questions which have already been matters of contest between the parties. I shall, therefore, decide these appeals on the merits as far as possible.

The suit was brought in respect of the land belonging to the *dargas*. One of the questions considered in the suit was, whether the *dargas* are public religious trusts or private religious trusts. The plaintiff contended that they were private religious trusts and that, therefore, section 92 of the Civil Procedure Code did not govern his suit. That seems to be clear from ground No. 20 of the grounds of appeal in Appeal No. 163 of 1910 presented to this Court at one stage of this suit. The judgment in that appeal was pronounced by Sankaran Nair and Spencer, JJ, on the 7th October 1914. I am satisfied, on a careful perusal of that judgment, that they must have held that section 92 of the Civil Procedure Code was not a bar to the granting of the relief for the appointment of a trustee for these *dargas*, for, if that section was such a bar, they would have dismissed that suit on that sole ground and not remanded the suit to the Subordinate Judge. So far as regards the parties to this suit (not only the parties who were before the Court on the date of the High Court judgment but also the parties added afterwards), I think we must take it that section 92, Civil Procedure Code, is not a bar to the Court granting in this suit, the reliefs contemplated in the High Court judgment as awardable by the Court. Now, in the plaint, the plaintiff contended that he had been properly appointed *sajjadanashin* by the previous incumbent of the office and therefore, that he was, on the date of the suit, the holder of that office, but in the alternative (that is, if the Court should

(1) 34 Ind. Cas. 186; 20 C. W. N. 752.
(2) 49 Ind. Cas. 139; 9 L. W. 79; (1918) M. W. N. 929; 25 M. L. T. 140.
(3) 12 M. L. J. 360.
(4) 31 B. 271; 8 Bom. L. R. 758.

hold that he did not hold the office) on the date of the suit, he prayed that the Court might exercise its powers under the Muhammadan Law and appoint him (the plaintiff) as the best candidate among the descendants of the original Rahimtulla to hold that office. That was how the learned Judges evidently understood the plaint and I respectfully agree with them. I might at once admit that in this suit, as in other suits of a like nature, the plaintiff or plaintiffs usually care more for their personal advantage or for the gratification of their personal spite against a defendant than for the advantage of the institution referred to in the plaint in the suit. And, in that view, the present plaint was mainly for establishing the plaintiff's personal claims. Even in cases of partition, dissolution or winding up of a partnership or of administration of an estate, the plaintiff who files the suit in most cases cares more for his personal interests than for the interests of the estate or business of the family (as the case may be) mentioned in the plaint. But the question is, whether the Court, having become seized of such a suit, has got the power to give reliefs to other persons who have been made parties in the suit or interested in the properties which are the subject-matters of the suit.

The Subordinate Judge who first dealt with the suit dismissed it on the ground that the plaintiff had not been appointed *sajjadanashin* by the predecessor who held the office (one Syed Shah Mohideen Sahib) and he refused to appoint a new trustee or manager or remove the first defendant from the management of the properties, though he observed that the properties or endowments mentioned in the first issue, (which properties alone are now in dispute) are endowments in respect of the *dargas* and that the Court was not prepared to say that the "first defendant alone was entitled to administer the properties" or 'that the other members have no right to the same." When the case came up on appeal for decision, Sankaran Nair and Spencer, JJ., made the following observations in their judgment:—"We are of opinion that the Subordinate Judge was right in holding that the plaintiff has failed to prove his appointment by Syed Shah Mohideen..... The succession to the Killai Darga trusteeship may be consistent with the law of primogeniture. But it is quite clear in the case of Nawabpettai, the trusteeship did not devolve according to that law. The succession is only consistent with nomination by the last incumbent and this is in accordance with Muhammadan Law. *We are, therefore of opinion that the case is one in which a trustee should be appointed by the Court as the last incumbent has failed to nominate his successor.* It is obvious that neither the plaintiff nor the first defendant if she is eligible can be appointed without Ghulam Kadir (one of the descendants of Rahimtulla, the original founder) "being a party to the suit. Moreover, any finding that may be arrived at in this suit as to the right of a female to be the trustee will not be binding on the descendants of Rahimatulla who are not parties to the suit. *We think, therefore, in the interests of the institution, it is desirable to make all the descendants of Rahimatulla who may lay claim to appointment, parties to the suit.* We, therefore, set aside the decree of the lower Court and direct the Subordinate Judge to restore the suit to his file, *make those descendants whom the parties might apply to be made parties to the suit and dispose of the case according to law after settling fresh issues*". Having considered these observations to the best of my ability, with the help of the eleborate arguments presented before us on both sides, I think that whatever main motive or intention the plaintiff might have had in bringing this suit, the learned Judges held that the Court should and could mainly look to the interests of the institution and as, in the interests of the institution the appointment of a proper trustee should be made in the suit. The question whether that trustee should be the plaintiff or the first defendant or any other member of the family of Rahimtulla (who might be among those who are already parties to the suit or might be made additional parties to this suit) should be carefully considered by the Court which should appoint the man best fitted as the trustee and to give the appropriate relief in favour of that man as trustee of the institution so as to decide once for all the questions arising out of the pleadings of all the parties. When the suit was so remanded the plaintiff and the first defendant resorted, according to the

Subordinate Judge, to certain devices intended to prevent the Court from doing any acts and coming to any decision in the interests of the institution and in the interests of the finality of a long standing litigation. And the Subordinate Judge, while recognising the right of the plaintiff to withdraw from the prosecution of the suit, refused to consider the litigation as put an end to thereby, and directed some of the defendants (who were willing) to be made plaintiffs and the plaintiffs to be made defendants. It is against that order of his that the civil revision petition was filed which was allowed by the learned Judge of this Court. The learned Judge held that Sankaran Nair and Spencer, JJ., when they ordered the other members of the Rahimtulla family to be made parties, did not intend that the lower Court should exercise its jurisdiction under Muhammadan Law (in the interests of the *dargas* and religious trusts) in this suit itself, to appoint a trustee for the trusts, *other than the plaintiff*, if the Court held that the plaintiff was not entitled to be a trustee. If it was held that they so inteded to give such power to the Court in this suit itself, it would be (according to the learned Judge) crediting the Division Bench Judges with the intention to change the character of the suit as brought, and such a conclusion ought to be avoided, if possible. I am inclined, however, to hold that the two learned Judges who decided the appeal did not think that the character of the suit (one of the reliefs prayed for in which was the appointment of the plaintiff as trustee if there is no lawful trustee in existence) would be changed, merely by the Court taking on itself the duty which it had under the Muhammadan Law, to appoint a proper person other than the plaintiff as trustee in that same suit. Even if the learned Judges were wrong in their opinion that the Court had the power in the plaintiff's suit as brought to appoint another trustee, I am satisfied that they did intend to decide that the Court had such power in this suit and it is not competent in the subsequent stages of the suit for the plaintiff to attack that decision. If, then, this suit is not purely a personal suit in which only private rights and private persons are concerned, and if it is a suit in which religious or charitable trusts (over which the Courts are expected to throw their mantle of protection almost as readily as in the case of minors) the power surely exists in the Court to see that the plaintiff on the record does not, by technicalities and devices of procedure, prevent it from deciding the suit as if the trustees were the principal parties thereto and allowing others to conduct the suit in the interests of the trusts and in the interests of justice.

Mr. T. Rungachariar argued that, under Order XXIII, rule 1, Civil Procedure Code, there being only one plaintiff in the suit, he can unconditionally withdraw the suit under clause (1) of rule 1 and as soon as he put in his petition for withdrawal his suit ceased to exist on the file of the Court. He also argued that, under Order I, rule 10, persons who are already on record as defendants cannot be transposed as plaintiffs. He based his arguments as regards this second point (which I shall take up first) on the change in the language from that in the old section 3 of the Civil Procedure Code to that in Order I, rule 10, clause (2). It is well known, (especially having regard to section 151 of the new Civil Procedure Code) that the new Civil Procedure Code was intended to give greater elasticity of procedure and to give further powers to Courts than were given in the old Civil Procedure Code. Therefore, it is *prima facie* unlikely that any change made in the language in the new Code could have been intended to give lesser powers to the Courts under Order I, rule 10, than were given under section 32 of the old Code. I need, however, only state on this point that I agree entirely with the decisions in *Brojendra Kumar Das* v. *Gobinda Mohan Das* (1) and *Bhimanagowd* v. *Eswaragowd* (2), and that the language of Order I, rule 10, clause (2) is wide enough to give the Courts powers to add either as plaintiff or defendant any person (that is, whether already a party as defendant or plaintiff) so as to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit—of course, a man cannot be both plaintiff and defendant in the same

capacity, but he has only to be removed as plaintiff before being added as defendant or removed as defendant before being made the plaintiff (with his consent, of course, in the latter case).

As regards the first point, I think the decision in the *Kumadi case*, *Rajah Bhaskara Sethupathi and Irulappa Nadan* v. *Narayanasamy Gurukkal* (3), confirmed in the Privy Council, and the analogy of the cases relating to partition, taking of accounts, administration and so on, give sufficient power to the Court to allow such a suit as the present to proceed with some of the defendants as plaintiffs notwithstanding the withdrawal by the plaintiff from the suit.

As regards the argument based upon the fact that in Order XXIII, rule 2 clause (1) the words "withdraw his suit" are mentioned whereas in clause 2 (*b*) "withdraw from such suit" are the words used, I do not think that the Legislature intended a different meaning to be attached to the two sets of words, for if they did intend such a difference in meaning, it would follow that, whereas under clause (3) of rule 1 if a plaintiff *withdraws* from a suit "he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit", but if he withraws his suit clause (3) (which speaks only of withdrawing 'from' suit) would not apply and the Court cannot make orders as to costs and the plaintiff will not be precluded from the institution of a fresh suit. I think it is unarguable that such could have been the intention of the Legislature.

In the result, I would allow the appeals with costs.

ODGERS, J.—In this case I agree with the judgment which has been delivered by my learned brother, but as we are differing from the judgment of the learned Judge of this Court, I venture to express my own opinion on some of the points raised in my own words.

With regard to the judgment of this Court delivered on the 7th October 1914 by Sankran Nair and Spencer, JJ., it is perfectly clear that the Court was of opinion that the trustee should be appointed by the Court as the last incumbent of the office had failed to nominate his successor. It is also clear from that judgment, in my opinion, that the appointment was to be made from among the descendants of the founder, Rahimtulla Therefore the Court was careful to state as follows: We think, therefore, in the interests of the institution, it is desirable to make all the descendants of Rahimtulla who may lay claim to appointment, parties to the suit" and directed the learned Subordinate Judge to dispose of the case according to law after settling fresh issues. To my mind this clearly shows that the learned Judges were of opinion that, whether the plaintiff's claim to be appointed succeeded or not, it was desirable that the Court should appoint somebody from the limited number of possible appointees to be trustee of the institution. It may here be remarked that the plaintiff mainly relied in his suit on his claim to succeed as heir to the trusteeship. The possibility that he might not succeed as heir but might have to be appointed on independent basis by the Court, seems only to come in as a side wind, as for instance in the latter part of his prayer in paragraph 5 (2). In this connection I may observe that the written statement of the 4th defendant, paragraphs 2 and 4, claims the same right to management as the plaintiff. The written statements of the defendant Nos. 3, 4 and 5, at paragraph 15, deny that the plaintiff is the heir of the last male holder and that he is fit and competent to look after the trust property. The same may be said of paragraph 9 of the first defendant's written statement, namely, that the plaintiff is not competent to be appointed *sajjada* under any circumstances. My learned brother has set out at length the various stages in this prolonged litigation and it is not necessary for me to refer to them. With regard, however, to the judgment of the learned Subordinate Judge, dated 12th April 1916, on the plaintiff's petition to withdraw, I may remark that the learned Judge was clearly of opinion that the High Court by its judgment intended that, in the interests of the charitable institution, the appointment should be made from the descendants of the founder. I ought to have previously said with regard to this charitable institution that I agree with the remarks of my

learned brother that the judgment of the learned Judges of this Court may be taken to imply that they were of opinion that this was not such a charitable institution as now falls within the purview of section 92, Civil Procedure Code. It is not referred to in either the judgment of the High Court or of the Subordinate Judge on the petition and this is accounted for by the fact that the suit was filed before the new Code came into force.

It was contended by Mr. T. Rangachariar, for the first respondent, that the plaintiff, having withdrawn his suit under Order XXIII, rule 1, there was nothing left of which the Court was seizal and that, therefore, the learned Subordinate Judge had no jurisdiction to proceed to transpose the parties to the suit in order to carry out what he conceived to be the directions of the learned Judges of this Court. It seems clear that, although the plaintiff may be entitled to withdraw his suit when he likes, he can only do so by petition on which the Court must pass orders with notice to the other parties on the question of costs. Mr. T. Rangachariar further insisted that there was a distinction between the powers given under Order I, rule 10 of the new Code and section 32 of the old. He contended that, whenever the word "person" is used in the section, it must, as distinguished from the word "party" mean some individual who is a stranger to the suit. It seems to me, however, that that contention is met by saying that a "party" who is struck out as plaintiff or defendant becomes a "person" and can then as such be added as either defendant or plaintiff, as the case may be. It is true that the words in section 32, Civil Procedure Code "and the Court may at any time either upon or without such application and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff" are omitted in the new Code, but, as pointed out by the Lordships of the Calcutta High Court in *Brojendra Kumar Das* v. *Gobinda Mohan Das* (1), the words are omitted as redundant and their omission does not make any difference to the powers of the Court under the new Code. I agree with my learned brother that we cannot say that this decision is in any way incorrect. With regard to the case also relied on by Mr. T. Rangachariar, reported as *Ashidbai* v. *Abdulla* (4), it was a partition suit in which the plaintiff was held to have no right to the property whatever. It was decided that that being so, if the plaintiff is found to have no share at all, there is no suit for partition and, consequently, no necessity for determining the defendant's share (at page 292). But here the plaintiff has been added as defendant for the purpose of determining (in spite of his withdrawal from the suit which is alleged to have been collusive) his rights as a member of the family of the founder of the charitable institution. His rights are, therefore, still to be adjudicated upon, not as nominee of the last holder but as one of the class of persons among whom the appointment has to be made. This fact seems to me to differentiate the case *in toto* from the case before us. I, therefore, agree that the judgment of the learned Judge which is under reference is wrong.

M. C P.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2549 OF 1918.

October 11, 1920.

Present :—Mr. Justice Abdul Raoof.

KARTAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

LAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 2—Appeal - Death of respondent—Legal representative already party to appeal—Abatement—Inheritance—Partition among brothers and exclusive possession of respective shares—Descendants of one branch, whether can succeed to estate of member of other branch.

Where on the death of a respondent it appears that his heirs are already parties to the appeal, it cannot be said to have abated merely because no fresh application is made to bring on the record the legal representatives of the deceased. [p. 239, col. 2.]

Four brothers effected a partition whereby *K.* separated from the other three and got some land whereon he founded a village. The other three continued to be joint and founded another village on the land which had fallen to their share, and both parties and their descendants continued in exclusive possession of their respective villages.

KARTAR SINGH v. LAL SINGH.

One *L.* the last male holder in the line of one of the three joint brothers, having died disputes arose as to mutation of his land between the descendants of *K.* and the descendants of the two brothers. The Revenue Courts decided that the descendants of *K.* were entitled to one-third share in *L's* land. Thereupon, the other side brought a suit claiming the whole of *L's* estate :

Held, that the defendants were not debarred from inheriting their one-third share in the estate of *L.* by reason of the alleged partition or separate and exclusive enjoyment of the village founded by *K.* [p. 240, col. 2.]

Kaila Singh v. *Tahal Singh*, 143 P. R. 1888, distinguished.

Raj Mal v. *Sandhi*, 1 Ind. Cas. 728; 41 P. R. 1909; 57 P. W. R. 1909; 49 P. L. R. 1909, *Nanda* v. *Hira*, 41 Ind. Cas. 270, 47 P. R. 1917; 117 P. W. R. 1917, followed.

Second appeal from the decree of the District Judge, Lyallpur, dated the 15th March 1918, affirming that of the Munsif, First Class, Chunian, District Lahore, dated the 30th April 1917.

Lala *Amar Nath Chopra*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The following facts which are either admitted by the parties or are found by the Courts are material for the decision of this second appeal.

One Nanak had four sons, Khan, Mian, Waryam and Ramu. The descendants of Khan were the defendants in this suit, while the descendants of Mian and Waryam were the plaintiffs. The defendants own the village Khanke Mor and the plaintiffs are the owners of Mianke Mor. One Viru, from whom, according to the history of the family, the parties have descended, is shown to have acquired the estate of which the two villages above mentioned were parts. Many years ago the four sons of Nanak effected a partition among themselves in the following manner. Khan separated from his three brothers and was given some land upon which he founded the village Khanke-Mor. His three brothers Mian, Waryam and Ramu continued to be joint and founded the village Mianke Mor on the land which had fallen to their share at the partition. From the time of the foundation of the village Khanke Mor, 450 years ago, up till now Khan and his descendants have remained in exclusive possession of it, while the descendants of the other three brothers have owned and possessed exclusively the village Mianke-Mor. Recently, Labha Singh, the last male holder in the line of Ramu, one of the three brothers, who had remained joint, died in 1914. Disputes arose as to the mutation of his land between the plaintiffs and the defendants. The Revenue Courts decided that the defendants were entitled to a one third share in it. Thereupon the plaintiffs, who are the descendants of Mian and Waryam, instituted the suit claiming the whole of Labha Singh's estate. The defendants, being the descendants of Khan, contested the suit on the allegation that they were entitled to a one-third share as held by the Revenue Court.

The main ground upon which the suit was based was that an absolute partition had taken place between Khan and his three brothers and that he had cut himself off from them and their lands, and so he and his descendants had no connection with the family and had no right to claim a share in the estate. Both the Courts below have given effect to this contention and have decreed the suit. The defendants have come up in second appeal in this Court.

Mr. Tek Chand, on behalf of the respondent, has raised a preliminary objection to the hearing of the appeal. He has contended that one of the plaintiffs-respondents, namely, Bahadur Singh, having died after the judgment of the lower Appellate Court and his legal representatives not being impleaded as respondents to the second appeal until the 11th March 1919, *i. e.*, long after the period allowed by law, the appeal must be taken to have abated. The facts are admitted by the appellants, but it has been contended on their behalf that as Bahadur Singh had died childless, leaving his real brothers Lal Singh and Teja Singh as his sole heirs, who were already on the record, the appeal cannot be said to have abated. Reliance was placed by the learned Vakil on the provisions of Order XXII, rule 2. In my opinion, the appellant's contention is right, and I, therefore, overrule the preliminary objection. As to the merits of the appeal reliance was placed on behalf of the plaintiffs-respondents on the decision in *Kaila Singh* v. *Tahal Singh* (1) while the appel-

(1) 143 P. R. 1888.

lants relied on *Raj Mal* v. *Sandhi* (2). In my opinion the latter ruling is more applicable to the facts of this case, and *Kaila Singh* v. *Tahal Singh* (1) is clearly distinguishable, inasmuch as the partition in that case was effected by the common ancestor himself. In the present case the partition was not effected by the founder or the common ancestor. Even if Khan had agreed not to claim any share in the estate of his other three brothers, the rights of his descendants to inherit from the common ancestor on the death of Lehna Singh cannot be affected by that agreement. In my opinion, the reasoning upon which the ruling in *Raj Mal* v. *Sandhi* (2) is based fully applies to the present case. A similar view was taken by a Division Bench of the Punjab Chief Court in *Nanda* v. *Hira* (3), the facts of which were almost similar. The learned Judges distinguished the ruling in *Kaila Singh* v. *Tahal Singh* (1) from the case which they had to decide. In my opinion, the defendants were not debarred from inheriting their one third share in the estate of Lehna by reason of the alleged partition, or by their separate and exclusive enjoyment of village Khanke-Mor or by the alleged agreement entered into by their ancestor Khan. For the above reasons, I allow the appeal, set aside the decrees of the Courts below, and dismiss the suit of the plaintiffs with costs in all the Courts.

Appeal allowed.

(2) 1 Ind. Cas. 728; 41 P. R. 1909; 57 P. W. R. 1909; 40 P. L. R. 1909.
(3) 41 Ind. Cas. 230; 47 P. R. 1917; 117 P. W. R. 1917.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 110 OF 1919.

July 7, 1920.

Present:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

TEKAIT KRIHSNA PRASAD—
APPELLANT
versus
SURENDRA MOHAN KUNDU—
RESPONDENT.

Mortgage, suit on—Preliminary decree—Interest up date of realization, meaning of.

A preliminary decree in a mortgage-suit awarded the plaintiff interest on the mortgage-money at the rate mentioned in the mortgage-bond till date of realization. In the final decree there was no direction as to interest:

Held, that the words "date of realization" in the preliminary decree meant the date of expiration of the days of grace, and that the final decree must be deemed to have refused interest after that date.

Appeal from an order of the Additional Subordinate Judge, Hazaribagh, dated the 9th January 1919.

Mr. *Atul Krishna Ray*, for the Appellant.

Messrs. *Susil Madhab Mullick* and *B. C. Mitter*, for the Respondent.

JUDGMENT.

COUTTS, J.—With regard to this appeal the learned Subordinate Judge has found that the decree-holders are not entitled to any interest after the period of grace and it is in regard to this matter only that the decree-holders have appealed. The preliminary decree was passed on the 14th of July 1898. The portion of it which refers to interest runs as follows:—

"That defendant No. 1 is to pay to plaintiffs the costs incurred by them; and that till the day of realization interest on the bond-money will run at the rate mentioned therein."

And it is argued by the learned Vakil for the appellants that, on a proper construction of this decree, the decree holders are entitled to interest on the bond rate until the money is actually realized. The meaning of "day of realization" in a preliminary mortgage decree has been discussed by their Lordships of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* (1). In that case their Lordships, in considering the case of *Rameswar Kosr* v. *Mahomed Mehdi Hossein Khan* (2), made the follwing observations: "The expression 'up to the date of realization' may have been used *per incuriam*, or it may have meant 'the day fixed for realization' as in fact it seems to have been understood by the Reporter of the case in the Indian Law Reports as expressed in his marginal note. Their Lordships cannot have intended to say that sections

(1) 34 C. 150; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 4 A. L. J. 103; 5 C. L. J. 108; 34 I. A. 9 (P. C.).
(2) 26 C. 39; 25 I. A. 179; 2 C. W. N. 633; 7 Sar. P. C. J. 413; 13 Ind. Dec. (N. S.) 629.

86 and 88 of the Transfer of Property Act indicate that interest at the mortgage rate should be paid up to the time of actual payment of the mortgage-money to the mortgagee. These sections contain no direction for interest beyond the day to be fixed by the Court up to which the account is directed to be taken, and in fact the whole difficulty, on which there has been so much controversy, has arisen from that circumstance. It is enough to say that the question as to rate of interest (if any) to be allowed after the fixed day until actual realization was not before the Board, and the case is not an authority on that question." And, again, at a later stage of their judgment their Lordships said: "That a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree." It seems clear, then, that the words 'date of realization' in the preliminary mortgage-decree should be interpreted to mean the date of the expiry of the period of grace and that for the interest after this period the final decree should be looked to." In the present case there is no direction as to interest in the final decree. There is only the order dated the 3rd of July 1901—

"The decree is hereby made absolute."

There is thus, as I have already said, no direction in the final decree for interest and, this being so, the learned Subordinate Judge was, in my opinion, right in his conclusion that it must be deemed to have been refused.

We have been referred by the learned Vakil for the appellants to the case of *Gokuldas* v. *Ghasiram* (3), in which the interest which had been allowed in the preliminary decree was allowed at the same rate until actual realization. That case, however, stands on an entirely different footing to the present case. In that case the final order ran as follows: "Whereas it appears to this Court that the defendant in this suit has not paid into Court or to the plaintiff the sum of Rs. 20,457 *plus* 1,106-10-0 and interest at 7 annas per cent. per mensem from the 22nd July 1896, which, by the conditional decree passed by this Court on 18th September 1896, he was required to pay on or before the 18th March 1897, it is hereby ordered that the conditional decree be made absolute." There was in that case no date fixed in the preliminary decree up to which interest at the rate allowed was to be payable. Consequently, it was held that interest at that rate was to continue after the period of grace up till the date of actual payment. In the present case, however, the period fixed in the preliminary decree is the date of realization which is the end of the period of grace. The case referred to, therefore, has no bearing on the present case. On the other hand, there is a case of the Calcutta High Court, *Udit Narayan Jha* v. *Musammat Jasoda Sahun Kalan* (4), which is on all fours with the present case and which entirely supports the view of the law which I have taken.

In my opinion, the decision of the learned Subordinate Judge is correct and I would dismiss this appeal with costs.

SULTAN AHMED, J.—I agree.

Appeal dismissed.

(3) 35 C. 221; 10 Bom. L. R. 144; 7 C. L. J. 233; 12 C. W. N. 369; 35 I. A. 28 (P. C.).

(4) 46 Ind. Cas. 469; 27 C. L. J. 576.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 2 OF 1919.

March 10, 1920.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Krishnan.

CHINNAMMALL—DEFENDANT—APPELLANT

versus

P. RATNASABAPATHY CHETTIAR (DIED) AND OTHERS—PLAINTIFFS—RESPONDENTS.

Religious endowment—Temple properties, lease of, by trustee—Permanent tenancy—Presumption—Burden of proof.

CHINNAMMALL v. RATANSABAPATY CHETTIAR.

In respect of temple properties leased out by the trustees of the temple, the presumption is against the existence of a permanent tenancy, and the burden of proving such a tenancy is upon those who allege its existence.

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 237 of 1917.

FACTS appear from the judgment.

Messrs. *V. C. Seshachari* and *S. Krishnamachari*, for the Appellant.—The evidence is that the land was held at a uniform rent for 32 years. The defendant purchased and has been enjoying the superstructure since 1895. The presumption of law is that the defendant held it on the basis of a permanent tenancy. The fact that the lease was by the temple trustees does not make any difference. There is no absolute prohibition of a permanent alienation by temple trustees. See *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (1).

Messrs. *T. R. Venkatarama Sastri* and *N. Swaminatha Aiyar*, for the Respondents.—The presumption of law is against a permanent tenancy. He who affirms it must prove it. The mere existence of a tenancy for 32 years is not enough to rebut the presumption. In this case the lessors are the trustees of the temple. They cannot, as a rule, make permanent alienations of temple properties. The burden of proving the existence of special circumstances justifying the alienation lies strongly on the defendant and he has not discharged it. The lower Court has come to a correct conclusion that the evidence in the case does not rebut the initial presumption against a permanent tenancy or establish that when the tenancy was created the lessors intended it to be permanent.

JUDGMENT.—This is an appeal from the judgment of the learned City Civil Judge, in a suit brought by the trustees of Sri Kachaleeswarer Temple to recover from the defendant a small plot which is situated in George Town close to the temple itself. The defence is that the plot is held on a permanent tenancy at a monthly rental of twelve annas. The law is perfectly clear that the presumption is against the existence of a permanent tenancy, and that it is upon those who allege it to prove it. The learned City Civil Judge has found that the evidence in this case is not sufficient to discharge that burden. The evidence simply comes to this, that, for the last 32 years, the land has been let at this rate and that the superstructure on the land was purchased by the defendant in 1895 and has been subsequently mortgaged by her.

It is easy to lay down what the presumptions are, but it is often difficult to decide whether the evidence is sufficient to rebut the presumption against a permanent tenancy or not. However, there is a circumstance in this case on which the learned Judge has not relied but which strengthens his conclusion and that is, that the lessors in this case are the trustees of a temple. Now, the circumstances under which trustees of temples may make permanent alienations of temple property have been considered by the Privy Council in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (1). It is only under very exceptional circumstances that such permanent alienation of temple property can be justified, and when it is a question whether the temple authority granted a permanent lease or not, the presumption is against any intention to make such a grant. That has been laid down by the Privy Council in *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (2), and the same rule has again been laid down by Sir Lawrence Jenkins in *Satya Sri Ghoshal* v. *Kartik Chandra Das* (3). What the learned Judge laid down there was: "The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity; it cannot be made in favour of that which offends legal principle." No presumption of permanency is, therefore, applicable to a property which was *debutter* (*i. e.*, dedicated to charity) at the time the

(1) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.).

(2) 13 M. I. A. 270 at p. 275; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

(3) 13 Ind. Cas. 556; 15 C. L. J. 227; 16 C. W. N. 418.

tenancy originated, for to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a *shebait*, *i. e.*, a trustee.

Now, having regard to the evidence in the case which the learned Judge thought not sufficient to rebut the presumption against the intention to grant a permanent tenancy when the tenancy originated and to the rule which we have just quoted as to the existence of a presumption against such an intention on the part of the trustees of a charitable endowment, there is no sufficient reason for interfering with the conclusion of the learned Judge. Therefore, the appeal must be dismissed with costs. Three months' time is allowed for removing the superstructure.

Appeal dismissed.

M. C. P.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1457 OF 1919.

October 29, 1920.

Present :—Mr. Justice Abdul Raoof.

AMIR CHAND—PLAINTIFF—APPELLANT

versus

HEM RAJ AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), ss. 13, 16 (sixthly)—Pre-emption, right of, based on vicinage—Co-owner, whether can maintain suit.

One co-sharer in a house is entitled to maintain a suit for pre-emption of an adjacent house even though all the co-owners do not join in the suit. [p. 244, col. 2.]

Ram Asra v. *Gurditta*, 42 P. R. 1891, followed.

Second appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 22nd May 1919, affirming that of the Senior Subordinate Judge, First Class, Jhang, dated the 30th July 1918.

Lala *Moti Sagar*, R. S. for the Appellant.

Bakhshi *Tek Chand*, for Respondents Nos. 1 and 2.

JUDGMENT.—This is a second appeal arising out of a suit for pre-emption. In order to understand the real points in issue in this case it is necessary to state the facts of the case shortly. The sale was effected by a registered deed, dated the 3rd February 1916, by Omed, vendor, in favour of Hemraj and Ram Chand, vendees, for Rs. 1,100. The plaintiff claimed pre-emption on the ground of vicinage alleging himself to be the exclusive owner of a house marked C on the plan. One of the vendees, Ram Chand is admittedly the owner of another house which is also in the vicinity of the house sold. He, too, therefore, had a right of pre-emption. It was, however, admitted that Hemraj was a total stranger and had no right of pre-emption. By joining a stranger with him in getting the sale effected Ram Chand is said to have forfeited his right of pre-emption. There is no dispute as to this point now. It is admitted that if the plaintiff had a right of pre-emption he is entitled to enforce it against Ram Chand in spite of his owning the house in the vicinity of the house now sought to be pre-empted. The suit was, however, resisted mainly on the ground that the plaintiff was neither the exclusive owner of the house C nor did he hold a share in it. The case for the defence was that the house C originally belonged to one Omed. It was mortgaged by him to Amir Chand and his two brothers, Jinda Ram and Hanuman, who formed a joint Hindu family, that later on it was sold to the three brothers, and that, on partition effected among the brothers, it fell to the lot of Jinda Ram. The Court of first instance, after a discussion of the evidence, gave effect to this last contention of the defendant and dismissed the suit. The plaintiff preferred an appeal to the lower Appellate Court, which has maintained the decree of the first Court upon different grounds and has dismissed the appeal The plaintiff has, consequently, come up in second appeal to this Court. It appears that in the lower Appellate Court the plaintiff rested his claim upon the sole ground, namely, that if Jinda Ram had become the sole owner of the house C by reason of the alleged partition, on his death the plaintiff had succeeded to a half share in the house as an heir of Jinda Ram and as such was entitled to maintain this suit. The lower Appellate Court decided the appeal against the plaintiff-appellant upon four grounds, namely :—

(1) that, as the plaintiff throughout had based his right to claim pre-emption on the exclusive ownership of the house C, he could not be allowed to succeed on the plea that he owned a share in it;

(2) that, under the law, the plaintiff was not entitled to succeed on the ground of holding a share only in the house C;

(3) that the plaintiff had lost his right to a share in the house C by reason of the fact that he had previously brought a suit for possession of certain joint properties and had omitted to include the share in the house C, which he had inherited on the death of Jinda Ram, and

(4) that the plaintiff had admitted some kind of partition by which he had parted with his share in the house C.

I shall take up these points in their inverse order. The lower Appellate Court has relied upon a statement made by the plaintiff in the lower Appellate Court for its decision on the point No. 4. I have read that statement. There is nothing in it, which may support the decision of the lower Appellate Court on this point. As regards the applicability of rule 2, Order II, the learned Judge of the Court below has neither cited any authority in support of his view nor has he referred to any materials on the record showing the circumstances under which the previous suit was instituted. We do not know whether any cause of action had arisen at all in respect of the house C. In any case, the present is not a suit for the recovery of the house C and I fail to see what bearing Order II, rule 2, can have on the decision of this case. I hold that the view taken by the learned District Judge on point No. 3 is not correct, the real question upon which the decision of this appeal depends is whether the plaintiff is entitled to maintain this suit in spite of the fact that he only owns a share in the house C and is not its full owner.

Mr. Moti Sagar has relied on section 16 (sixthly) of the Pre-emption Act, No. 1 of 1913, and has argued that the view taken by the lower Appellate Court is incorrect. According to that section (sixthly) the right of pre-emption vests—

"in the persons who own immoveable property contiguous to the property sold."

Therefore the right to pre-empt in this case vested in all the heirs of Jinda Ram. Section 13 of the Act provides that—

"Whenever, according to the provisions of this Act, a right of pre-emption vests in any class or group of persons, the right may be exercised by all the members of such class or group jointly, and, if not exercised by them all jointly, by any two or more of them jointly, and, if not exercised by any two or more of them jointly, by them severally"

The provisions of this section leave no doubt as to the plaintiff's right to maintain this suit.

In a case reported as *Ram Asra* v. *Gurditta* (1), governed by the Customary Law, it was held that—

"One co-sharer in a house is not debarred from instituting a suit to enforce a right of pre-emption based on vicinage on the ground that another co-sharer therein refuses to join in such suit."

Evidently, the Legislature did not intend to effect a change in the existing law.

There is no doubt that, under the Muhammadan Law, the plaintiff would have a right to pre-empt. See *Nundo Pershad Thakur* v. *Gopal Thakur* (2).

The learned Judge of the Court below is not right in holding that the plaintiff based his right of pre emption solely on the ground that he was the exclusive owner of the house C. From the discussion of the facts in the judgment of the Court of first instance it is clear that the plaintiff had urged this alternative ground also.

For the reasons set forth above, I set aside the decision of the lower Appellate Court upon the preliminary points mentioned above and remand the case to that Court, under Order XLI, rule 23, with the direction that it be reinstated on its original number of pending appeals and disposed of according to law. Costs will abide the result.

Case remanded.

(1) 42 P. R. 1891.
(2) 10 C. 1008; 5 Ind. Dec. (N. S.) 672.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 7 OF 1920.

June 22, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

MOTILAL MANSUKHRAM—PLAINTIFF —APPLICANT

versus

MANEKLAL DAYABHAI—DEFENDANT —OPPONENT.

Contract Act (IX of 1872), ss. 11, 65—Minor, contract by—Minor, whether bound to restore benefit.

Section 65 of the Contract Act starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was and never could have been any contract, for instance, where one of the parties to a contract is a minor.

Application against the decision of the Small Cause Court Judge at Ahmedabad, in Suit No. 1270 of 1918.

FACTS.—Defendant, a minor, purchased goods from the plaintiff, and the latter sued the former for the price of the goods in the Small Cause Court. The Judge found that the goods had actually been sold to the defendant and recorded an opinion that the latter was bound to restore either the goods or their value to the plaintiff under section 65 of the Contract Act. The case was, however, adjourned for examination of the authorities. More than nine months afterwards the suit was dismissed. Plaintiff moved the High Court in revision.

Mr. *G N. Thakor*, for the Applicant.

Mr. *R. J. Thakor*, for the Opponent.

JUDGMENT.

MACLEOD, C. J.—It would have been more satisfactory if the Small Cause Court Judge had given some reasons for coming to the conclusion he did contrary to that he arrived at nine months previously. Still, the Privy Council ruling in *Mohori Bibee* v. *Dharmodas Ghose* (1) is, too, clear for us to consider any other decision possible. It may be said that a contract purporting to be made between two persons competent to contract, after it is discovered that one of the persons was a minor at the date of the contract, becomes thereby an agreement unenforceable by law, and, therefore, void under section 2 of the Indian Contract Act, and, until it was discovered to be void on the evidence, because one of the parties was a minor, it purported to be a perfectly good contract. But their Lordships of the Privy Council distinctly say that section 65 starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never could have been, any contract, and though, according to the argument of the applicant's Pleader, that decision conflicts with the words of the section, still, as long as it stands, it is binding on us. The Rule, therefore, must be discharged with costs.

Rule discharged.

(1) 30 C. 539; 5 Bom. L. R. 421; 30 I. A. 114; 8 Sar P. C. J. 374; 7 C. W. N. 441 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 764 OF 1919.

March 26, 1920.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

LAKSHMINARASIMHA SOMAYAJIYAR —PLAINTIFF—APPELLANT

versus

RAMALINGAM PILLAI—DEFENDANT No. 2—RESPONDENT.

Madras Local Boards Act (V of 1884)—Rules under Act—Election to Taluk Board—Election, validity of, whether can be questioned in Civil Court—Jurisdiction of Civil Courts, rules ousting, validity of—Suit to declare election invalid, maintainability of—Declaratory relief—Discretion of Court.

Per *Sadasiva Aiyar, J.*—Under the Madras Local Boards Act, the Governor-in-Council has no power to make rules ousting the jurisdiction of Civil Courts in the matter of inquiring into the validity or otherwise of elections, and relegating those matters to a special tribunal established for the purpose. [p. 248, col. 1.]

A person who resides, and owns property within the area of a Taluk Board, with a fair chance of being appointed or elected as a member of the Board, has a substantial interest in the matter of the proper constitution of the Board, sufficient to give him the right to sue for a declaration that the election of a member of the Board is invalid. But the granting of such relief is within the discretion of the Court, and a person who has accepted the election proceedings and has competed at the election, is not entitled to question the election on the grounds of bribery, corruption and

want of secrecy in the ballotting, merely because he has failed to be elected. [p. 249, col. 1.]

Per *Spencer, J.* (*Contra*)—The Governor-in-Council has the power of making rules to provide for the whole scheme of elections and for the conduct of inquiries into complaints and objections to elections held or about to be held as well as into objections to the list of voters, and such rules have the effect of taking away the jurisdiction of the Civil Courts in respect of these matters. [p. 250, col. 1.]

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 317 of 1918, preferred against the decree of the Court of the Additional District Munsif, Tinnevelly, in Original Suit No. 528 of 1917.

FACTS appear from the judgment.

Mr. *K. S. Ramabadra Iyer*, for the Appellant.—Plaintiff has the right to maintain this action. Under the rules he can protest and he can object to the Collector's declaration of the result of the voting. He has also the right of suit as a landholder. He has a substantial interest in the conduct of the election. See *Robert Fischer* v. *Secretary of State for India* (1). Also *Natesan, In re* (2) and *Sabhapat Singh* v. *Abdul Goffur* (3).

The Civil Court has judisdiction to entertain the suit. The objection that the electoral register is not valid can only be taken in a Civil Court and not before the Collector. The Collector has not yet passed orders on the objections.

The Collector's jurisdiction has been conferred as an expeditious remedy, but it does not oust the jurisdiction of the Civil Courts. *Hayward* v. *East London Waterworks Company* (4), *Secretary of State for India* v. *Venkatesalu Naidu* (5), *Raghunandan Prasad* v. *Sheo Prasad* (6) and *Khunni Lal* v. *Raghunandan Prasad* (7).

The Government has no power to frame rules to take away the jurisdiction of the Civil Courts. Rules under Statutes must be strictly construed. The Local Boards Act does not provide for the setting up of special tribunals.

Section 144 of the Local Boards Act is different from section 250 (6) of the District Municipalities Act. The Act must itself provide for the removing of the jurisdiction of the Civil Courts.

Rule 13 of the rules framed under the Local Boards Act contemplate an interregnum period when there should be nomination.

The elections should not have been held on the basis of the old electoral register. It ceased to have any force when the new rules were introduced.

Mr. *B. Sitaram Row* (with him Messrs. *Chidamharam* and *Martandam*), for the Respondent.—Under section 8 of the General Clauses Act a repealing enactment does not render invalid whatever was done under the repealed enactment. The old register continues until the new register is prepared. *Raghunandan Prasad* v. *Sheo Prasad* (6).

The Local Government has power to set up special tribunals under the combined operation of section 144 of the Act and of rule 16.

JUDGMENT.

SADASIVA AIYAR J.—The facts have been set out in the judgment just now delivered by my learned brother and I need not repeat them.

The questions argued were, (1) whether the powers given by sections 16 and 144 of the Local Boards Act (Madras Act V of 1884) to the Governor-in-Council to frame forms and to prescribe rules and conditions, as regards the system of representation and of election, include or imply the power to make rules for the conduct of inquiries into the objections made to the validity of elections and to the creation of special tribunals to make such inquiries so as to exclude the jurisdiction of the ordinary Civil Courts and to make the opinion of the special tribunals final, as to the validity of elections; (2) assuming that the Governor-in-Council has such powers, do the rules as framed on the 6th June 1917 (See Exhibit III) exclude the jurisdiction of the Civil Courts to entertain objections to the validity of the election even when those objections are based on the grounds (*a*) that there was no valid electoral register in existence on the date of election, and (*b*) that consequently the President of the District Board should have filled the vacancy, by appointment under rule 13; and (*c*) the

(1) 22 M. 270 (P. C.); 3 C. W. N. 161; 26 I. A. 16; 7 Sar. P. C. J. 459; 8 Ind. Dec. (N. S.) 192.
(2) 38 Ind. Cas. 847; 40 M. 125; 31 M. L. J. 634.
(3) 24 C. 107; 12 Ind. Dec. (N. S.) 736.
(4) (1885) 28 Ch. D. 138; 54 L. J. Ch. 523; 52 L. T. 175.
(5) 30 M. 113; 1 M. L. T. 435.
(6) 20 Ind. Cas. 490; 35 A. 308; 11 A. L. J. 349.
(7) 20 Ind. Cas. 497; 35 A. 450; 11 A. L. J. 659.

defendant, who claims to have been elected, has, therefore, not been validly elected; (3) whether the plaintiff has an interest in the matter of the legal validity of the constitution of the Taluq Board sufficient in the eye of the law to give him the right to sue for a declaration or the validity of the disputed election; and (4) even if all the above three points are decided in the plaintiff's favour, whether this is a case where the Court has a discretion to grant or refuse the declaratory and injunction reliefs prayed for, and, if the Court has such discretion, whether such reliefs ought to be refused in this case.

I shall deal with point No 3 first. That point is "whether the plaintiff has an interest in the matter of the proper constitution of the Taluq Board sufficient, in the eye of the law, to give him the right to sue for a declaration of the invalidity of the disputed election." The plaintiff is a resident of Shermadevi and the vacant seat in question was a seat on the Taluq Board of Shermadevi to which Taluq Board have been given important powers under the Local Boards Act to deal with certain affairs of the inhabitants of the Taluq. If the disputed election is held invalid, he has a chance of being appointed to the vacancy, or of being elected when a valid election is held. The suit may not be one falling under section 42 of the Specific Relief Act as the plaintiff does not sue for a declaration of his own legal character or his right to any property. But he is a citizen owning properties situated within the area of the Taluq Board and having a fair chance of being appointed or elected as a member of the Board and he has, therefore, such a substantial interest in the proper constitution of the Board, as entitles him to bring a suit for a declaration as to the invalidity of the election, it having been held in the well-known case of *Robert Fischer* v. *Secretary of State for India* (1) that section 42 of the Specific Relief Act is not exhaustive for the declaratory suits entertained by Civil Courts.

The next point which I shall consider is point No. (1), *viz.*, "whether the powers given by sections 16 and 144 of the Local Boards Act to the Governor-in-Council to frame forms and to prescribe the rules and conditions as regards appointment by election and as regards the system of representation and of election include or imply the power to make rules for the conduct of the inquiry into the objections made to the validity of elections and the creation of special tribunals to make such inquiries so as to exclude the jurisdiction of the ordinary Civil Courts and to make the opinion of the special tribunal final as to the validity of an election." Section 16 is too vague. Further, the rules were not made under section 16 but only under section 144 clause (1). Clause (1) deals with the power to make rules merely as to the qualification of the electors and of candidates for appointment by election and as to the method and time of election and of elective Presidents, Vice-Presidents and members of Local Boards [Local Boards including Taluq Boards according to the definition in section 3 clause (12)]. I think that rules as to the method of election of the members of Local Boards cannot include a rule constituting a special tribunal to inquire into the validity of elections. It has been argued for the respondent that sub-clause (*f*) of clause 1 (*a*) of section 144 which speaks of "any other matters regarding the system of respresentations and of election" might include this matter of setting up a separate tribunal with exclusive jurisdiction to enquire into objections to the validity of elections." Clause 1 (*a*) of section 144 relates to the election of *panchayats* and not to the election of members to Taluq Boards. It may, however, be argued that, even if clause 1 (*a*), and sub-clause, (*a*) to (*f*) under it, do not apply to elections of the Taluq Board members, still the divisions (*a*) to (*f*) under clause 1 (*a*) indicate what is meant by the "method and time" of appointment by election occurring in clause 1 (*a*), and as clause 1 relating to Local Board, also uses the expression "method and time of election", matters relating to method and time of election of Taluq Board members include matters analogous to those provided for by sub-clauses (*a*) to (*f*) of clause 1 (*a*) relating to *panchayat* elections. Even accepting this argument, sub-clause (*f*), following sub-clauses (*a*) to (*e*), (which deal with the division of the electoral area, the number of representatives and so on) cannot be interpreted as including a matter of a totally different nature, *viz.*, the setting up of an exclusive tribunal to inquire into the objections to elections. This Local Boards Act, V of 1884, was passed in the same year as the District Municipalities Act (IV of 1884),

Section 250 clause 1 (*a*) of that Act provides for the making of rules similar to those enacted in the provisions of section 144 1 (*a*) of the Local Boards Act. As originally framed, sub-clauses 1 to 6 under clause 1 (*a*) of section 250 of the District Municipalities Act almost exactly corresponded to sub-clauses (*a*) to (*f*) of section 144, 1 (*a*) of the Local Boards Act. Sub-clause (6) in the Municipal Act was "any other matters regarding the system of representation and election, which it may seem expedient to provide for." Sub-clause (*f*) of the Local Boards Act is "any other matters regarding the system of representation and election." Doubts, however, seem to have arisen about 1894 whether sub clause (6) in the District Municipalities Act included the conduct of inquiries relating to the elections Hence, by Act III of 1897, section 164, clause 1, section 250, clause 1, of the Municipalities Act was amended by making the old sub-clause (6) as sub-clause (7) and by introducing a new sub-clause which the present sub-clause (6) providing expressly for the conduct of inquiry relating to the elections. The Legislature seems to have overlooked the fact that the corresponding section 144, clause (1*a*) of the Local Boards Act also was guilty of the like omission as was found in the District Municipalities Act and ought to be amended likewise. Rules made under statutory powers must, on pain of invalidity, not be in excess of the statutory powers authorising them and powers to make rules, especially where such rules create new jurisdictions and take away the powers of ordinary Civil Courts, ought to be construed very strictly (See Maxwell). I am, therefore, of opinion that under the Local Boards Act the Governor-in-Council had no power to make rules ousting the jurisdiction of Civil Courts in the matters of inquiring into the validity or otherwise of elections.

I shall now deal with the point No. 2 which is as follows: "Assuming that the Governor-in-Council has such powers, do the rules, as framed on the 6th June 1917 (See Ehxibit III) exclude the jurisdiction of the Civil Courts to entertain objections to the validity of an election even when those objections are based on the ground (*a*) that there was no valid electoral register in existence on the date of the election and (*b*) that consequently the President of the District Board should have filled the vacancy by appointment under rule 13, and (*c*) that the defendant who claims to have been elected has, therefore, not been validly elected." It is no doubt unnecessary to deal with this point as I have decided that the Governor-in Council has not got the powers to make rules so as to establish a new tribunal to inquire into the validity of elections. Assuming, however, that he has such powers, I think that rules 12 (2) and 33 (*c*) and (*d*) read together intend that any objection that there was no valid electoral register in existence at the date of election, should be decided by the Collector finally and should not be questioned by the Civil Courts.

A subsidiary question which was argued was whether there was really no valid register in existence on the date of the disputed election. I am inclined to hold that the old register was not superseded by the new rules, which only superseded the old rules and not the things which were validly done under the old rules and which were not inconsistent with the new rules. Section 8 of the Madras General Clauses Act, (I of 1891), says, "where any Act" (which must include a rule made under the Local Boards Act as such a rule has the force of law according to section 147 of the Statute) "... ...repeals any other enactment, then the repeal shall not (*a*) affect anything done... before the commencement of the repealing Act,... (*c*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed or (*d*) affect any right, privilege...acquired, accrued under any enactment so repealed." The register prepared under the repealed rules and the rights and privileges of the voters acquired under those rules could not, therefore, be affected, especially when the repealing rules substantially (as pointed out by my learned brother) reproduce the old rules on the point in dispute.

Lastly, comes the 4th point, *viz.*, "whether this is a case where the Court has a discretion to grant or refuse declaratory and injunction reliefs, and if the Court has such discretion, whether such reliefs ought to be refused in this case" I do not see how it can be seriously argued that the grant of a declaratory decree in any case is not a matter for the discretion

of the Court. Section 52 of the Specific Relief Act shows that the grant of the relief of injunction is always a matter for the discretion of the Court, having regard to the conduct of the plaintiff who made unfounded allegations of undue influence and bribery against the defendant (besides the unfounded allegations of the want of secrecy in the balloting etc.,) and to the fact that he himself accepted the election proceedings as having been regularly begun (and competed for the vacancy of the election) till he sustained defeat at the election, the Court would be exercising its discretion properly in refusing declaratory and injunction reliefs, to such a plaintiff, even assuming that a valid electoral register did not exist, and hence the election was invalid.

I forgot to refer to one argument relied on by the lower Appellate Court and by the appellant's learned Vakil, *viz.*, that rule 13 when read with rule 11 (1) contemplates the possibility of an interregnum when no valid electoral register is in existence, and that interregnum could only occur owing to the supersession of the old rules by the new rules. I do not think that the argument can be accepted. It may be that, owing to the Collector of the District under rule 1 having created new circles, there could be no valid register, so far as the new circles be concerned, and it may be that that was the contingency contemplated by rule 13, or it may be that rule 13 merely reproduced the corresponding old rule (which was enacted when an interregnum was possible, before the very first register was prepared) and was included in the new set of rules unnecessarily, nobody caring to ascertain whether it was really necessary. I shall, however, not pursue the matter further.

In the result, I hold that, though the plaintiff was entitled to institute the suit and though a Civil Court has jurisdiction to entertain it, the election was validly held, under a valid electoral register, and that, even if the election was invalid, the Court ought to refuse in its discretion the reliefs claimed by the present plaintiff. No question of inconvenience can arise by refusing to declare the invalidity of an election as, under section 162 of the Local Boards Act, the acts of a Local Board with members legally disqualified to sit as members are not invalid.

Finally, I might suggest that, when the Local Boards Act is taken up for revision, the Legislature will take good care to see that the powers to make rules and the subjects on which rules can be made are defined clearly and at length.

In the result the second appeal is dismissed with costs.

SPENCER, J.—The appellant was an unsuccessful candidate for a seat on the Taluq Board of Shermadevi at an election which took place in October 1917. He brought the suit to have it declared that the election of the second defendant was illegal and invalid. In his plaint he alleged bribery, corruption and want of secrecy in the balloting. But he gave up these contentions at the trial. The substance of his objections to the second defendant's election, as put forward in this and in the lower Courts, was that a new roll of electors was not prepared when the revised rules under sub-clause (1) of section 144 of the Local Boards Act (Madras Act V of 1884) were published by Government in June 1917. He maintained that an election held on the old voter's list was invalid, the qualifications entitling a person to vote under the new rules being a little different from the qualifications required by the old rules. He also raised the question, in ground No. 7 of his memorandum of second appeal, whether the Government had any power to make rules for the election of Taluq Board members, which would have the effect of taking away the jurisdiction of Civil Courts.

I will deal with the last point first. Section 16 of the Local Boards Act provides that members of Taluq Boards may be partly appointed by election, subject to such rules and condition as may from time to time be prescribed by the Governor-in-Council and section 144 provides "that the Governor-in Council may from time to time frame forms and make rules (1) as to the qualifications of electors and of candidates for appointment by election and as to the method and time of election of elective Presidents, Vice-Presidents and members of Local Boards." Next follows clause 1 (*a*) which relates to the election of *panchayats* and then several sub-clauses (*a*)

to (*f*) of which sub-clause (*d*) deals with the registration of electors and sub clause (*f*) speaks of "any other matters regarding the system of representation and of election." It is not quite clear whether sub-clauses (*a*) to (*f*) are intended to qualify clause (1) of section 144 which refers to election to Local Boards, or whether they only qualify clause 1 (*a*) which deals with the election of *panchayats*. But, in any case, I think that the words "any other matters regarding the system of representation and of election" illustrate what is meant in clause (1) by the words 'method of election' of members of Local Boards. I think these words are wide enough to cover the power of making rules to provide for the whole scheme of election and for the conduct of inquiries into complaints and objections to elections held or about to be held as well as to objections to the list of voters.

An argument has been drawn from the analogy of the District Municipalities Act (Madras Act IV of 1884). In that Act an additional clause was added to section 250 by the Amending Act III of 1897, by which the words "the conduct of inquiries relating to elections" were added. From the fact that Government thought it advisable, *ex abundanti cautela*, to introduce clause 6 to amplify the powers already conferred by the section, it does not follow that the words of the clause, as they origianlly stood, were not wide enough to include power to make rules for the preparation of the electoral register. I am not impressed by an argument based on another piece of legislation to the effect that Government intended to limit its own powers under this Act and I, therefore, hold that the rules published in 1917 were valid.

The next objection is, that, the rules framed by Government in 1917 having been declared to be in supersession of all existing rules, the electoral register prepared under the authority of the old rules became useless and rendered an election held on the votes of the electors named in that register invalid. The fallacy in this argument lies in the supposition that the suppersession of the old rules necessarily led to the supersession of everything done under the old rules. Rule 11, clause (1), of the new rules which came into operation on 1st July 1917 provides that "when the electoral register has been revised by the Divisional Officer and corrected as aforesaid, the said register shall be deemed to be complete and shall come into operation with effect from the 1st day of January next ensuing, and shall continue in operation for the twelve months beginning on that day; and, if the next electoral register is not ready by the prescribed date, until such register is ready, and it shall be conclusive as to the general qualifications to vote prescribed in rules 4, 5, 6 and 7 above." Rule 12 (1) of the old rules which came into operation on 1st January 1916, contains similar provisions in almost identically the same language. Taking it, therefore, that these rules have the force of law, it was the law, both at the time of the election and when the last electoral list was prepared, that that list or register should be in operation until a new register was prepared. In *Todd, Ex parte*; *Ashcroft, In re* (8) Lord Eshar observed:—"It is a wholesome doctrine to hold that the section is retrospective, so far as it is a repetition of the former enactment, but that it is not retrospective as far as it is new." I am, therefore of opinion that the new rules cancel the old rules, but they do not render the old electoral register of no effect, when there was a provision both in the old rules and in the new rules for its continuance. In this view the plaintiff's suit was rightly dismissed as it failed on the merits.

But a question was also raised whether the validity of the election was a matter which could be made the subject of a civil suit. Rule 12, clause 2, lays down: "No failure to observe the dates prescribed in this and the preceding rules, or to observe other directions in these rules regarding the preparation of the register, shall entitle any one to question the validity and conclusiveness of the register, in proceedings under rule 33." It has been argued for the appellant that this rule gives him a right to question the correctness of the register in a Court of Law. On the other side, it is argued that it is tantamount to a prohibition of his questioning the register either in a Court of Law or before the Collector. One of the objections to an election under rule 33 (*c*) is that "the

(8) (1887) 19 Q. B. D. 186 at p. 195; 56 L. J. Q. B. 431; 57 L. T. 835; 35 W. R. 676; 4 Morrell 20.

person whose election is questioned was not duly elected by a majority of lawful votes." The District Munsif was of opinion that this rule permitted an objection to be taken in a petition before the Collector. The District Judge was of opinion that it could not be raised in such proceedings. My view as to the provision in rule 12 (2) is that it was intended to debar an objection to the electoral register being taken, except as specially provided for in rules 4, 5 and 6 at the time of the preparation of such register; and if this view is correct the plaintiff has no *locus standi* to take this objection after the election. I do not think that rule 12 (2) implies that such objections as could not be taken before the Collector in proceedings under rule 33 could be taken in such proceedings as a suit in a Civil Court. The machinery for the conduct of the elections, provided by the rules framed under the Act, being complete in itself the jurisdiction of the ordinary Civil Courts to take cognisance of such a matter is ousted. See *Nataraja Mudaliar* v. *Municipal Council of Mayavaram* (9) and *Bhaishankar Nanobhai* v. *Municipal Corporation of Bombay* (10).

The plaintiff's suit deservedly fails for another reason. When the register was prepared, he did not adopt the procedure provided by rule 10 (4) of objecting up to the 20th of September. The election was on October 2nd and in his petition to the Collector dated October 6th (Exhibit 1), he did not raise this point. He went to the polls on the footing of the register being a valid one. The technical point he has taken in these proceedings is evidently an afterthought. He is, therefore, not entitled to the equitable relief of a declaration on a matter connected with the preparation of an electoral register. In *Bhupendra Nath Basu* v. *Ranajit Singh* (11) it was held that, in similar circumstances connected with an election, where the conduct of the plaintiff was remiss and dilatory, the Court ought not to interfere and give him a declaratory decree, in the exercise of its discretionary jurisdiction, under section 42 of the Specific Relief Act.

The suit was rightly dismissed and the second appeal should be dismissed with costs.

M. C P.

Appeal dismissed.

(9) 12 Ind Cas. 311; 36 M. 120; 10 M. L. T. 219; (1911) 2 M. W. N.233; 21 M. L. J. 878.
(10) 31 B. 604; 9 Bom. L. R. 417.
(11) 20 Ind. Cas. 670; 41 C. 384.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 705 OF 1918.

June 22, 1920.

Present :—Mr. Justice Shah and Mr. Justice Crump.

NARSAPPA NINGAPPA MALI—PLAINTIFF—APPELLANT

versus

BHARMAPPA RAYAPPA MALI—DEFENDANT—RESPONDENT.

Hindu Law—Succession—First cousins, whether succeed per stirpes *or* per capita.

Where at the date of the opening of the succession to the estate of a deceased Hindu his nearest heirs are his first cousins they take *per stirpes* without reference to the shares which their respective fathers would have taken had they been alive. [p. 252, col. 1.]

Second appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 293 of 1917, modifying the decree passed by the Subordinate Judge at Athni, in Civil Suit No. 398 of 1916.

Mr. *Nilkant Atmaram*, for the Appellant.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff Ningappa and continued by his sons after his death for one third share in the property in suit. It is now found that the plaintiff and defendant No. 1 are the sons of Rayappa who was one of the four sons of Narasappa. Defendants Nos. 2 to 5 are the sons of Satyappa who was the son of Shidlingappa, one of the sons of Narsappa. The property in suit originally belonged to Shiddappa, the son of Ningappa, the second son of Narasappa. In 1910, Satyappa and the present plaintiff and defendant No. 1 filed a suit to recover the property which belonged to Shiddappa from the then defend.

ant who was in possession of that property. In that suit they claimed the property as the nearest heirs of Shiddappa. The reversion to Shiddappa opened on the death of his mother which took place in 1909, the widow of Shiddappa having died in 1908. The plaintiff's present claim is based on the allegation that he, defendant No. 1, and Satyappa, were the nearest heirs of Shiddappa and that he was entitled to one-third share in the property. Defendants Nos. 2 to 5 put forward a defence that Rayappa was not a son of Narasappa at all. This defence has been negatived in both the lower Courts, and we are not now concerned with it.

The Trial Court passed a decree in favour of the plaintiff in respect of his one-third share. The Appellate Court has modified that decree by declaring that the plaintiff is entitled to one-fourth share in the plaint property.

This modification of the decree is apparently based upon the view that Satyappa was entitled to one half and Ningappa and Bharmappa together were entitled to the other half of the property of Shiddappa. According to Hindu Law, however, all the three were then the heirs of Shiddappa and each one of them was entitled to claim an equal share without reference to the shares of their respective fathers who might have half and half if they had been alive and if their third brother Kedari was not alive at the time when the reversion to Shiddappa's estate opened on his mother's death. There is nothing on the record of this case to justify the suggestion which has been made by Mr. Desai before us that Shidlingappa, the father of Satyappa, and Rayappa, the father of the present plaintiff, and defendant No. 1 were alive at the material time. On the contrary, it is clear from the pleadings and from the suit filed in 1910 by Satyappa and the present plaintiff and defendant No. 1 that on the death of Shidappa's mother the nearest heirs were the plaintiffs in the suit of 1910. Mr. Desai has not been able to support the view that these three persons took *per stirpes* and not *per capita*. It is clear from the decision in *Nagesh* v. *Gururao* (1) that, according to the Hindu Law, each one of these heirs is entitled to an equal share in the property of Shiddappa. The Trial Court was right in awarding one-third share in the property to the plaintiff.

We accordingly reverse the decree of the lower Appellate Court and restore that of the Trial Court with costs in this Court and in the lower Appellate Court on the original defendants Nos. 2 to 5 who are respondents Nos. 2 to 5 in this Court.

The cross objections are dismissed with costs.

Decree reversed.

(1) 17 B. 303; 9 Ind. Dec. (N. S.) 19?.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 29 OF 1919.

March 29, 1920.

Present :—Sir John Wallis, KT., Chief Justice and Mr. Justice Krishnan.

GIRDARIDOSS RADHAKISHEN DOSS, A FIRM OF MERCHANTS AND COMMISSION AGENTS AT No. 111, MINT STREET, MADRAS —DEFENDANTS—APPELLANTS

versus

M. PONNU PILLAI—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), *s.* 108—*Landlord and tenant—Destruction of building—Negligence—Tenant, liability of—Notice, whether necessary—Tenant determining tenancy, effect of.*

The destruction of a building owing to the negligence of a tenant renders the tenant liable for damages. [p. 253, col. 2]

When a tenant elects to determine the tenancy under section 108 (*c*) of the Transfer of Property Act, such election amounts to a waiver of the notice calling on him to restore the property required by section 108 (*m*) of that Act. [p. 253, col. 2.]

A. rented certain premises in which he had stored a large number of bales of piece goods, and put a watchman in charge, who, one night, lit a hanging lamp in the hall in close proximity to the bales of piece goods, locked up the premises and went away intending to return and sleep there. On his return he found the premises destroyed by fire :

Held, that the fire was caused through the default of *A.*'s servant in leaving a lighted lamp unattended for some hours; that such default amounted to a negligent act, and that *A.* was bound to make good the damage caused under section 108 (*m*) of the Transfer of Property Act. [p. 254, cols. 1 & 2.]

Appeal from the judgment and the decree of the Hon'ble Mr. Justice Kumaraswami Sastri, dated the 26th March 1919,

passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 26 of 1918.

FACTS appear from the judgment.

The Hon'ble Mr. *K. Srinivasa Aiyangar*, Advocate-General, and Mr. *G. Krishnaswamy Aiyar*, for the Appellants.—The Trial Judge was wrong in his finding that the appellants were guilty of negligence Both under English and Indian Law there is no liability in the case of accidental fires. There is no direct evidence here as to how the fire was caused. It is not proved that the fire was caused owing to the negligence of the appellants. There is no statutory obligation on a tenant to insure his landlord's property against fire. There is the evidence of the Insurance Agent that piece goods are uninflamable. These bales of piece goods had iron loops round them. As a fact, the lamp was burning all through the period without any mishap.

The suit is premature, as three months' notice under section 108 (*m*) of the Transfer of Property Act was not given.

Messrs. *O. P. Ramasawmy Aiyar* and *A. Doraisawmy Aiyar*, for the Respondent.—There is no question of accidental loss by fire in the case. The fair inference to be drawn from the conduct of the appellants was that the destruction of the premises was due to their negligence. The law in India, as contained in section 108 (*m*) of the Transfer of Property Act, is that the tenant is liable in damages for negligence. The tenant is bound to restore the property to his landlord at the end of the period in as good a condition as he took it subject to ordinary wear and tear. etc., Here there was gross negligence on the part of appellant's servants in keeping lighted an ordinary Japanese lamp of the cheaper variety close to bales of piece goods unattended by any one for hours.

The defendant's liability has to be solely determined by applying the tests laid down in section 108 (*m*) of the Transfer of Property Act.

As to the objection based on the want of notice, Exhibit C is substantial compliance with the statutory requirement. Defendant by his letter, Exhibit E, repudiated his liability for damages. He must be deemed to have waived his right to notice.

JUDGMENT.

WALLIS, C. J.—This is an appeal by the defendant from the judgment of Kumaraswami Sastri, J. in a suit brought by a landlord against a tenant for damages for the destruction of the demised house by fire. The learned Judge has found that the fire was occasioned by the negligence of the defendant. The destruction of a building owing to the negligence of the tenant is treated in English law as permissive waste for which a tenant for life or for a term is liable and a tenant-at-will not liable, while the case of a tenant from year to year is doubtful. These distinctions are not recognised by the Transfer of Property Act. Section 108 (*m*) requires the tenant to restore the property in as good a condition as it was when he was put into possession subject only to changes caused by reasonable wear and tear or irresistible force and to allow the lessor and his agents at all reasonable times to enter upon and inspect the condition thereof and give or leave notice of any defect in such condition, and when such defect has been caused by any act or default on the part of the lessee his servants or agents, he is bound to make it good within three months after such notice has been given or left. In the present case the plaintiff by Exhibit C called on the defendant to pay Rs. 15,000 damages, while the defendant sent a counter-notice Exhibit D claiming to determine the tenancy under section 108 (*e*) in consequence of the destruction of the premises by fire, as he was entitled to do under that clause if the injury was not occassioned "by the wrongful act or default of the lessee." He also sent a reply to Exhibit C repudiating his liability to pay damages. The action of the defendant in electing to determine the tenancy under section 108 (*e*) amounts to a waiver of the notice calling on him to restore the property required by section 108 (*m*) and no question of the absence of such notice has been taken. Indeed, the case seems to have been conducted without reference to section 108 (*m*) which, however, embodies the rule of law to be applied. To make the defendant liable under section 108 (*m*) the defect in this case, the destruction of the premises by fire, must have been caused by "any act or default on the part of the lessee, his servants or agents" and all

we have to do is to apply this test to determine the defendant's liability. Such actions appear to have been infrequent and there are not many cases for our guidance. On the facts, the learned Judge has found that the fire was caused by the defendants' negligence and that question has been reargued before us. The admitted facts, as found by the learned Judge, are that the defendant took the house in 1916 and a Muhammadan Dubash of his was allowed to live in the upper part with his three wives and two servants. In October 1917 piece-goods were stored in a room opening into the *kudam* and the goods were insured, but the policy did not take effect until the first premium was paid in December. Late in December the Muhammadan and his family left the house, which was then put in charge of a watchman, some ten days before the fire occurred. The watchman swears that, according to his usual custom, he lit a hanging lamp in the hall where the goods were stored, locked up the premises and took the key to the defendant's house in the neighbourhood and went away to Triplicane for his evening meal intending to return and sleep there, and that on his return he found the premises destroyed by fire. The lamp was a cheap Japanese hanging lamp with a central draught like the one shown to us, and was hanging in the hall, near the stair case leading to the floor above.

In the draughty conditions of houses in India even the best lamps flare up and in this case the situation of the lamp was exceptionally draughty, having regard to the fact that the room was quite open on the east side and to nearness of the stair-case where there would have often been a strong draught. In these circumstances, a cheap lamp like this if left unattended for some hours, might well flare up, become heated and explode and this would seem to be what actually occurred. There seems no other way of accounting for the fire, putting aside deliberate incendiarism which is not now suggested on either side. The question then is whether it was negligence to leave a lighted lamp like this unattended in close proximity to the bales of piece-goods which were stored in large quantities in the room. Mr. Waddell, the agent for the Insurance Company which has paid the defendant's claim on the goods, gave evidence that piece-goods tightly packed in bales are not more inflamable than ordinary furniture, and said that he did not consider it dangerous to leave the lighted lamp suspended over the bales. It seems fairly clear that the bales were piled one on top of the other quite near the lamp. It may not be possible now to fix the exact relative positions. In my opinion, in the conditions prevailing in India, to leave a lighted lamp unattended for hours in close proximity to bales of piece-goods was a distinctly negligent act, and I am not prepared to differ from the finding of the learned Judge or from his estimate of the cost of restoring the damage. The appeal fails and is dismissed with costs.

KRISHNAN, J.—I agree with the learned Chief Justice. The suit from which this appeal arises was one brought by a landlord against his tenant for compensation for damages caused to the demised premises by fire, which it is alleged was the result of the negligence or default of the latter's servants. The rights and liabilities of lessors and lessees are regulated in this country by the Transfer of Property Act. Section 108 of that Act provides in clause (*e*) omitting words which are not material here that "if by fire.....any material part of the property be wholly destroyed.....the lease shall at the option of the lessee be void: provided that if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to the benefit of that provision;" and again in clause (*m*) that "the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force,.....and when such defect has been caused by any act or default of the lessee, or his servants or agents, he is bound to make it good within three months after notice to him."

Fire comes within the term "irresistible force" and if the injury to the property in suit had been caused by fire without any default on the part of the tenant, he would not have been responsible for the loss; but, on the other hand, he could have avoided the lease as he claimed to do in his letter Exhibit E. A tenant is not in the position of an insurer of the landlord's property

against fire risks and he is not, therefore, liable for loss by accidental fires.

The main question then for our decision is whether the fire in this case was caused by the default of the defendant's servants or not. The evidence makes it quite clear that defendant had stored up in a room in the house a large number of pressed bales of cotton piecegoods and yarn and also some indigo seed. Taking the size of the room and the number and approximate size of the bales into consideration it would seem that the room must have been fairly closely packed with the bales. There was no one living in the house at the time of the fire, the defendant's Dubash and his family who were living in it previously having left it a few days prior to it. On the night of the fire what the defendant's clerk, who was put on to watch these goods, did, was to leave an old kerosine oil Japanese metal lamp hanging from the ceiling of the room, within three feet of these bales burning and to go away for his evening meal at Triplicane looking up the house from the outside. He was away for about two hours and when he came back he found the room and the goods in it had all been burnt down. The room had no wall on one side and thus was open to the outside wind, the lamp itself was one of the Ditmar patent pattern with a metal container and a central draught through a metal tube passing through the container and a round wick. Such lamps are known to be very liable to flare up when there is any breeze or when the container gets heated by the burning of the lamp itself; and when that happens the whole of the kerosine oil in the lamp is liable to take fire and burn. I agree with the learned Trial Judge that, to leave such a lamp as that lit in a room open on one side with a large number of bales of piece goods and yarn within a few feet of it with no one to watch it or attend to it, was undoubtedly an act of gross negligence on the part of the defendant's clerk as found. The folly of the man's act was so great as, when coupled with the facts that the goods in the room belonging to his master had been heavily insured and that the Dubash and his family who had been living in the house previously had left it with all their things very shortly before, as almost to lead to the suspicion that his act was not unintentional. That, however, is not alleged before us but there can be no doubt that his act was a piece of gross negligence.

It was argued that there was no evidence to show how the fire was caused or to show that the lamp had anything to do with the origin of the fire. It is true there is no direct evidence on the point but it is surely a reasonable inference to attribute the fire to the kerosine oil lamp as no other possibility of its origin has been suggested in the evidence.

It was also argued that pressed bales of piece goods and of yarn with iron hoops round them like those which were stored in the present case are not inflammable goods and there was thus no risk and therefore, no negligence in leaving a lighted lamp near them; and the evidence of Mr. Waddell, the Insurance Agent, was referred to in support of this contention. It may be, for purposes of insurance, pressed bales of cotton goods are treated as non-hazardous goods as Mr. Waddell says. But that is hardly to the point as they are all the same liable to take fire and burn as the fire in this case in which they were all burnt has conclusively proved. The clerk's act in leaving a lamp of the kind above described burning and unattended to, near a large quantity of such bales is nonetheless a negligent act in my opinion, even though the bales may not have easily caught fire. Nor does the fact that the lamp had been left burning in the room in the same manner on previous evenings without any mishap, even if it be true, materially affect, in my opinion, the question of negligence as that has to be judged from the nature of the act itself.

I accept therefore, the learned Trial Judge's finding that the fire which burnt down a part of plaintiff's building was caused by the default of the defendant's servants, and I hold, therefore, he was bound to make good to the plaintiff the damage caused under section 108, clause (*m*) of the Transfer of Property Act.

It was objected that no notice was given by the plaintiff to the defendant as required by that clause. I think, however, plaintiff's lawyer's notice, Exhibit C, is in substantial compliance with it and though plaintiff did not wait for three months before bringing his present suit the defendant by his repudiation of all liability for the damage

caused by his letter, Exhibit E, waived his right to the time. No plea was raised in this case that the defendant should have been given three months' time to repair or that the suit was premature on that account. The objection must, therefore be overruled.

I have not referred to any of the English cases cited on the point as the case before us is really governed by the Transfer of Property Act. The learned Chief Justice has stated the law in England on the point and I think it is unnecessary for me to refer in detail to these cases.

The next point argued is as regards the *quantum* of damages awarded. It was contended that Mr. Hebbar's evidence on the question should have been preferred to that of Mr. Srinivasachari's. There is no valid reason urged why we should do so. Mr. Hebbar did not prepare an estimate himself but only gave the rates differently from those Mr. Srinivasachari gave. The latter was not cross-examined on the point of rates at all whereas Mr. Hebbar, who is a D. P. W. Sub-Engineer, and was speaking of D. P. W. rates in his examination in-chief, had to admit in cross-examination that his rates had no reference to the D. P. W. rates; he then said that he was speaking with reference to Royapuram Hospital rates, but he did not produce any schedule of such rates or even of the D. P. W. rates. The learned Trial Judge has accepted a part of his evidence and has reduced Mr. Srinivasachari's estimate accordingly and fixed the damages at Rs. 8,000. I am not prepared on the evidence on record to interfere with his finding on the point.

I agree, therefore, that the appeal fails and should be dismissed with costs.

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3104 OF 1915.

October 30, 1920.

Present :—Mr. Shadi Lal,

Chief Justice, and Mr. Justice LeRossignol.

PARMANAND—PLAINTIFF—APPELLANT

versus

SHEO CHARANDAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Adoption of a daughter's son, whether valid—Custom of Khatris *of Amritsar—Inheritance—Adopted son, share of—Joint Hindu family—Property in the hands of member, nature of—Will devising joint property, whether valid.*

Under the Hindu Law, the adoption of a daughter's son is invalid, but it is valid according to a custom prevailing among the *Khatris* of the town of Amritsar. [p. 257, cols. 1 & 2.]

According to the Mitakshara School of Hindu Law, an adopted son takes one-fourth of the entire estate in the presence of a natural son. [p. 258, col. 1.]

All the property in the hands of the members of a joint Hindu family is to be treated as joint property, but it is open to any member to show that any particular property is his separate property. [p. 257, col. 2.]

In a suit for possession by partition of certain property left by one *P.*, it appeared that he adopted the plaintiff in July 1905. About five years afterwards, he got a son, the defendant, who relied on a Will executed by the deceased whereby he devised his entire estate to his natural son :

Held, (1) that as soon as the plaintiff was adopted by *P.* he became a co-parcener with the latter, and that the latter could not dispose of any property which belonged to the joint family; [p. 257, col. 2.]

(2) that the Will could operate only upon the separate property of the deceased and was invalid *qua* the joint property. [p. 257, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Amritsar, dated the 31st August 1915.

Bakhshi *Tek Chand* and Mr. *Mukand Lal*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—The dispute in this case relates to the estate of one Dr. Pohlo Ram, a *Khatri* of the town of Amritsar, who died on the 23rd June 1914. It is common ground that Pohlo Ram adopted the plaintiff, Parma Nand, in July 1905, and that it was about five years after that adoption that Pohlo Ram got a son Shiv Charan Das, who now resists the claim of the adopted son to a share in the estate. Two grounds of defence have been put forward on his behalf, namely, (1) that the

plaintiff, being Pohlo Ram's daughter's son, could not be validly adopted; (2) that the deceased left a Will by which he devised his entire estate to his natural son, and that the latter is consequently the sole heir.

Upon the question of the validity of the adoption we are quite clear that, under the Hindu Law, the adoption of a daughter's son is invalid, and that the contention urged in this Court for the first time that the plaintiff's mother was not the daughter of Pohlo Ram is a mere after thought and cannot be entertained at this late stage of the case. It is, however, contended that, among the *Khatris* of the Punjab, there is a general custom favouring the adoption of a daughter's son, and that the evidence on the record proves that the *Khatris* of the town of Amritsar recognise such an adoption as valid. The learned Vakil for the plaintiff-appellant has invited our attention to several judgments of the Punjab Chief Court, in which the adoption of a daughter's son was upheld; namely, *Sardar Diwan Singh* v. *Musammat Subhan*(1)relating to the *Khatris* of the Ferozepore District; *Atma Singh* v. *Jatta Singh* (2) as to the *Khatris* of Amritsar *Taba* v. *Shib Charan* (3) relating to the *Khatris* of the Jullundur District; *Gandi Mal* v. *Musammat Radhi* (4) regarding the *Khatris* of the Ferozepore District; and *Harnaman* v. *Atma Ram* (5) relating to the adoption of a sister's son among the *Khatris* of Tahsil Pipli in the Ambala District.

It appears that the adoption referred to in some of these cases was not a ceremonial adoption in the *Dattaka* form but was probably an appointment of an heir. There is, however, no doubt that the force of the doctrine of the Hindu Law prohibiting the adoption of a daughter's son has been considerably weakened; and the instances adduced by the plaintiff must, therefore, be regarded as an adequate proof to discharge the onus which rested upon him. We have six instances (not four, as wrongly stated by the Subordinate Judge) in support of the custom, three of which are deposed to by the adopted sons themselves, namely, Kishan Chand (P. W. No 3), Lachman Das (P. W. No. 4) and Murli Das (P. W. No 8). As regards the remaining three, we have the evidence of Ganda Mal (P. W. No. 11 who himself adopted his daughter's son, and of Bhagat Ram (P. W. No. 2), who deposed not only to an adoption by himself but also to an adoption by his brother. It is to be observed that this evidence stands entirely unrebutted, and that there is not a scintilla of evidence on the record to show that the adoption of a daughter's son is regarded as invalid by the *Khatris* of Amritsar. We must, therefore, hold that the plaintiff has succeeded in establishing a custom recognising the validity of the adoption of a daughter's son among the *Khatris* of the town of Amritsar, and that he must be treated as the validly adopted son of Pohlo Ram.

With respect to the second ground of defence, there can be no doubt that Pohlo Ram made Will on the 26th September 1912 by which he devised his estate to the defendant. The *factum* of this Will, as well as of the codicil made on the 30th May 1914, is not now in dispute, and it is only the validity, which is the bone of contention between the parties. Now, it is not seriously contested that as soon as the plaintiff was adopted by Pohlo Ram, the former became a co-parcener with the latter, and that the latter could not dispose of any property which belonged to the joint family. The principle of the Hindu Law is firmly established that all the property in the hands of the members of a joint Hindu family is to be treated as joint property, but that it is open to any member to show that any particular property is his separate property. There can be no doubt that the Will could operate only upon the separate property of the deceased, and that it should be regarded as invalid *qua* the joint property.

The Subordinate Judge has not adjudicated upon the question relating to the nature of the property, and as the parties are unable to come to any agreement on this point, we are constrained to remand the case to the Trial Court for re-decision with reference to the foregoing remarks. The Subordinate Judge should, after excluding such property as may be proved to be the separate property of the deceased Pohlo Ram, pass a decree in favour of the plaintiff for the

(1) 72 P. R. 1878.
(2) 64 P. R. 1883.
(3) 162 P. R. 1883.
(4) 57 P. R. 1886.
(5) 24 P. R. 1900.

share to which he is entitled as against the natural son. As to the exact share to which the plaintiff is entitled, reference may be made to paragraph 168 of Mayne's Hindu Law, where it is pointed out that the adopted son takes one-fourth of the entire estate in those provinces which follow the Mitakshara School of Law.

We accordingly accept the appeal, and, setting aside the decree of the lower Court remit the case for re decision. As the appellant was allowed to appeal *in forma pauperis* no order for the refund of Court-fee is required, and the other costs shall abide the event.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 691 OF 1919.

February 25, 1920.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

PERICHERLA BUTCHIRAJU AND OTHERS —DEFENDANTS—APPELLANTS

versus

ADDEPALLI VENKATA MANGA SEETARAMAYYA, LATE A MINOR, BY HIS MOTHER AND GUARDIAN, GALLAMMA, NOW DECLARED MAJOR—PLAINTIFF—RESPONDENT.

Landlord and tenant—Rent—Enhancement—Change from grain to money, whether enhancement.

A change from grain to money rent and *vice versa* may, when the circumstances of the case and the evidence adduced admit of it, be treated by the Court as an enhancement.

Second appeal against the decree of the District Court, Godavari, in Appeal Suit No. 65 of 1918, preferred against the decree of the Court of the Deputy Collector, Rajahmundry Division, in Original Suit No. 65 of 1917.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—The lower Appellate Court's judgment is based on *Hassan Kuli Khan* v. *Nakchhedi Nonia* (1). The decision has been considered and explained in *Tarap*

(1) 33 C. 200.

Ali v. *Kalipada Bandopadhya* (2). There is, as the latter case decides, no obstacle to the Courts treating a change from grain to money rent or *vice versa* as an enhancement, when the circumstances of the case and the evidence adduced admit of its doing so. In these circumstances, we cannot adopt the lower Appellate Court's grounds of decision.

It follows that we cannot endorse its refusal to allow the examination of first defendant and Krishna Sastri as witnesses. In this connection, we may state that, we agree entirely with its observations on the Deputy Collector's conduct of the trial.

We accordingly set aside the lower Appellate Court's decree and remand the appeal to it for re admission and disposal on the merits with reference to Nos. 2 to 6 of the issues framed at the trial in the light of the foregoing. It will also reconsider the question of examining first defendant and Krishna Sastri. Costs to date here and in the lower Appellate Court will be costs in the case and be provided for in the decree to be passed. Stamp duty will be refunded on application.

M. C. P.

Appeal allowed; Case remanded.

(2) 34 Ind. Cas. 97; 23 C. L. J. 635.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 461 OF 1918.

March 24, 1920.

Present:—Sir John Heaton, KT., Acting Chief Justice, and Mr. Justice Crump.

GENU TUKARAM TAPKIR—PLAINTIFF —APPELLANT

versus

NARAYAN RAGHU TAMHANE—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 60—Mortgage—Redemption—Clog on equity of redemption—English rule, whether applicable in India—Redemption not to take place so long as there are fruit trees standing on land, whether clog—Suit brought while trees are standing, whether maintainable.

GENU TUKARAM *v.* NARAYAN RAGHU.

The rule of English Law regarding a clog on the equity of redemption is not applicable in India. [p. 260, col. 1.]

A provision in a mortgage-deed that the mortgage shall not be redeemed so long as there are fruit trees standing on the mortgaged land which have been planted by the mortgagee is not a clog on the equity of redemption, and a suit for redemption brought while such trees are standing on the land is premature. [p. 260, col. 2.]

Second appeal from the decision of the Joint Judge, Poona, in Appeal No. 68 of 1915, varying the decree passed by the Subordinate Judge at Haveli, in Civil Suit No. 613 of 1913.

Mr. *G. S. Rao*, (with him Babus *K. V. Joshi* and *B. K. Mehendale*), for the Appellant.

Mr. *H. G. Kulkarni*, for the Respondent.

JUDGMENT.

HEATON, ACTG. C. J.—This is a case of some interest, partly because it is unusual itself, and partly because it has followed a somewhat surprising course. The plaintiff is a mortgagor and seeks to redeem. The mortgage is one of a very early date, about 1867 or 1868, and it provides that the mortgagor was to receive Rs. 900, and that the mortgaged property was to be placed in the possession of the mortgagee who was to enjoy the land and trees. But it was evidently contemplated that the mortgagee should develop the land in some way, probably by planting fruit trees. The mortgage provided that redemption should not take place until after twenty-one years, and that, if the mortgage was not redeemed then, the mortgagee was to continue to enjoy the land and to take the profits in lieu of interest. The deed also provided that if the mortgagee should, at some future time, after the expiration of the twenty-one years, when the mortgagor sought to redeem, have planted trees, or something of that kind described in the deed as Udim (* * *) which were bearing fruit, the mortgagee should not be required to give up possession until this *udim* had come to an end; though meantime he should pay to the mortgagor the customary *khand* (* * *) There were other detailed provisions in the document, which, I think, I need not set out, because what I have said gives a general idea of the main features of the document.

The twenty-one years must have come to an end about 1888 or 1889. It was not, however, until 1913 that the mortgagor's successors brought this suit for redemption, and it is found, indeed it is admitted by both sides, that at that time there were fruit-bearing trees, and they are still there, which had been put down by the defendant. The Courts below were naturally a good deal exercised as to how redemption could, or on what terms it should, be permitted in those circumstances.

The Trial Court came to the conclusion that the stipulation about the martgagee continuing in possession, if there were fruit trees on the land, was a clog on the equity of redemption, and need not, and could not, therefore, bind the mortgagor. He made an order that defendant No. 2 should continue in possession for three years, *i. e.*, till the end of 1917, at the expiry of which period the land mortgaged should be restored to the mortgagor free from all incumbrances.

The defendant No. 2, mortgagee, appealed. The Appellate Court came to the conclusion that, before considering the case fully on the merits, a good deal had to be determined, and he sent the case back with directions that practically involved the taking of an account from the date of the institution of the suit. Evidence was recorded and inquiries were made, and the Court of first appeal eventually made its own estimate of the account, at any rate, from 1914, shortly after the suit was filed. It arrived at the cost of the fruit trees planted by the mortgagee, and arrived at the net income year by year. Finally, it made the decree which appears at the end of its judgment.

That decree awarded immediate possession of part of the land to the plaintiff, but it postponed the mortgagor's taking possession of the remainder of the land, the remainder being that part on which these fruit trees had been planted, until the year 1924, and it directed that the mortgage debt of Rs. 900 should be paid by instalments.

Now, the first point we have to decide is whether the provision in the deed postponing the mortgagor's taking possession, so long as there were fruit-bearing trees on the land, is a clog on the equity of redemption of

the kind which must be regarded as invalid under the law in British India. Personally, I do not think it is a clog. The contract is a very elaborate and a very peculiar one. I am quite unable to say with certainty whether, if this case came before an English Judge thoroughly conversant with the English law of mortgage, that Judge would find in this stipulation a clog on the equity of redemption, and, therefore, cut it out of the mortgage contract. But of this I feel quite certain, that the English Law on the point is not the law which we have to apply. We have to apply the Transfer of Property Act, and the section in that Act which is applicable is section 60. That section begins, "at any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, if any, to require the mortgagee" to do certain things. Now, the words "at any time after the principal money has become payable" must, as I think, mean become payable according to the terms of the mortgage contract, because there is no other way whatever, except by reference to the mortgage-contract, which enables you to ascertain the amount payable or how or when it is to be paid. So that section 60, as it stands, merely enacts that redemption is to be according to the terms of the mortgage contract, and there is nothing in the Transfer of Property Act that I know of which says anything about clogs on the equity of redemption. So, if we are to determine in this country whether a certain provision in a mortgage-contract is contrary to law, we are not, as it seems to me, to look to the English rule. We must look to the law applicable in British India. There is the law of contract itself which provides a great many instances in which provisions of various kinds are invalid, and, failing everything else, there are certain broad general equitable principles which might be applied.

The rule in English Law regarding a clog on the equity of redemption has, as I understand it, long ceased to be what can be described as an equitable principle. It is a rigid rule of law, and one as to which the English Judges themselves have on occasions pronounced very adverse opinions. So I do not think that equitable principles require us to apply the rigid rule which is applicable in England.

The contract, if you take it by itself, seems to me to be a perfectly fair one. It is meant to serve the principal purpose that the land is to be developed by the mortgagee, and I can find in it nothing which is either unfair in itself, or which gives the slightest indication of there being anything in the nature of undue influence exercised by the mortgagee over the mortgagor. Nor is it suggested anywhere in the case that there is anything to object to in this contract unless you apply the rigid rule which is applicable in England.

Therefore, in my opinion, we have to go by the contract, or else we have to go by the Dekkhan Agriculturists' Relief Act, which enables the Court in a redemption suit to set aside or modify the provisions of a contract. We cannot go by the law of contract, pure and simple, because if we do so, I mean without reference to the Dekkhan Agriculturists' Relief Act, the suit is premature. There has been no payment of the mortgage debt, nor has there been any tender of the mortgage money, or offer of payment of any kind or demand for an account from the mortgagee, so no suit for redemption would lie under the Transfer of Property Act. And, under the Dekkhan Agriculturists' Relief Act, an account has to be taken as provided by section 13. That must be an account from the beginning of the mortgage up to the date of the suit. No such account has been taken, although, somewhat curiously, an account has been taken from the date of the suit to the year 1924. It seems to me, therefore, that the case has been disposed of without applying those provisions of the Dekkhan Agriculturists' Relief Act which are applicable to a suit of this nature.

CRUMP, J.—This is a suit for redemption under the provisions of the Dekkhan Agriculturists' Relief Act, and it appears to me important to bear that in mind in considering the method in which it has been dealt with by the lower Appellate Court.

Before coming to that aspect of the matter, I would state briefly the view which I have formed as to the document of mortgage which governs the relations of the parties

to this suit. The document is exceedingly ill-drafted, and, therefore, difficult of comprehension. But, as I understand it, it falls into two parts, the first part providing that, on payment of the principal sum on the expiry of twenty-one years, the mortgagor shall be entitled to recover the land and trees free of all charges. The second part of the document then goes on to provide that, if the money is not so paid, the mortgagee will be entitled to remain in possession and to develop the land by growing crops upon it, which were obviously meant to be crops requiring considerable periods for their maturity, as plainly appears from the fact that Panwala crop is mentioned as an instance of the crop in contemplation by the parties. I do not read the document as establishing any fresh relation between the parties after the expiry of twenty-one years, and it appears to me that the relation continued to be that of the mortgagor and mortgagee.

It is true that the word '*khand*' (* * *) is used as denoting payments to be made by the mortgagee to the mortgagor, but I do not think that the English word 'rent' is an exact translation of that word, but rather the word '*khand*,' more particularly on the context in which it is used in this document, denotes the share of the crop to be paid by the mortgagee to the mortgagor, not necessarily in the capacity of a tenant. It seems to me, therefore, that up to the date of the suit the relation of the mortgagee and mortgagor subsisted, and that, under the terms of the contract itself, a suit for redemption would have been premature had it not been for the terms of the special Act.

As to the argument based upon the principle militating against any clogs on the equity of redemption, I have only to say this much that I agree with the judgment delivered by the learned Chief Justice that the matter, so far as this country is concerned, must be governed by the provisions of section 60 of the Transfer of Property Act, and it appears to me that if this document is construed with reference to those provisions, there is nothing in it which amounts to what is known as a clog in the English Law. That section sets out that "the mortgagor has a right to redeem at any time after the principal money has become payable", and I agree that the words "after the principal money has become payable" mean payable under the conditions of the contract. If, then, the contract be such as I have indicated, the principal money would not become payable until such time as the mortgagee had reaped the benefit of the trees which the document permits him to plant. Therefore, it is only under the provisions of the Dekkhan Agriculturists' Relief Act that the plaintiff is entitled to redeem. It follows, therefore, that it is to the provisions of that Act, and that Act alone, that we must look in considering the method in which the account is to be made between the parties.

Now, it needs hardly to be said that under section 13 of that Act the account is to be taken from the date of the transaction up to the date of the suit, and that when the money so due is determined, the Court shall make such decree as is contemplated in the Act. The Court may either make a decree for redemption, or may permit, if the mortgagee has not been fully paid, the mortgagee to remain in possession for such further period as it thinks fit. In the present case the Judge of the lower Appellate Court has taken an account up to a future date 1924, a procedure which appears to me is not only not contemplated by the Act, but in itself extremely undesirable. How such an account can be taken with any certainty is a matter which I do not understand but, in view of the provisions of the relevant Statute, it is unnecessary to go into the details of that matter. It seems to me, therefore, that the decree which has been made is not one which can be sustained, as it is plainly contrary to the provisions of the law which we are bound to apply in this case.

HEATON, ACTG. C. J.—If the parties can agree, that will settle the matter. But failing an agreent, we shall have, so far as we can see at present, to remand the case in order that an account may be taken as required by section 13 of the Dekkhan Agriculturists' Relief Act. The matter can be mentioned again when we sit together, which will be probably on Tuesday week.

HEATON, ACTG., C J. AND CRUMP, J.—As the parties have failed to arrive at a settlement in this matter we, in pursuance of the

judgments already delivered, direct the case to be remanded, in order that accounts may be taken as required by section 13 of the Dekkhan Agriculturists' Relief Act. We, therefore, set aside the decree and direct that accounts be taken accordingly and a fresh decree be made.

Costs including the costs in this appeal will be dealt with by the lower Court.

Decree set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1326 OF 1919.

March 23, 1920.

Present :—Sir John Wallis, KT., Chief Justice, and Mr. Justice Krishnan.

MUHAMMED KHALI—DEFENDANT No. 1—APPELLANT

versus

ALATHADI MALWA KUNHI RAMA NAIR—PLAINTIFF—RESPONDENT.

Contribution—Registered pattadar *with limited interest in land, position of—Government revenue, payment of, by* pattadar *for whole land*—Pattadar, *right of, to contribution.*

A. claimed certain land which was included in the *patta* of *B.*, the registered holder, and liable for the Government revenue. The suit was compromised and a decree passed awarding the land to *A.* conditional on his paying the assessment to *B.* Subsequently, the Government revenue was enhanced, and *B.*, who had paid the enhanced assessment, brought the present suit against *A.* for contribution:

Held, that *A*, being the registered holder but interested in only a portion of the land, having paid the whole of the assessment was in the position of a co-mortgagor and had a right to contribution as against other persons interested in the land on which the revenue was a charge. [p. 263, col. 1.]

Second appeal against the decree of the District Court, South Kanara, in Appeal Suit No. 386 of .1918, preferred against the decree of the Court of the District Munsif, Kasaragod, in Original Suit No. 415 of 1917.

FACTS appear from the judgment.

Mr. *K. P. Lakshmana Rao*, for the Appellants.—Under the terms of the *rasinamah* decree the defendant is bound to pay to the plaintiff a specific sum, *i. e.*, annas eight, for Government revenue. No contract could be implied for payment of more on the occurrence of any contingency. The contract between the parties having been embodied in a decree of Court, it should be presumed that the intention of the parties was that the defendant should be liable in a certain fixed amount. It is not competent to Courts to go behind the decree.

Mr. *B. Sitaram Rao*, for the Respondent.—The principle of the decision of the Full Bench in *Rajah of Vizianagram* v. *Setrucherla Somasekhararaz* (1) applies to this case. The revenue is a charge on the land and the registered holder is in the possession of a part of the mortgaged property. He is entitled to contribution from the persons interested in the property. The right also arises under section 82 of the Transfer of Property Act. See also *Naraina Pai* v. *Appu* (2), *Alayakammal* v. *Subbaraya Goundan* (3).

JUDGMENT.

WALLIS, C. J.—In this case the appellant, first defendant, claimed certain land which was included in the plaintiff's *patta* and a compromise decree was arrived at which awarded him the land but provided that he should pay the assessment (annas eight) to the plaintiff, who was the registered *pattadar* and liable to Government for the land revenue. Subsequent to that time, the Government increased the land revenue upon the land, but there was no separate registry in the name of the first defendant. The *rasinamah* decree only provided that the defendant should pay the plaintiff annas eight by way of assessment and I cannot extract from that any implied agreement that any more should be paid, or, on the other hand, that that should be the only liability of the defendant in respect of assessment. I think that, as regards the additional assessment imposed upon the land subsequently, the matter must be governed by the decision of the Full Bench in *Rajah of Vizianagram* v. *Setrucherla Somasekharara* (1) which has been recently followed in *Narain Pai* v. *Appu* (2). See also *Alayakammal* v. *Subbaroya Goundan* (3) The rule laid down in *Rajah of Vizianagram* v. *Setrucherla*

(1) 26 M. 686 (F. B.).
(2) 28 Ind. Cas. 456.
(3) 28 M. 493; 15 M. L. J. 219.

Somasekhararaz (1) is that where the revenue is paid by the registered holder of land in which various people are interested, as that revenue is a charge upon the land, the registered holder is in the position of a mortgagor of a part of the mortgaged property. In these circumstances, a mortgagor of a part of the mortgaged property, under section 82 of Transfer of Property Act, has a right to contribution. Whether that section applied or not, *Rajah of Vizianagram* v. *Setrucherla Somasekhararaz* (1) is an authority for the proposition that where, as here, a registered holder who is only interested in a portion of the land has paid the whole assessment, he is in the position of a co-mortgagor and has a right to contribution as against the other persons interested in the land on which the revenue was a charge. That is quite sufficient to support the decision of the District Judge in this case.

The appeal fails and is dismissed with costs.

KRISHNAN, J.—I agree. This case is governed by the rulings in *Rajah of Vizianagram* v. *Setrucheral Somasekhararaz* (1) and *Narsina Pai* v. *Appu* (2) both as regards plaintiff's right and as regards limitation.

M. C. P.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 58 OF 1919 IN SUIT No. 166 OF 1919.

November 17, 1919.

Present :—Mr. Justice Heaton and Mr. Justice Marten.

HIRALAL AMBALAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOPALJI KALLIANJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract, breach of—Damages, measure of—Variation, effect of—Delivery not to be made, effect of.

Plaintiffs contracted to buy certain goods from one *M.* which they agreed to sell to the defendants. Subsequently, it was agreed between the parties that the defendants should pay *M.* direct against delivery and should get *M.* to give credit to the plaintiffs for the amount. Defendants agreed to sel the same goods to *M.*, and, therefore, failed to take delivery. Plaintiffs sued the defendants for damages :

Held, (1) that the intention of the original contract between the plaintiffs and the defendants that there should be delivery by the former to the latter was subsequently modified and there was in fact to be no delivery ; [p. 265, col. 1.]

(2) that the plaintiffs were only entitled to the difference between the price which they had agreed to pay to *M.* and the price which defendants had agreed to pay to them. [p. 265, col. 1.]

Appeal against the following judgment of Macleod, C. J. :—

'On the 4th of September 1918, the plaintiffs bought 35 bales of *dhoties* from Mathuradas Morarji at Rs. 11-2 and Rs. 11-6 per piece of 8 and 9 yards. On the 7th September the plaintiffs sold these 35 bales to the defendants for Rs. 11-8 and Rs. 11-12 per piece and the defendants sold them back to Mathuradas Morarji at Rs. 11-12 and Rs. 12. The result of these three contracts was that the goods which Mathuradas sold on the 4th came back to him on the 8th at the cost of 10 annas per piece which would have to be divided between the plaintiffs and the defendants, 6 annas to the plaintiffs and 4 annas to the defendants.

The defendants say that an agreement was arrived at in the natural course between themselves, the plaintiffs and Mathuradas, under which it was arranged that this payment should be made, and no doubt that was a course for any sensible firm of merchants to follow. And there was no necessity for the delivery order to travel from Mathuradas to the plaintiffs and from the plaintiffs to the defendants and back again to Mathuradas.

The plaintiffs, however, allege that the defendants did not take delivery of the goods and they were entitled to recover from the defendants, for breach of contract, damage, according to the rates on the 20th of December, which was Rs. 4-6-0 and Rs. 4-10-0.

Now, it is quite obvious that the plaintiffs had suffered no damage at all. They can only be entitled to the difference between the rate at which they bought from Mathuradas and the rate at which they sold to the defendants. And, therefore, there will be a decree for the plaintiffs at the rate of 6-annas a piece.

It is unfortunate that the defendants did not adequately realise the exact situation and pay into Court this amount since they

were entitled to demand from Mathuradas the difference between Rs. 11-2-0 and Rs. 11-12-0. Instead of doing that, they counter-claimed the difference of profit which they ultimately might make if Mathuradas paid up, I don't think that this course of conduct would entitle them to recover costs from the plaintiffs although the plaintiffs' claim is an absolutely unconscionable one and cannot be considered in his favour by the Court The plaintiff, although he has recovered at the rate of 6 annas per piece, will not be allowed his costs from the defendants. But in the proceeding againt Mathuradas, which the defendant says he will take, it will be open to him, if he can prove that Mathuradas agreed to Havalas being exchanged and that, in consequence of Mathuradas not fulfilling that agreement, the defendant incurred the costs of the suit filed against him by the plaintiff, to contend that he is entitled to recover those costs as damages from Mathuradas.

Messrs. *Campbell* and *Desai*, for the Appellants.

Messrs. *Kanga* and *Kania*, for the Respondents.

JUDGMENT.

HEATON, J.—We do not think it necessary to call upon the respondents.

This case is one in which the plaintiffs sued for damages for the breach of a contract on the ground that the defendants, to whom they had sold certain goods, had failed to take delivery. When the case came on for hearing there was put in certain correspondence, and it was admitted that there were three contracts relating to these goods. The first was the sale by Mathuradas to the plaintiffs; the second was the sale by the plaintiffs to the defendants, which is the contract for the breach of which the plaintiffs sue, and the third was the sale by the defendants back to Mathuradas, the original vendor. It was further admitted that these contracts related to precisely the same goods. Counsel who appeared for the plaintiffs in the Trial Court, there said that if the Court thought that on the admitted facts there was only a claim for difference he did not wish to contest the case further; and the Court gave judgment according to the evidence.

The main point taken in appeal is that this case must be decided exclusively on a consideration of the contract between the plaintiffs and defendants and the Court had no right to take into account any later contract between the defendants and Mathuradas, or to take into account the effect such a contract might have on the dealings between the plaintiffs themselves and the defendants.

Now, in the circumstances which I have stated, one would naturally infer, particularly as it is also admitted that the goods sold were in the godown of Mathuradas and had been there all the time, that the understanding between the parties either was or came to be that there should not in fact be actual delivery. The goods had been sold to the plaintiffs, then to the defendants, then back to the original vendor who had them and had had them all the time. But, of course, it might be entirely wrong to draw this inference merely from the pleadings and the correspondence put in when no further evidence had been heard in the case. I will assume that it would be wrong, yet in this case the plaintiffs' plaint itself places the matter on a safer basis than mere inference. It shows that there was a modification of the original contract between themselves and the defendants because the plaint states:—"It was agreed that the defendants should pay Messrs. Mathuradas Morarji direct against delivery and should get the said Messrs. Mathuradas Morarji to give credit to the plaintiffs for the amount paid." That seems to me to justify any Court in holding that the intention of the original contract that there should be delivery by the plaintiffs to the defendants was subsequently modified and there was, in fact, to be no such delivery. The delivery required to give effect to the modified contract between the plaintiffs and defendants would be a delivery by Mathuradas, not by the plaintiffs, to the defendants, and that of course was rendered unnecessary by the contract between the defendants and Mathuradas by which the former sold the goods back to the latter.

On this state of facts, therefore, it seems to me quite impossible to assume that there could conceivably be a breach of contract on the part of the defendants by reason of their

not taking delivery. That being so, the only thing the defendants have failed to do is to pay the price. And I think the decree of the lower Court is correct and that the appeal should be dismissed with costs.

MARTEN, J.—The appellants' case here is really based on the case of *Williams Brothers* v. *Ed. T. Aguis Limited* (1), and it is said, on the authority of that case, that the Trial Judge applied the wrong measure of damages in arriving at the figure that he did in the present case. Now, the House of Lords case decides that, where there are three contracts, very much the same as we have here, then as between the parties to the original contract No. 1, if there was a breach by the original vendor, the damages must be assessed in the ordinary way, *viz.*, by ascertaining the difference between the contract price and the market price at the date of the breach, and not by reference to what the original purchaser purports to have done under his sale to another person under contract No. 2. That is the law laid down by the House of Lords.

Now, that authority would, I think, be binding upon us here if we merely had three contracts and nothing more. What differentiates, in my opinion, the present case from the House of Lords case is that here there was an express agreement between the plaintiffs and defendants that the contract between them should not be carried out in the ordinary way but that the defendants should pay Mathuradas, the original vendor. It will be remembered that there were three contracts of sale, *viz.*, (1) Mathuradas to the plaintiffs, dated 4th September 1918, at Rs. 11 2-0; (2) plaintiffs to defendants dated the 7th September 1918, at Rs. 11-8-0; and (3) defendants to Mathuradas, dated the 8th September 1918, at Rs. 11-12-0. I disregard the second range of prices in each contract, as the net result is the same. The agreement I have referred to as pleaded in paragraph 4 of the plaint is:—"It was agreed that the defendants should pay Messrs. Mathuradas Morarji direct against delivery and should get the said Messrs. Mathuradas Morarji to give credit to the plaintiffs for the amount paid." I regard that agreement as a variation of the contract No. 2, and that the two must be read together.

Now, that being so, what is the proper result if one assumes that the defendants broke their contract with the plaintiffs? I should say that the correct measure of damages would be such as would put the plaintiffs in the same position as if their contract No. 2, as varied by the above agreement, had been carried out. In that case, the plaintiffs get Rs. 11-8-0 *minus* Rs. 11-2-0 which equals annas 6. But annas 6 is what the learned Judge has given them in the Court below, and, in my opinion, that was the right rate per piece.

It follows that, in my opinion, the appeal must be dismissed with costs.

Appeal dismissed.

(1) (1914) A. C. 510; 83 L. J. K. B. 715; 110 L. T. 865; 19 Com. Cas. 200; 58 S. J. 377; 30 T. L. R. 351.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 214 OF 1919.

March 11, 1920.

Present:—Sir Abdur Rahim, KT. Offg. Chief Justice, and Mr. Justice Moore.

MATHOSRI RAMA BOI AMMANI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

V. RY. SIVAJI RAJAH SAHIB AND OTHERS—DEFENDANTS NOS. 1 TO 5, 7 TO 11, 13 TO 24—RESPONDENTS.

Hindu Law—Stridhanam—*Woman dying without issue*—Stridhanam, *devolution of*—Sapinda, *meaning of.*

Under the Mitakshara School of Hindu Law, the *stridhanam* property of a female married according to an orthodox form who has left no issue, devolves on the husband, and, failing him, on his *sapindas*; thus, the husband's daughters' son's son would have preference over the wife's sister or sister's son. [p. 266, col. 2.]

The term '*sapinda*' means, a relation allied to the propositus by affirmity of blood. [p. 266, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore in Original Suit No. 26 of 1917.

FACTS appear from the judgment.

Mr. *T. R. Venkatarama Sastriar*, for the Appellants.—The appellants, as the sister and sister's son of the original propositus,

Umamba Boi Sahib, are entitled to her *stridhanam* in preference to her husband's daughter's son's son. He is not a *sapinda* of Umamba Boi Sahiba's husband, Sivaji Maharaj. The word '*sapindas*' means only *gotraja sapindas*, those that belong to the family of the husband of the propositus. The daughter's son's son does not belong to his family.

Mr. *T. Ranagchoriar*, for the Respondents.—The word '*sapinda*' as used in the Mitakshara should not receive a narrow construction. It is not confined to *gotraja sapindas*, but extends to those related by blood. The succession must be traced to the husband as if the property belonged to him. See *Marya Pillai* v. *Sivabagyathachi* (1), *Kanakammal* v. *Ananthamathi Ammal* (2). *Kamala* v. *Bhagirathi* (3). See also Privy Council decision in *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothikar* (4).

JUDGMENT.—The dispute in this appeal relates to the right of inheritance with respect to certain properties which were the *stridhanam* properties of Umamba Boi Saheba, a lady who must be taken to have been married in the approved form to Sivaji Maharaja of Tanjore. On her death the properties were inherited by her surviving co-widow, Jeejamba Boi Saheba. The appellants, on the death of Jeejamba Boi Saheba, claim to be entitled to this property by virtue of their relationship as sister and sister's son of Umamba Boi Saheba. The learned Subordinate Judge has found on the basis of the law laid down in the Mayukha that Jeejamba Boi Saheba formed a fresh stock of descent and therefore, the appellants (plaintiffs in the suit) had no case. The family of the Maharajah of Tanjore migrated from Poona and the Subordinate Judge has found that they are governed by Maharastra Law. But it is not necessary for the decision of this appeal to consider that question inasmuch as it is conceded that Maharajah Sivaji left a daughter's son's son. It is contended however that the husband's daughter's son's son is not entitled to succeed to a woman's *stridhanam* property as a *sapinda* of the husband. The word "*sapinda*," as used in placitum 11 of Chapter II of the Mitakshara, means, according to the contention of the appellant's learned Pleader, only *gotraja sapindas*, that is, *sapindas* belonging to the family of the propositus's husband. But it is well established that the word "*sapinda*" is used in that placitum in the generic sense of relations allied to the propositus by affinity of blood. This is clearly laid down in *Marya Pillai* v. *Sivabagyathachi* (1), a case which has been followed in *Kanakammal* v. *Ananthamathi Ammal* (2), and also in *Kamala* v. *Bhagirathi* (3). It is there laid down: "The meaning of the above text is plain. It means that the *stridhanam* property of a woman married according to an orthodox form who has left no issue will devolve on her husband and on failure of the husband, the property will go to his *sapindas* in the order laid down in the Mitakshara with reference to succession to the property of a male. That is to say, we have to ascertain the persons who would succeed to the property as the nearest *sapinda* of the husband if the property belonged to him." This is absolutely clear, and we are bound by the decision which has been followed in other decisions of this Court. This view of the law is also generally supported by a ruling of the Privy Council, in *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothikar* (4). On this ground alone the appeal must be dismissed. We do not, therefore, think it necessary to consider whether, at the time when the petition was made for amendment of the plaint, the Pleader for the plaintiff had made an admission which would be binding on the plaintiffs.

The appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

(1) 12 Ind. Cas. 128; 36 M. 116; (1911) 2 M. W. N 168; 21 M. L. J. 850; 10 M. L. T. 494.

(2) 25 Ind. Cas. 901; 37 M. 293.

(3) 16 Ind. Cas 939; 38 M. 45; 23 M. L. J. 518 12 M. L. T. 499; (1912) M. W. N. 1166.

(4) 25 Ind. Cas. 290; 42 C. 384; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 41 I. A. 290 (P. C.).

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 11 OF 1920.

June 22, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

NATHURAM SHIVANARAYAN—PLAINTIFF—APPLICANT

versus

DHULARAM HARIRAM MARWADI—DEFENDANT—OPPONENT.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Finding of fact—High Court, power of, interference of.

Ordinarily, the High Court is averse to interfering on pure questions of fact under section 25 of the Provincial Small Cause Courts Act, but it must not be understood that the High Court has no power of interfering with decisions on questions of fact. [p. 267, col. 2.]

At the same time, interference in regard to appreciation of evidence should in general only be exercised when there appears to the Court to be a very clear case of misappreciation, which has resulted in injustice to a party and makes the decree one that cannot be regarded by a revisional Court as according to law. [p. 268, cols. 1 & 2.]

Civil Extraordinary Application from the decision of the Subordinate Judge at Jalgaon, in Small Cause Suit No. 768 of 1919.

Mr. *A. G. Sathaye*, for the Applicant.

Mr. *P. B. Shingne*, for the Opponent.

JUDGMENT.

MACLEOD, C. J.—This is a Rule granted under section 25 of the Provincial Small Cause Courts Act, which enables the High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, to call for the case, and pass such order with respect thereto as it thinks fit. What happened was this. The plaintiff had dealings with the defendant and one Dhularam Chaturbhuj. According to his story, Dhularam Chaturbhuj paid in Rs. 100 which was credited to Dhularam Chaturbhuj in the rough and daily book of the plaintiff, but by mistake of his ledger clerk the Rs. 100 was credited to the ledger account of the defendant, which ledger account was on the same page as the ledger account of Dhularam Chaturbhuj. Thereafter, the defendant made payments which were in due course properly credited to his account in the ledger. It was only after some time when the plaintiff was examining the accounts of Dhularam Chaturbhuj that he discovered that Rs. 100 paid by Dhularam Chaturbhuj had been wrongly credited to the defendant's ledger account. Naturally, he made entries correcting the mistake. The defendant sent a notice claiming that he had paid Rs. 100, and when the plaintiff brought a suit for Rs. 110-11-3, the defendant raised this defence with regard to Rs. 100. The learned Judge says in his judgment: "The plaintiff has not written in his accounts who had made this re payment, *i. e.*, by the hand of which person, whether he wrongly entered it in the name of Dhularam Chaturbhuj or not. Of course, the credit entry appears in the book of Dhularam Chaturbhuj. But the plaintiff ought to have taken defendant's signature for the correction made if the defendant was then willing to admit plaintiff's mistake." Then he deals with the evidence and says that he disbelieved the plaintiff's story as his conduct was extremely suspicious and the account-books could not be credited, and passed a decree for Rs. 10-11-3 only.

Now, it is quite true that this Court, even under section 25 of the Provincial Small Cause Courts Act, would be averse to interfering on pure questions of fact. But we cannot concede that the High Court has no power whatever of interfering with decisions on questions of fact. In the case of the *Poona City Municipality* v. *Ramji* (1) the head-note includes these words: "The provisions of section 622 of the Civil Procedure Code (Act XIV of 1882) do not afford a safe guide for the exercise of the extraordinary jurisdiction under section 25 of the Provincial Small Cause Courts Act (IX of 1887). The wording of the two sections is wholly different, that of section 25 of the Provincial Small Cause Courts Act being of the widest description and conferring the most ample discretion on the High Court, while it has been held by the Privy Council that section 622 of the Civil Procedure Code (Act XIV of 1882) ought to be construed in a very restricted and limited sense."

In *Turner* v. *Jagmohan Singh* (2) the Court found that the power of interfering

(1) 21 B. 250; 11 Ind. Dec. (N. S.) 169.

(2) 27 A. 531 at p. 537; 2 A. L. J. 297; A. W. N. (1905) 77.

in revision conferred by the provisions of Small Cause Courts Act is wide—wider than the power conferred by section 622 of the Civil Procedure Code, and if substantial grounds are shown for the interference of the Court, the Court is not merely justified in exercising, but acts reasonably in the exercise of its revisional powers. In that case they were of opinion that a grave injustice would be done if the decree of the Court below were allowed to stand. That case seems to have turned entirely on the appreciation of the evidence in the lower Court.

Now, in this case it appears to us that the learned Judge's appreciation of the evidence was distorted by the view he took that the plaintiff ought to have got the defendant's signature when the entries were amended. He does not seem to have distinguished between what the plaintiff ought to have done as an ordinary precaution, and something which, if not done, prevented the plaintiff from suing, and, having started in that way, it appears that he took a far more favourable view of the defendant's case than was justified by the evidence. Really, the statement of the defendant that he had paid Rs. 100 was not supported by any outside evidence, and, in my opinion it was clearly dictated by the defendant's desire to take advantage of the error in account-keeping made by the plaintiff's ledger-keeper. As opposed to that, there was the evidence of the debtor who paid Rs. 100, and the daily account-book of the plaintiff. In my opinion, therefore, this is a case in which we should exercise our discretion to prevent an injustice being done to the plaintiff. I think the decree of the lower Court must be set aside and a decree passed in favour of the plaintiff for the amount sued for, *viz.*, Rs. 110-11-3, with costs of this application.

FAWCETT, J.—I concur. As regards the powers of interference vested in the High Court under section 25 of the Provincial Small Cause Courts Act, I may add that a similar view has been taken by the Judicial Commissoner's Court in Sind in *Rupchand* v. *Minhomal* (3). At the same time, I think that interference in regard to appreciation of evidence should in general only be exercised when there appears to the Court to be a very clear case of misappreciation, which has resulted in injustice to a party and makes the decree one that cannot be regarded by a revisional Court as "according to law."

In the present case, the weight of the evidence, as it stands, was immensely in favour of the plaintiff, and is met only by an uncorroborated assertion that defendant had actually paid the money. Had the learned Subordinate Judge not considered that the plaintiff ought to have acted in a certain way for which there was certainly no obligation on the plaintiff, I do not imagine that he would have come to the conclusion that he did, *viz.*, that the account-books were unreliable. In my opinion, the circumstances do not show that the evidence given for the plaintiff should not have been accepted. I, therefore, concur in the order proposed.

Rule made absolute.

(3) 27 Ind. Cas. 366; 8 S. L. R. 164.

MADRAS HIGH COURT.
CIVIL APPEAL No. 105 OF 1919.
March 31, 1920.
Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Krishnan.
Sree Rajah VELLANKI RAMAKRISHNA RAO BAHADUR ZEMINDAR GARU —PLAINTIFF—APPELLANT
versus
KOTAGIRI SUBBANNA RAO GARU AND OTHERS—DEFENDANTS NOS. 1 TO 4 AND 6 TO 11—RESPONDENTS.

Hindu Law—Marriage—Sudras *of* Velama *caste*—*Marriage with wife's sister's daughter, validity of.*

Among *Sudras* of the *Velama* caste in the Madras Presidency, the Hindu Law does not operate to render invalid a marriage with a deceased wife's sister's daughter. [p. 271, col. 1.]

Appeal against the decree and judgment of the Court of the Temporary Subordinate Judge, Masulipatam, in Original Suit No. 52 of 1917.

FACTS appear from the judgment.

Mr. *K. Bashyam Aiyangar*, for the Appellant.

—The lower Court erred in finding the adoption

to be valid. The marriage between 1st and 2nd defendant is *virudha sambandam* or within prohibited degrees of relationship. The 1st defendant was the sister's daughter of the deceased wife of 2nd defendant. The Hindu Law looks with disfavour on unseemly marriages. Where the husband stands in the position of a parent the marriage is prohibited. See Aswalayana's *Grihya Parisistha*. (See Ghose's Translation, Volume II page 830). The test was followed by the Madras High Court in *Minakshi* v. *Ramanada* (1). The decision in *Ragavendra Rau* v. *Jayaram Rau* (2) in which the validity of the marriage was upheld was given with special reference to the Tamil country. It does not affect the custom or rules followed by the Telugu Velamas in the Northern Circars. And here the parties are not Brahmans but Sudras to whom the decision in *Ragavendra Rau* v. *Jayaram Rau* (2) cannot apply.

Mr. *A. Krishnasami Aiyar* (with him Messrs. *A. S. Viswanatha Aiyar* and Mr. *P. Markandeyulu*), for the Respondents.—The text of *Grihya Parisistha* is not mandatory. It is a moral precept, hortatory in its nature. The evidence is that the rule has not been observed as a binding custom. This marriage took place 24 years ago and no exception was taken to it during all this period. In *Ragavendra Rau* v. *Jayaram Rau* (2) the Madras High Court upheld the validity of the marriage. No doubt the orthodox Brahmins do not look on such marriages with favour, but it has not been shown that the rule in *Grihya Parisistha* acquired the force of a binding custom.

The decision in *Ragavendra Rau* v. *Jayaram Rau* (2) was not meant to be restricted to any particular community. It applies to both Tamil and Telugu districts.

The marriage of a Hindu with his deceased wife's sister is very common. And surely there is nothing incongruous in his marrying his wife's sister's daughter.

JUDGMENT.—This is an appeal from the decree of the Temporary Subordinate Judge of Masulipatam dismissing the plaintiff's suit for the declarations that the adoption of the 3rd defendant by defendants Nos. 1 and 2 is not true in fact and valid in law and that he, the plaintiff, is the next reversioner to the Zemindari and is entitled to succeed to it on the 1st defendant's death, and that the alienations by her to defendants Nos. 4 and 5 are not binding on him. The Subordinate Judge found the adoption to be proved on evidence and he held it to be valid in law. On that finding plaintiff's suit failed and it was dismissed with costs. The plaintiff appeals.

He does not now dispute the fact of the adoption but he contends that it is not valid in law. His argument is that the marriage between defendants Nos. 1 and 2 was invalid under the Hindu Law as being "*virudha sambandam*," or a marriage between persons within the prohibited degree of relationship and that they were, therefore, not legally husband and wife and they could not validly adopt a son to themselves. The 1st defendant was, admittedly, the 2nd defendant's deceased wife's sister's daughter. It is claimed that she could not, therefore, have legally married the 2nd defendant. For this contention the appellant's Vakil relies on a text in *Grihya Parisistha*, stated to be a work of the sage Aswalayana, and on the observations in *Minakshi* v. *Ramanada* (1) adopting the rule stated in the text. The text has been translated by Mr. Ghose in his "Principles of Hindu Law", 3rd Edition, Volume II, page 830 as follows:—

"A girl with whom there is no relationship unseemly for marriage should be married. The relationship such as makes the pair like parent and child to each other is relationship unseemly for marriage such as the daughter of the wife's sister and the sister of the wife of the paternal uncle. Some exclude the mother's *gotra*." That text, no doubt, treats a marriage like the one we have in the present case to be a *virudha sambandha*. But the effect of that text has been considered at great length in *Ragavendra Rau* v. *Jayaram Rau* (2) and it was held that it was merely hortatory in character and not mandatory. The same view was taken by the Bombay High Court in *Ramchandra Krishna Joshi* v. *Gopal Dhondo Joshi* (3) (see pages 630 to 633) which was followed in *Yamnava Govind Appaji* v. *Laxuman Bhimrao Kulkarni* (4).

(1) 11 M. 49 at pp. 51, 53; 11 Ind. Jur. 449; 4 Ind. Dec. (N. S.) 35.

(2) 20 M. 283; 7 M. L. J. 134; 7 Ind. Dec. (N. S.) 201.

(3) 32 B. 619; 10 Bom. L. R. 948.

(4) 16 Ind. Cas. 180; 36 B. 533; 14 Bom. L. R. 543.

The rule is one of those moral precepts the breach of which an orthodox Hindu views with disfavour, but which does not effect the legality of the marriage. The marriage is an undesirable one but it is not an illegal one.

As the learned Judges in *Ragavendra Rau* v. *Jayaram Rau* (2) have discussed the question very fully and as we entirely agree with their reasons and their view, it is unnecessary for us to go over the same ground again. That decision is one of special authority because one of the Judges who took part in it was Subramania Ayyar, J., who is himself a Brahmin and was thoroughly conversant with the practice and sentiments of the Brahmin community. The learned Judges, after examining a large body of unimpeachable evidence of well known men in this Presidency came to the conclusion that, among Brahmins, the custom of allowing a man to marry his wife's sister's daughter was established. They also referred to the observations of the learned Judges in *Minakshi* v. *Ramanada* (1) regarding the rule of *virudha Sambanda* that we are considering, and rightly pointed out that it was rather assumed than decided in that case that the rule was in force. The decision in *Ragavendra Rau* v. *Jayaram Rau* (2) has stood unchallenged now for over 20 years and we think that we should take it as having settled the question in favour of the validity of such a marriage among Brahmins.

The learned Vakil for the appellant thereupon argued that the decision in that case should not be applied to the present case because that case referred to Tamil Brahmins in the south of the Presidency, whereas the present case refers to a Telugu Sudra in the Northern Circars, the parties being Velamas who are Sudras of a high class. At first sight, the distinction seems to be material but on examination it will be found to be unsubstantial. The evidence given of the validity of the marriage in *Ragavendra Rau* v. *Jayaram Rau* (2) included that of such a man as the Hon'ble Mr. N. Subba Rao, who is a Telugu Brahmin of the Northern Circars. The Court made no distinction in its finding between Tamil Brahmins of the South and Telugu Brahmins of the North and there is no reason to suppose that there is any distinction between the two on the point. The ruling, therefore, we think applies to both Tamil and Telugu Brahmins as it purports to do.

But it is no doubt a case relating to Brahmins while the present case relates to Sudras. The distinction, however, is not in favour of the applicability of the *Grihya Parisistha* rule to the latter. The rules in the *Parisistha* were meant for the twice-born classes and for the Brahmins in particular; they were not meant to apply to Sudras at all. The Velamas no doubt follow Brahmin customs and have copied several of their rules, but when the Brahmin custom itself is in favour of the legality of such a marriage as we are dealing with there is no room for assuming that the contrary rule prevails among the Velamas. At any rate, very little evidence is sufficient to justify the conclusion that the same custom as prevails among Brahmins is followed by them. There is evidence in the present case, as pointed out by the Subordinate Judge, to show that such a marriage is valid among them, (see D. W. No. 2 and D. W. No. 3 and D. W. No. 23). Instances among allied castes have been referred to by several defence witnesses and, though that evidence may have no direct bearing on the question of custom among Velamas, it probabilizes the existence of a similar custom among them.

As against that evidence, our attention was drawn to the evidence of P. Ws. Nos. 2, 3, 5, 6, 7 and 21. The effect of the evidence of the plaintiff's witnesses is, we think, correctly summed up by the Subordinate Judge when he says that they say that to their knowledge there were no instances of a person marrying his wife's sister's daughter, and that there was no such usage so far as they knew. The positive evidence of defense witnesses Nos. 2, 3 and 23 which has been accepted by the Trial Judge and which we see no reason to discredit though they are not men of wealth as some of the plaintiff's witnesses are, we think, outweighs the somewhat negative evidence of the plaintiff's witnesses. Such a marriage, though legal, is apparently not one looked on with much favour and that probably explains why there are so few instances of it in the caste. But the paucity of instances does not detract from the value of those that have been proved.

It is for the plaintiff to establish his plea that the rule of prohibition relied on by him

applies to the 1st defendant's marriage and renders it invalid. The *Grihya Parisistha* rule on the point is not observed even by the Brahmins. In itself, it has no binding force particularly on the Sudras. It is only if the rule has been shown to have been adopted as a binding custom by the defendant's caste that we can give it any legal effect. The argument that there is a presumption that the caste custom is in accordance with the precepts of the sages than against them, is of no force in this case, as the custom regarding this marriage was established to be otherwise by the Indian Law Reports, 20 Madras case, with reference to Brahmins whose ways these Velamas copy. We agree with the Subordinate Judge that the plaintiffs has failed to establish that there is any rule of law or caste custom against the validity of the 1st defendant's marriage with the 2nd defendant and that, on the other hand, the defence evidence shows that it is in accordance with the recognised practice in the caste.

It is conceded that in the Velama caste a man may marry his own sister's daughter as also his wife's own sister. There does not seem to be anything very strange then in his being permitted to marry his wife's sister's daughter. The marriage of the defendants took place twenty-four years ago and no one seems to have taken any exception to it till now. The defendants had several children born to them but they seem to have lost them all and so they took the 3rd defendant in adoption in 1910. The evidence of witnesses Nos. 1 and 2 and the documents referred to by the Subordinate Judge Exhibit II Series, III and X to XXI (*a*) show that plaintiff and his family and the defendants were moving on terms of intimacy till recently and that plaintiff took no exception to the marriage himself. In these circumstances, it is a satisfaction to find that we are not obliged to declare the marriage to be illegal.

No other point has been argued before us. Finding the 1st and 2nd defendant's marriage to be perfectly legal, it follows that the objection to the legality of the 3rd defendant's adoption based solely on its illegality fails. The plaintiff's appeal must, therefore, be dismissed with costs.

M. C. P.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 182 OF 1919.

June 24, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

GIRJASHANKAR DAJI BHAT—PLAINTIFF—APPELLANT

versus

MURLIDHAR NARAYAN CHAUDHARI —DEFENDANT—RESPONDENT.

Hindu Law—Vritti, *whether immoveable property—Interference with right—Injunction, suit for—Acquiescence in decision of caste, effect of—Specific Relief Act (I of 1877), s.* 54.

Yajman vritti is immoveable property and an owner of such property is entitled to seek the protection of the Court by way of injunction against any undue interference with his right as such owner by the caste. Where, however, the owner of a *vritti* has for several years acquiesced in a decision of the caste he is not entitled to seek the protection of the Court against the action of the caste. [p. 272, col. 2.]

Second appeal from the decision of the First Class, Subordinate Judge, at Nasik, in Appeal No. 226 of 1917, reversing the decree passed by the Subordinate Judge, at Yeola, in Civil Suit No. 450 of 1916.

Mr. *H. V. Divatia*, for the Appellant.

The Hon'ble Mr. *T. Strangman*, (with him Mr. *A. G. Desai*), for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued for an injunction restraining the defendants from prohibiting plaintiff from officiating in his *vritti* as *Upadhyaya* among the *patidar* Gujaratis of Yeola, and from receiving the perquisites of the *vritti*. The plaintiff alleged that he was the hereditary priest of the caste and had a right to officiate in the *yajman vritti* as such priest; that he had officiated in the *vritti* till *Pausha* of Samvat 1962; that the defendants asked him to do certain acts, prejudicial to his *vritti*, that the plaintiff refused to do these acts, and thereupon the defendants issued an illegal order to their friends and castemen that they should not allow the plaintiff to officiate in his *vritti* and pay the perquisites to him. Therefore, the plaintiff filed the suit for an injunction. He succeeded in the lower Court. That decision was reversed in appeal, the Court finding that, although the plaintiff was the hereditary priest of Yeola, his continuance or removal from such office was exclu-

sively within the competence of the caste and was a caste question and, therefore, such a question was beyond the jurisdiction of the Civil Courts. Curiously enough, in coming to entirely opposite conclusions both Courts have relied upon the decision in *Ghelabhai Gavrishankar* v. *Hargovan Ramji* (1). There Mr. Justice Chandavarkar held that, "an hereditary priesthood vested in particular families is regarded as *vritti*, or immoveable property, which is the source of their maintenance. Such families have for generations lived on these *vrittis*; and to turn them adrift now on the ground that their castes can take away their hereditary rights would be not only contrary to the nature of the right, created by custom, but it would amount to spoliation." No doubt in that case the plaintiff sought to establish his right as hereditary priest of a particular section of the caste in the family of the 1st defendant, and it was sought to make a distinction between an action brought by an hereditary priest against a particular family, and the claim for an injunction against the caste or the *panchas* who seek to prohibit him from exercising that office. It seems to me that once you decide that an hereditary office of this nature is immoveable property then there must be a right in the owner of such immoveable property, to seek the protection of the Court against any undue interference with his right as owner. Therefore, if the present defendants had been proved to be interfering with the plaintiff's right, and it may be presumed that the plaintiff is an hereditary priest to the families of the defendants as well as to the other families of the caste to which they belonged, the plaintiff would have been entitled to an injunction restraining the defendants from interfering with that immoveable property.

But, in dealing with injunctions, there is another question which has to be considered by the Courts. It did not appear from the judgment of the Trial Court that, as a matter of fact, the complaint which the plaintiff had to make regarding the interference of the defendants took place so far back as ten years ago. I certainly read the 2nd paragraph, on page 8, as implying that quite recently the *panchas* had asked the plaintiff to give Rs. 21 to his *bhaubind* Nageshbhat and Rs. 11 to his *bhauband* Gopal out of the perquisites received by him, and, on his refusing to do so, they prohibited him from officiating. Now, however, it appears that that interference took place in *Samvat* 1962, and that thereafter the plaintiff had disputes with his *bhaubands*, and sued to recover from them his share in sums collected by them for their services as officiating family priests. It appears now that the present plaintiff is not the only member of the priestly family to which hereditary rights have been given, and that, as a matter of fact, some ten years ago disputes arose between members of the priestly family as to how the emoluments of the office should be distributed, and the caste interfered, not with regard to the exercise of the hereditary office, but with regard to how the emoluments of the office were to be distributed amongst the members of the priestly family. Whether that would afford ground for an injunction is a question which I need not deal with, because, in my opinion, the plaintiff, by acquiescing in the action of the defendants for so long, has debarred himself from seeking the protection of the Court. In my opinion, therefore, the decree of the lower Court must be confirmed and the appeal dismissed. Parties to pay their own costs throughout. The cross-objections which are not pressed are dismissed. Parties to bear their own costs of the cross-objections.

FAWCETT, J.—I concur. The case of *Ghelabhai Gavrishankar* v. *Hargovan Ramji* (1) virtually says that a Hindu is legally bound to accept the ministrations of a hereditary family priest unless the latter has become '*patita*', *i. e*, outcaste, or has declined to officiate. It is not alleged that either of the last two conditions have arisen in this case, and, therefore, the action of the caste in preventing the plaintiffs from giving his ministrations as a hereditary family priest, which he has been found by both the lower Courts to be, does, in my opinion, give rise to a cause of action against them. The case seems to me to fall under section 54 of the Specific Relief Act, in that the defendants have invaded the plaintiff's right to, or enjoyment of, pro-

(1) 12 Ind. Cas. 928; 36 B. 94 at p. 104; 13 Bom. L. R. 1171.

perty. Most of these cases of *vritti* are based on the view that there is a disturbance to an office of the nature of trespass and an injunction is an ordinary form of relief against the person who commits that wrong. The case may also be said to be one where the injunction would tend to prevent a multiplicity of judicial proceedings, and to that extent it is a proper case for the grant of a perpetual injunction No doubt the practice of the Bombay Courts is generally to refuse preventive relief which would have the result of forcing a particular priest on a *yajman*, see *Raja* v. *Krishnabhat* (2). But this is not a case of an injunction against a *yaman*. The injunction is sought against the members of the caste *panchayat*, and it would still be open to any of the families of that caste to continue to refuse to employ the plaintiff, if they so deem fit, and the plaintiff would then have the right, which has been recognised in this Presidency, of suing the priest, who actually performs the ceremonies, for the fees which should have gone into his pocket. Having regard to the fact that this remedy is still open to the plaintiff in the case of future ceremonies, and any past ceremonies in respect of which the right of suit is not time-barred, and to his delay in applying to the Courts for preventive relief against the caste *panchayat*, which virtually amounts to acquiescence, I concur in thinking that the lower Court's refusal to grant an injunction should be upheld.

Decree confirmed.

(2) 3 B. 232; 2 Ind. Dec. (N. S.) 156.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1540 OF 1916.

April 8, 1919.

Present :—Justice Sir N. R Chatterjea, KT, and Mr. Justice Newbould.

BASANTA KUMAR CHOWDHURI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 112—Fisheries, lease of—Lease, forfeiture of—Waiver of forfeiture.

Plaintiff obtained certain fisheries on lease from the Government on the condition that they should not be transferred without the permission of the Deputy Commissioner In 1903 the plaintiff sub-let the fisheries and thereby incurred a forfeiture of his lease and, owing to this, the Deputy Commissioner in 1911 cancelled the lease. It appeared that rent for a period subsequent to the plaintiff's granting the sub-lease and before cancellation of the lease, and for the period subsequent thereto had not only been accepted but was realised by attaching the moveable property of the plaintiff:

Held, that, having regard to the provisions of section 112 of the Transfer of Property Act, there was a waiver of the forfeiture and the plaintiff was entitled to a declaration of his title to the fisheries under the lease, and to possession thereof. [p. 274, col. 1.]

Appeal against the decree of the District Judge, Sylhet, dated the 1st of April 1916 affirming that of the Subordinate Judge, first Court, of that District, dated the 25th of March 1915.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Hemendra Kumar Das*), for the Appellants.—Refers to section 112 of the Transfer of Property Act. It is not a question of evidence, it is a question of law. Lessor can waive the forfeiture, there is nothing to prevent that. I rely also on section 115 of the Evidence Act, by his conduct the Secretary of State is estopped from saying that I have no right to fishery. The Secretary of State is debarred both on the ground of waiver and estoppel. Such acceptance of rent would go to constitute a tenancy. My client had a subsisting tenancy at the time of the suit. Refers to *Raj Mohan De* v. *Mati Lal Saha Poddar* (1). Having received payment from me, how can the Secretary of State now turn round and say I had no title to *jalkar mahal* for these years for which they received rents from me? By demanding rent, he shows that tenancy was subsisting notwithstanding the alleged forfeiture.

Refers to *Kristo Nath Koondoo* v. *T. F. Brown* (2).

Babu *Ram Charan Mitra*, Senior Government Pleader, (with him Babu *Srish Chundra Chowdhuri*), for the Respondents.—Lessor had the power to elect. Receipt of rent

(1) 33 Ind. Cas. 331; 22 C. L. J. 546.
(2) 14 C. 176; 7 Ind. Dec. (N. S.) 117.

after the determination of lease would not amount to waiver. He cannot say that his old tenancy continues. He might sue for refund and damages. I determined his tenancy in January 1911. The proviso in section 112, Transfer of Property Act, is important. Waiver can only be pleaded if lessor was aware of forfeiture. Deputy Commissioner's agent was not authorised to receive rent for a cancelled lease. Deputy Commissioner cancelled the lease. Acceptance of rent must be by lessor. He has the power to cancel lease. To apply section 112, Transfer of Property Act, the other side must show acceptance *plus* knowledge of forfeiture.

Dr. *Basak* was not called upon to reply.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs to recover possession of two fisheries on establishment of the plaintiff's right thereto.

These fisheries are called Mahal Samil fisheries and are governed by the provisions of the Assam Land and Revenue Regulation, I of 1886. These two fisheries were let out by Government in periodic Mahal Samil Settlement many years ago, and it is found that the plaintiffs held under the condition that the fisheries should not be transferred without the permission of the Deputy Commissioner. It appears that these fisheries were sub-let by the plaintiffs in 1908 to certain persons. The Deputy Commissioner in 1910 called on the plaintiffs to show cause why the lease under which they held, should not be cancelled. On the 23rd January 1911, the Deputy Commissioner cancelled the lease. The plaintiff's case was that they were land holders within the meaning of the Regulation and that they had power to transfer the lease but, as a matter of fact, they did not do so. There were various other matters alleged in the plaint.

The Court of first instance dismissed the suit and that decree was affirmed on appeal. The plaintiffs have appealed to this Court.

Several questions were raised on behalf of the appellants, but it is unnecessary to go into them because we think that the appeal should succeed on the ground that there was waiver of forfeiture on the part of the lessor.

As stated above, the plaintiffs granted sub-leases in the year 1908 and the lease of the plaintiffs was cancelled by the Deputy Commissioner in 1911.

When the case was argued before us on the previous occasion, it was pointed out on behalf of the appellants that the rent was accepted by the lessor or realised by the lessor for a period subsequent to the alleged forfeiture of the lease and after the lessor had knowledge of such forfeiture. We, therefore, sent back the case to the lower Appellate Court for a finding upon that point and also as to the circumstances under which the rent was received or realised. The parties were allowed to adduce evidence on the points. The learned District Judge has now returned his findings. He says : "the evidence shows that rent was realised for this Mahal Samil fishery as well as for other properties by attachment process ; the peons who were deputed with the attachment orders have been examined ; the cheques have been passed. There seems no doubt that rent was realised by attachment in respect to this Mahal Samil fishery on various dates in 1915" and also that realisation was made in the same way on the 19th December 1910, (*i. e.*, before the cancellation of the lease).

Now, section 112 of the Transfer of Property Act lays down that a forfeiture under section 111, clause (*g*), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting : Provided that the lessor is aware that the forfeiture has been incurred : Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture such acceptance is not a waiver.

It is clear upon the findings that rent was not only accepted but that the rent was realised by actually attaching the moveable properties of the plaintiffs ; and this was done for a period subsequent to the plaintiff's granting the sub-lease (by reason of which the forfeiture was incurred) and before the Deputy Commissioner made the order cancelling the lease of the plaint-

iffs as also for the period subsequent to it.

It was contended before us by the learned Senior Government Pleader that where rent is accepted after the institution of a suit, such acceptance is not waiver. But, in the first place, no suit had been brought by the lessor to eject the lessee; it is the lessee who has brought a suit for establishment of his title and recovery of possession. In the next place, the rent has been realised from the plaintiffs not only after the institution of the suit but before the institution of the suit, and before the cancellation of the lease, as well as subsequent thereto.

The learned District Judge was of opinion that the rents were realised from the plaintiffs by the subordinate officers of the Deputy Commissioner such as the local Tahsildar without the knowledge of the forfeiture. But that is immaterial if the Deputy Commissioner had knowledge of it. The learned Judge says that the Deputy Commissioner had merely information of the granting of the sub-lease, in 1910; and, although he issued notice to show cause why the lease should not be cancelled, the petition showing cause was filed before the Extra Assistant Commissioner in December 1910, while the matter was pending before the Deputy Commissioner, and that, therefore, the latter cannot be said to have definite knowledge of the forfeiture before the 23rd January 1911 when he cancelled the lease. But, although the lease was cancelled on the 23rd January 1911, the forfeiture took place much earlier. The sub-lease was granted in 1908 and it cannot be said that the Deputy Commissioner was not aware of the forfeiture when he issued notice to show cause why the lease should not be cancelled on that ground. Even if the knowledge of the Extra Assistant Commissioner (before whom the petition of the lessee showing cause was presented) be not taken to be the knowledge of the Deputy Commissioner, the latter must be taken to have been aware of the forfeiture when he issued notice upon the lessee to show cause when the lease was actually cancelled on the 23rd January 1911.

It appears that rent was realised on the 19th December 1910, *i. e.*, after notice to show cause was issued, and before the lease was cancelled on the 23rd January 1911.

The realisations by the subordinate officers were on behalf of the defendant and the defendant had the benefit of those realisations.

We think, having regard to the facts found and the provisions of section 112 of the Transfer of Property Act, that there was waiver of the forfeiture. In this view, it is unnecessary to consider the various other questions of law which have been raised in the case.

The decrees of the Courts below are set aside and the plaintiff's suit is decreed. The plaintiff's title to the fisheries under the lease will be declared and they will recover possession thereof. The amount of mesne profits will be ascertained in further proceedings upon the application of the plaintiffs.

The plaintiffs are entitled to costs in all Courts.

Decree set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1075 OF 1917.

March 22, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

M. KRISHNAMACHARIAR—DEFENDANT No. 1—APPELLANT

versus

T. TIRUVENGADA CHARIAR—PLAINTIFF—AND DEFENDANT No. 2 AND HIS LEGAL REPRESENTATIVE—RESPONDENTS.

Transfer of Property Act (IV of 1882), s 43—Transferee not misled by representation, whether entitled to protection – Estoppel.

Section 43 of the Transfer of Property Act being intended to benefit only transferees who have been really misled cannot be taken advantage of by a transferee who is not proved to have been misled by the erroneous representation of the transferor as to the latter's power to transfer. [p. 276, col. 2.]

KRISHNAMA CHARIAR v. TIRUVENGADA CHARIAR.

Pandiri Bangaram v. *Karumoory Subbaraju*, 8 Ind. Cas. 388; 34 M. 159 at p. 161; 8 M. L. T. 285, followed.

Jag Mohan Singh v. *Sita Ram Singh*, 39 Ind. Cas. 186; 20 O. C. 72, dissented from.

Second appeal against the decree of the Subordinate Judge, Chingleput, in Appeal Suit No. 89 of 1916, (Appeal Suit No. 379 of 1915, on the file of the District Court of Chingleput), preferred against the decree of the Court of the Additional District Munsif, Chingleput, in Original Suit No. 93 of 1914 (Original Suit No. 557 of 1913 on the file of the District Munsif's Court, Conjeeveram).

FACTS appear from the judgment.

Messrs. *V. C. Seshachariar* and *K. V. Sesha Aiyangar*, for the Appellants.—Section 43 of the Transfer of Property Act should be held to enure for the benefit of a transferee not misled by the transferor's representation as to title. The decision in *Pandiri Bangaram* v. *Karumoory Subbara u* (1) was doubted by one of the Judges who was a party to it in *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib* (2). Dr. Gour doubts its soundness in his Commentaries on the Transfer of Property Act. It should be re-considered.

Moreover, the words 'and the transferee has been misled by the erroneous representation' do not occur after 'consideration' in section 43 of the Transfer of Property Act. *Vide Jag Mohan Singh* v. *Sita Ram Singh* (3) *contra*. There is no reason for placing a narrow construction on section 43.

Mr. *M. O. Parthasarathy Aiyanger*, for the Respondents referred to the ruling in *Pandiri Bangaram* v. *Karumoory Subbaraju* (1) which has been consistently and uniformly followed in a series of subsequent decisions, and should be preferred to the Oudh ruling. There was no reason for disturbing them now.

JUDGMENT.

SADASIVA AIYAR, J.—The only question of law arguable in this case is whether section 43 of the Transfer of Property Act can be taken advantage of by a transferee who is not proved to have been misled by the erroneous representation of the transferor as to the latter's power to transfer.

It is true that the words "and the transferee has been misled by the erroneous representation" do not occur after the word "consideration" in section 43. *Pandiri Bangaram* v. *Karumoory Subbaraju* (1), however, decided that though such additional words do not occur in this section, the Legislature must have intended to benefit only transferees who have been really misled. The provision being one based on considerations which Courts of Equity, rather than Courts applying strict law, take notice of, it was evidently considered that a person who was really not misled could not have been intended to have the benefit of the provision.

I followed *Pandiri Bangaram* v. *Karumoory Subbaraju* (1) in *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib* (2) (sitting with Hannay, J.) though I felt some doubts whether such addition to the language of section 54 could be taken as having been intended by the Legislature. I again followed it in *Kodi Sankara Bhatta* v. *Moidin* (4), sitting with Oldfield, J. Another Division Bench (Bakewell and Phillips, JJ.) has followed *Pandiri Bangaram* v. *Karumoory Subbaraju* (1) in *Venkata Lakshmi Narasayya* v. *Meenakshi Ammal* (5). [See also *Swaminatha Mudali* v *Saravana Mudali* (6) where sitting with Spencer, J., I refer at page 378 to *Pandiri Bangaram* v. *Karumoory Subbaraju* (1), as having been followed by me with some hesitation in *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib* (2).]

The Patna High Court has also followed *Pandiri Bangaram* v. *Karumcory Subbaraju* (1) in *Chakrapani Nandi* v. *Srimati Gayamoni Dasi* (7).

There is no doubt as to the opinion of Dr. Gour doubting the correctness of *Pandiri Bangaram* v. *Karumcory Subbaraju* (1) and there is an Oudh case *Jag Mohan Singh* v. *Sita Ram Singh* (3) in favour of the appellant and in support of the doubts I expressed in *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib* (2) but I think

(1) 8 Ind. Cas. 388; 34 M. 159 at p. 161; 8 M. L. T. 285.
(2) 27 Ind. Cas. 785; 28 M. L. J. 44.
(3) 39 Ind. Cas. 186; 20 O. C. 72.
(4) 49 Ind. Cas. 147; 35 M. L. J. 120; 8 L. W. 100.
(5) 52 Ind. Cas. 992; 10 L. W. 221; (1919) M. W. N. 707.
(6) 40 Ind. Cas. 581; 33 M. L. J. 370.
(7) 48 Ind. Cas. 228; 5 P. L. W. 219; (1918) Pat. 278.

that the matter should now be deemed settled on the principle of *stare decisis* by the uniform decisions in this Court for the past 10 years since *Pandiri Bangaram* v. *Karumoory Subbaraju* (1) was decided in March 1910.

I would, therefore, dismiss the second appeal with plaintiff's costs.

SPENCER, J.—This is not a case in which the appellant can claim the benefit of section 43 of the Transfer of Property Act as it has not been found as a fact that the 2nd defendant made any erroneous representation to Srinivasa Pillai who was 1st defendant's predecessor in-title when he sold the suit land to him in 1896.

It is not necessary for the purpose of this case to import any wider expansion of the principles of estoppel than those which are contained in the plain words of the section. A transfer made not in consequence of any representation of title but independently, or made with some representation which is not an erroneous one, or is erroneous and the transferee knows it to be erroneous, will not come within the scope of the section. I consider that a correct construction was placed on this section in *Pandiri Bangaram* v. *Karumoory Subbaraju* (1), which confirmed a judgment of mine, and in *Venkata Lakshmi Narasayya* v. *Meenakshi Ammal* (5), and I should have no hesitation in following those decisions if there was any diversity of rulings, but in fact no direct authority has been quoted in support of the appellant's Vakil's argument that the effect of section 43 has been misunderstood by the lower Appellate Court. He has only an observation in Gour's Transfer of Property Act, Note 720 at page 446, and a decision of the Oudh Court in *Jag Mohan Singh* v. *Sita Ram Singh* (3) in his favour. The decision in *Chakrapani Nandi* v. *Srimati Gayamoni Dasi* (7) is also against his contentions.

I agree that the second appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 70 OF 1918.

May 21, 1920.

Present:—Mr. Justice Walmsley and Mr. Justice Greaves.

MANUJENDRA DUTT CHOUDHURY —PLAINTIFF—APPELLANT

versus

BESWANATH ROY AND ANOTHER —DEFENDANTS—RESPONDENTS.

Interest—Fraud and undue influence, absence of—High rate of interest, whether recoverable.

In the absence of fraud or undue influence, the holder of an instrument is entitled to recover interest at the rate stipulated in the instrument, even though the rate may be 25 per cent. per mensem. [p. 278, col. 1.]

Appeal against the decree of the Additional District Judge, Khulna, dated the 6th October 1917, affirming that of the Subordinate Judge of that District, dated the 25th of June 1912.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *Batuknath Bhattacharjee*), for the Appellant.—Having regard to the recent Privy Council decisions in *Aziz Khan* v. *Duni Chand* (1) and *Balla Mal* v. *Ahad Shah* (2) there is nothing to prevent me from recovering interest at the rate stipulated in the lease and the authorities relied upon by the Courts below are no longer good laws. See also *Bejoy Kumar* v. *Satish Chandra Ghose*(3).

Babu *Brojolal Chakravarty* (with him Babus *Panchanan Ghosal* and *Protul Chandra Rai*), for the Respondents.—The Privy Council decisions cited by my learned friend have no bearing on the facts of the present case. According to the scope of the order of remand the whole question depends upon section 74 of the Contract Act. The stipulation for the payment of a high rate of interest was intended to secure punctual payment of rent and cannot be said to represent the loss which the lessor is put for non-payment. The stipulation was thus

(1) 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R. 1918 (P. C.).

(2) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

(3) 56 Ind. Cas. 1007; 24 C. W. N. 444.

one by way of penalty and comes under section 74 of the Contract Act. Moreover, there can be no doubt that the rate of 25 per cent. per mensem is an unconscionable rate. Refers to *Krishna Charan Barman* v. *Sanat Kumar Das* (4) and *Upendra Lal Gupta* v. *Ataulla* (5).

Dr. *D. N. Mitter* was not called upon to reply.

JUDGMENT.

WALMSLEY, J.—Since the order of remand passed by this Court on the 12th March 1917, and since the order passed by the learned District Judge on the 6th October 1917, there have been published decisions of their Lordships of the Privy Council in the case of *Aziz Khan* v. *Duni Chand* (1) and in the case of *Balla Mal* v. *Ahad Shah* (2). In view of these rulings I think the question raised in this appeal must be taken as settled. The Courts below held that the defendants have been unable to prove fraud or undue influence, and, in my judgment, it follows that the plaintiff is entitled to recover interest at the rates stipulated in the lease; that is, at the rate of Rs. 25 per cent. per mensem. Interest will be calculated at that rate up to the date of the institution of the suit and interest will run again at 6 per cent. from the date on which the first Court passed its decree. We make no order as to costs.

GREAVES, J.—I agree.

(4) 34 Ind. Cas. 609; 25 C. L. J. 24; 44 C. 162; 21 C. W. N. 740.
(5) 36 Ind. Cas. 404; 21 C. W. N. 108.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No 677 OF 1919.
June 30, 1920.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

RAMA RANCHHOD—DEFENDANT—APPELLANT
versus
Sayad ABDUL RAHIM—PLAINTIFF—RESPONDENT.

Landlord and tenant—Ejectment—Notice to quit, necessity of—Tenant setting up permanent tenancy, whether entitled to notice—Bombay Land Revenue Code (Act V of 1879), s. 83—Permanent tenancy—Presumption—Grant, proof of, whether necessary—Burden of proof—Admission by tenant of annual tenancy, effect of.

A plea of permanent tenancy set up by a tenant does not amount to a disclaimer of the landlord's title so as to disentitle the tenant from demanding a notice to quit. [p. 279, col. 1.]

A tenant relying upon the presumption contained in section 83 of the Bombay Land Revenue Code need not set up and prove a grant. [p. 280, col. 2.]

Where a tenant relies upon the presumption contained in section 83 of the Bombay Land Revenue Code it is for the landlord to prove an agreement or usage as to the intended duration of the tenancy. [p. 280, col. 2.]

The presumption as to permanency arising from the antiquity of the tenancy cannot be displaced by proof of a document in which the tenant admits himself to be an annual tenant, if it is shown that the tenant still continues, in spite of the document, to hold the land on the old rent. [p. 280, col. 2.]

Second appeal from the decision of the First Class, Subordinate Judge, A. P., at Broach, in Appeal No. 8 of 1917, varying the decree passed by the Second Class, Subordinate Judge at Ankleshwar, in Civil Suit No. 170 of 1916.

Mr. *G. N. Thakor*, for the Appellant.
Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff in this case sued for possession of the plaint land from the defendant and for Rs. 16 as rent for the season of Samvat 1972, alleging that the defendant was cultivating the plaint land, that he had passed a rent-note for the same for Samvat 1939, and that he was holding over on the expiration of that year. The defendant in his written statement pleaded that his ancestors were permanent tenants on the land and so he was a permanent tenant. That the suit was also bad as plaintiff had given no notice to determine the alleged tenancy.

The Trial Court found that the permanent tenancy set up by the defendant was not proved. But the plaintiff's claim for possession was rejected on the ground that it was bad for want of notice. Accordingly, a decree was passed for the amount of rent only. In appeal the learned Appellate Judge also held that the defendant had not proved his permanent tenancy. But he differed from the decision of the lower Court on the question of notice and held that no notice to quit was necessary as the tenant had disclaimed the landlord's title. Therefore, the plaintiff was decreed possession in addition to the amount decreed in the lower Court.

In appeal, the first question that arises is whether, assuming that the defendant was a yearly tenant, notice was necessary on the facts of the case, and that depends entirely on the question whether the defendant has disclaimed the landlord's title and, therefore, disentitled himself from demanding notice to quit. The question seems to have been set at rest by the decision in *Vithu* v. *Dhondi* (1). There it was held that "the plea of permanent tenancy set up for the first time in the defendant's written statement in the present case was not such a disclaimer of the landlord's title as to dispense with proof of legal notice to quit." The respondent in that case relied upon the decision in *Baba* v. *Vishvanath Joshi* (2). There it was held that where a tenant set up a claim to be a *mirasdar*, that was a sufficient disclaimer of the landlord's title. The judgment was based on the decision of an English case—*Vivian* v. *Moat* (3). But it has been held by the Privy Council in *Maharaja of Jeypore* v. *Rukmini Pattamahadevi* (4) that the doctrine of *Vivian* v. *Moat* (3) does not apply to Indian tenures such as were before the Courts. Finally, in *Ochhavalal* v. *Gopal* (5) the same question was raised. There the tenant had claimed to be a permanent tenant and the argument was that the setting up of a permanent tenancy was a sufficient disclaimer of the landlord's title and renders notice unnecessary. It was held by Sir Lawrence Jenkins that there was no repudiation of the relation of landlord and tenant. It seems clear that the relationship of landlord and tenant still continues, although the tenant may set up a different kind of tenure from the one on which the plaintiff landlord relies. It would be a different matter if a tenant sets up a claim to be the owner of the land and disputes the right of the plaintiff to be considered as a landlord on any kind of tenure. Therefore, it seems to me that in this case notice was necessary. Therefore, the Trial Court was right in rejecting the plaintiff's claim for possession apart entirely from the question whether the defendant was or was not a permanent tenant. That question was not necessary for a decision in the case. Evidence was gone into on that issue and we have the decision of both the Courts on the issue. It may be desirable for us to express an opinion as to whether those findings are correct. The learned Appellate Judge does not appear to me to have interpreted correctly section 83 of the Land Revenue Code. He says:—"It might be that he and his forefathers may be in cultivation of this plot of land, but long possession by itself cannot create an interest in permanency. In this instance there is no grant from the plaintiff or his ancestors in favour of the defendant or his ancestors conferring a right to hold the land in perpetuity. The defendant or his ancestors had not done any acts which are lasting and improving the land." Now, there is no need for a person who sets up a permanent tenancy to rely upon a grant. If that was necessary, then there would be no need for section 83, the 2nd paragraph of which expressly provides that where, by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, it shall, against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him, unless there is evidence of its period or its intended duration agreed upon between the landlord and the tenant or any usage of the locality as to duration of such

(1) 15 B. 407; 8 Ind. Dec. (N. S.) 277.
(2) 8 B. 228; 4 Ind. Dec. (N. S.) 526.
(3) (1881) 16 Ch. D. 730; 50 L. J. Ch. 331; 44 L. T. 210; 29 W. R. 504.
(4) 50 Ind. Cas. 631; 42 M. 589; 36 M. L. J. 543; 17 A. L. J. 552; 29 C. L. J. 528; 21 Bom. L. R. 655; (1919) M. W. N. 271; 23 C. W. N. 889; 26 M. L. T. 16; 10 L. W. 381; 46 I. A. 109 (P. C.).
(5) 32 B. 78; 9 Bom. L. R. 1332.

tenancy. So in this case we have all the facts before us which would point to establish the defendants' right to be considered permanent tenants, that is to say, he and his ancestors had cultivated this land as far back as memory could go and there was no evidence as to when they commenced to cultivate the land. The case of *Raghunath* v. *Lakshuman* (6) is a very similar case. There it was held that, if the documents in the case were excluded, then there could be no doubt that the facts were such as to attract the presumption mentioned in section 83 of the Land Revenue Code. Here also, apart from any documents, all the facts are such as to attract that presumption. So we have got to consider whether there is anything in the documents which rebuts the presumption. The only document which the plaintiff relied upon is the rent note executed by the defendant for the season 1939. The plaintiff relied upon the words of the rent note and especially the final words on which the defendant agreed to clear out and deliver the land in the possession of the plaintiff at the end of the season of 1939. There was a very similar document in *Raghunath* v. *Lakshuman* (6). There the document was: "I have got the *makta* (contract for a lump sum) fixed for the current year. As soon as the period was over I will make over the plots to the Sarkar," and Sir Lawrence Jenkins said with regard to that document: "No doubt this stipulation taken by itself strongly favours the plaintiff's contention, and, but for the authority of the case of *Gangaji* v. *Sakharam* (7), I should have felt greater difficulty in dealing with the argument founded by the Advocate-General on this clause. That case...decides that questions of this class cannot be determined by a clause, such as the present, but that the matter must be judged in the light of the actual facts. There the determining point was the fact that the tenant still continued to hold and that is what has happened here." So, also, that has happened in this case. After 1882 the defendant continued to occupy the land and pay the same rent until the suit was filed. The rent mentioned in the rent-note is Rs. 45. But that appears to be explained by the plaintiff in his plaint where he claims Rs. 16 out of the Rs. 45 and says the balance Rs. 29 was paid to Government for assessment. In the absence of any evidence on the point, and there being nothing to the contrary in the defendant's written statement, I think I must take it as admitted that the defendant paid the assessment Rs. 29 and paid Rs. 16 to the landlord. There is, therefore, nothing in the case to rebut the presumption which arises from the antiquity of the defendant's tenancy. The only thing that can be urged against him is that, after 1882 he alleged that there was an oral agreement between him and the landlord to the effect that he should be a permanent tenant and in the Record of Rights, in which he appears as a permanent tenant, he is mentioned as a permanent tenant by oral contract. The defendant has failed to prove any such oral contract, but it does not follow that we cannot presume permanent tenancy from the rest of the facts of the case. It often happens that a party who has got a perfectly good case, to make it stronger, alleges something which he thinks will help him, and fails to prove that particular circumstance. The proper course is to strike out all evidence as regards oral tenancy and the oral agreement alleged to have been made after 1882, and then to see whether what remains is sufficient to prove the defendant's case. And, in my opinion, the defendant has proved the antiquity of his tenancy, and if there is nothing within the provisions of the second paragraph of section 83 which will prevent the Court from coming to the conclusion that permanent tenancy can be presumed, then the defendant is entitled to succeed. I may mention that the learned Judge in the Trial Court has interpreted the second paragraph of section 83 in entirely the opposite way in which it ought to have been interpreted. He says: "There is no satisfactory evidence of the origin or commencement of the tenancy forthcoming, but then this is not the only thing necessary for presuming a permanent tenancy, for, presuming that the duration of the tenancy is co extensive with the duration of the tenure of the landlord coupled with the antiquity, two other conditions should be satisfied, *viz.*, there is no

(6) 2 Bom. L. R. 93 at p. 95.
(7) (1889) P. J. 156

evidence of the period of its intended duration, if any agreed upon, between the landlord and the tenant or those under whom they respectively claim title and there is no usage of the locality as to duration of such tenancy. Both these conditions are wanting in this case". But those are not the conditions which must be established before a permanent tenancy is presumed. They have to be established by the party denying the permanent tenancy in order to rebut the presumption which arises from the antiquity of the tenancy.

In my opinion, therefore, the appeal must be allowed and the decree of the lower Court will be set aside and there will be a decree for the plaintiff for Rs. 16.

Defendant will be entitled to his costs throughout.

The cross-objections are dismissed with costs.

FAWCETT, J.—I agree that the appeal should be allowed. On the point of necessity of notice, the judgment of the Privy Council in *Maharaja of Jeypore* v. *Rukmini Pattamahadevi* (4) is conclusive on the points that a mere claim to be a permanent tenant is not a denial of the landlord's title such as to work a forfeiture, and that the doctrine of English Law regarding the ejection of an annual tenant in *Vivian* v. *Moat* (3) is not applicable to Indian tenures such as the one in that case. As explained in the judgment of the Privy Council, the denial or disclaimer does not work a forfeiture in that case, but is construed as rendering a notice to quit unnecessary. This could not apply possibly in the present case; for, under section 111, clause (*h*), of the Transfer of Property Act, in order to determine a lease there must be a notice duly given by one party to the other, and, secondly, in the case of an agricultural lease, such as the present, section 84 of the Land Revenue Code lays down that, in the absence of any special agreement in writing to the contrary, an annual tenancy shall require for its termination a notice given in writing in a certain form. Therefore, even where there has been a disclaimer of the landlord's title, such notice is necessary to determine an annual agricultural tenancy in this Presidency. This is already laid down in the cases of *Vithu* v. *Dhondi* (1) and *Ochhavalal* v. *Gopal* (5). Consequently, the lower Appellate Court was clearly wrong in my opinion in holding that notice was not necessary.

On the second point I think it desirable that this litigation should not end without the main point of dispute between the plaintiff and the defendant being decided. In *Raghunath* v. *Lakshuman* (6) it has been held that a question of this kind, whether the defendant is a permanent or an yearly tenant, is one of law, depending on the legal inferences from the facts which are found and that this Court in second appeal can, therefore, come to its own conclusion in the matter. I agree with the learned Chief Justice that, apart from the rent-note of 1882, the defendant is entitled to a presumption in his favour under the second paragraph of section 83 of the Land Revenue Code. The rent-note is no doubt an admission by the defendant which might, in certain circumstances, amount to satisfactory evidence of the intended duration of the tenancy within the meaning of the paragraph. But it is an admission that is not conclusive, and it has already been laid down by this Court in *Raghunath* v. *Lakshuman* (6), and in the previous case there referred to, that in judging the weight to be attached to such an admission the main test is, what has actually happened and in particular whether the tenant still continues to hold the land in spite of a document by which he admits he is an annual tenant. In the present case the facts that the defendant has continued to hold the land on the same rent, and that he pays the Government assessment, lend strong support to his contention that he is a parmanent tenant; and it would, I think, be very unsafe in these circumstances to hold that this document, Exhibit 18, was a deliberate admission by the defendant that he was not entitled to continue to hold the land in the way it had been held from the time of his ancestors. It frequently happens that a document of this kind is signed without any real comprehension of its exact legal effect, and in fact it may never have been read by or to the defendant. I think, therefore that the two lower Courts gave excessive weight

co this particular admission, and that the presumption arising in the defendant's favour under section 83 is not displaced by it.

I hold, therefore, that there is clear justification for our interfering with the finding of fact arrived at by the two lower Courts and concur in the order allowing the appeal.

Appeal allowed.

PATNA HIGH COURT.
(CUTTACK CIRCUIT COURT.)
MISCELLANEOUS CIVIL APPEALS NOS. 12 AND 13 OF 1919.
January 22, 1920.
Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.
Raja BRAJA SUNDAR DEB—JUDGMENT-DEBTOR—APPELLANT
versus
SIVARANJAN DEI AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2), O. VI, rr. 14, 15, 17, O. XXI, r. 66—Execution of decree—Application for order for sale—Verification by karpardaz of decree-holder, whether sufficient—Application not signed by decree-holder—Defect, whether can be remedied—Order on application whether "decree"—Appeal, whether lies.

The verification of an application under Order XXI, rule 66 of the Civil Procedure Code by the *karpardaz* of the decree-holder who is acquainted with the facts verified by him is sufficient and valid under Order VI, rule 15 of the Code. [p. 284, col. 1.]

The mere fact that the application is not signed by the decree-holder will not make it absolutely void. The defect can be cured at any stage by amendment. [p. 284, cols. 1 & 2.]

An order made under Order XXI, rule 66 of the Civil Procedure Code is not a decree within the meaning of section 2 (2), and is, therefore, not appealable. [p. 285, col. 1.]

Appeal against the orders passed by the Subordinate Judge, Cuttack, dated the 5th July 1919.

Rai *Janaki Nath Bose Bahadur*, for the Appellant.

The Hon'ble Mr. *M. S. Das*, Messrs. *Bisvanath Sinha* and *Satya Narain Sen Gupta*, for the Respondents.

JUDGMENT.—Raja Brajasundar Deb is the appellant in both the Miscellaneous Appeals Nos. 12 and 13 of 1919. He is the present proprietor of Killa Aul. Surna Manjari Dei, respondent in Appeal No. 12, is the widow and Sarat Kumari Dei, respondent in Appeal No. 13, is the minor daughter of Pitambar Deo, the late proprietor of Killa Aul. The widow and the daughter obtained separate decrees for maintenance against the appellant on the 25th October 1911. The decrees were to some extent modified by the High Court of Calcutta in March 1914 and appeals against the decrees of the High Court to His Majesty in Council were dismissed on the 16th November 1917. Several executions of the decrees from the year 1912 proved infructuous.

The present applications for execution of both the decrees were registered on the 25th July 1918. The execution case of the widow Surna Manjari Dei was numbered 786 of 1918 and that of the daughter, Sarat Kumari Dei, numbered 787 of 1918. The widow claimed Rs. 56,220-4-5 and the daughter Rs. 18,288-3-6, as due under their respective decrees.

Two annas of *touzi* No. 23 of Killa Aul was advertised for sale in the execution of the widow and one anna of the same property in that of the daughter. The date fixed for sale in both the executions was 15th July.

On the 13th June the judgment-debtor filed petitions in both the executions, objecting to the execution being proceeded with and the property being sold. The grounds urged were the same in both the objections, which were heard together and were disposed of by one order of the Court, dated the 5th July 1919, whereby the objections were disallowed and the two executions were directed to proceed. Against this order the judgment-debtor filed two appeals to this Court, one in each execution, and prayed for stay of the sale of the property which was fixed for the 15th July. The respondents objected to the stay of the execution by their sworn petition, dated the 14th July. The sale was, however, stayed under the order of this Court on the appellant having deposited the amount of the decrees in each as security.

The present two appeals have been heard together. There has been one argument in respect of both. They may

therefore, be disposed of by one judgment of this Court,

The two executions proceeded simultaneously : the steps taken, the several petitions filed and the orders passed in both the executions were similar, and hence reference to one of the executions, say for instance, that of the widow in Appeal No. 12, is sufficient for the purpose of this judgment.

The facts briefly stated are as follows:—

February the 22nd, 1919, was originally fixed for the sale of the property, but on the objection of the judgment-debtor it was held that the writ of attachment was not duly served, and, therefore, a fresh writ of attachment was ordered to be issued. As the property to be attached was village Aul, the Headquarters of the Raja, the Court directed that this writ be served with the help of Police, which was accordingly done on the 19th March 1919.

On the 28th March the Court directed notice under Order XXI, rule 66 of the Code of Civil Procedure to issue, returnable on the 17th April

On the 24th April the Court passed the following order :—

"Postal notice is received. Judgment debtor's agent did not accept it. Decree-holder paid *talbana*. Order : put up on 28th April 1919 for orders. Decree-holder to file affidavit by that date."

On the 28th April the decree-holders filed valuation affidavit and the Court made the following order :—

"No objection is made. Ordered : Issue sale proclamation fixing 16th June. The decree-holder to get the sale advertised in the Bihar and Orissa Gazette."

The sale proclamation was, however, returned by the peon unserved, alleging that he could not serve it on account of his illness. The peon was suspected of having deliberately declined to serve the sale proclamation. The sale date was extended to the 15th July and the sale proclamation was ordered to be served with the help of Police. It was accordingly served on the spot and on the *kachehri* of the Raja on the 13th June 1919 and was hung up in the Court-house on the 14th June.

The objection of the Raja was filed on the 27th June. The date fixed for the disposal of objection was the 5th July in view of the fact that the date fixed for the sale was the 15th July.

On the 2nd July the Raja filed a list of his witnesses, praying for summonses to issue upon them. These witnesses were probably to prove the allegations of facts alleged in the petition of objection, notably that the proclamation was not affixed on a conspicuous part of the property sought to be sold and that there was material irregularity in the service thereof. The Court passed the following order :—

"Issue summons at the risk of the petitioner for 5th July. The date cannot be changed. The petitioner ought to have moved for summons on the very day he filed the present objection."

On the 5th July the Raja filed a petition stating that the summonses were not served and that, consequently, the witnesses were not willing to appear, and prayed for an adjournment of the case. This was refused by the Court for the reason that there was "no satisfactory ground for delay."

It is urged in this appeal that the Court ought to have granted the prayer of the Raja and should have enforced the attendance of witnesses and granted sufficient adjournment. We think that the Court rightly exercised its discretion in rejecting the petition of the Raja. It is not stated in the petition that the sale-proclamation was not actually served. It was served on the 13th of June. There is no reason why the petition of objection was filed so late as the 27th, nor why the application for summons was not made until the 2nd July. The object was simply to prevent the sale taking place on the 15th of July. This contention is, therefore, overruled.

The next contention is that the application filed on behalf of the decree holders for an order for sale was not signed and verified according to law ; and hence the proceedings following the sale application were incompetent and void, and the property of the judgment-debtor could not be sold : (grounds (*a*) and (*b*) in the petition of objection). This contention is based on the petition of the decree-holders, dated the 28th March 1919, wherein it is stated that the decree-holders came to know from their *Karpardaz*, Hara Krishna Mahanty, who had made thorough inquiries about the

matter, that the property of the judgment-debtor under attachment was not mortgaged, sold, or in any way transferred elsewhere, and that it was in the possession of the judgment-debtor. This statement in the petition has been verified by Hara Krishna Mahanty describing himself as the *karpardaz* on behalf of the decree-holders and being acquainted with the facts verified by him. The Court acted upon this petition and directed the notice prayed for to be issued upon the judgment-debtor (*vide* Order No. 25, dated the 28th March 1919). The Court was, therefore, satisfied that Hara Krishna Mahanty was acquainted with the facts stated in the petition and was competent to verify it. Under Order XXI, rule 66 (3) the petition was to be verified in the manner prescribed for the verification of pleadings by Order VI, rule 15. This rule says that every pleading shall be verified either by the party himself or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. It is not disputed that Hara Krishna Mahanty was acquainted with the facts of the case as stated by him in the verification and the subsequent affidavit of the 28th April. The verification made by him was, therefore, proper and legal and the Court was right in accepting it.

It is then contended that the petition in question was not properly signed inasmuch as it ought to have been signed by the decree-holders themselves or by a person duly authorised by them to sign it as required by Order VI, rule 14. The petition was signed by Hara Krishna Mahanty and the affidavit of the 28th April states that he was the agent appointed by the decree holders and was acting as such. It is said that there is nothing to show that Hara Krishna Mahanty was duly authorized to sign the petition. The objection that the petition was not duly signed was not pressed in the Court below, as is apparent from the order dated 5th July wherein only the objection as to verification appears to have been urged. The ground was, however, taken in the petition of objection. It is not, therefore, open to the judgment-debtor to press this point in appeal, for had it been taken in the Court below the defect, if any, would have been cured by an amendment under Order VI, rule 17 (new) which allows amendment to be made at any stage, unlike the old section 55 (*b*) (1) of the Code of 1882 under which amendment of the signature and the verification could be made only before the settlement of issues.

The case of *Baroda Prosad Bose* v. *Girijanath Roy Chowdhury* (1), where a plaint not properly signed and verified under section 51 was directed to be removed from the file of registered suits, has no application to the present case. The decision proceeded upon the fact that under the old Code the defect could not be removed by amendment after the settlement of issues, Geidt, J., one of the Judges to the decision doubted the correctness of the order. That ruling, in the first place, is not an authority for the present law in the new Code. The weight of decision seems to be that the mere fact that a plaint was not duly signed as required by Order VI, rule 14, will not necessarily make it absolutely void: *Basdeo* v. *John Smidt* (2) and *Heydorn & Co.* v. *Muhammad Shafi* (3). It was pointed out by Lord Macnaghten in the case of *Mohini Mohun Das* v. *Bungsi Buddan Saha Das* (4) that there is no rule providing that a person named as a plaintiff is not to be treated as such unless he signs and verifies the plaint. Assuming, therefore, that the petition in question was not duly signed it is not open to this Court to reverse the order of the Court below merely on that account, as it was a defect only in the proceedings in execution and did not affect the merits of the case or the jurisdiction of the Court. Section 99 of the Code prohibits our interference in a case of this kind.

Again, it is undisputed that the application for execution of the two decrees registered on the 25th of July were duly signed and verified by the decree-holders themselves. In those petitions there was a prayer for the sale of the property and all the particulars required by Order XXI, rule 66, namely, the property to be sold, the revenue assessed thereon and the valuation thereof, were duly stated. The subsequent petition of the

(1) 2 C. L J. 11.
(2) 22 A. 55; A. W N. (1897) 172; 9 Ind. Dec. (N. S.) 1068.
(3) 14 Ind. Cas. 107; 34 A. 348; 9 A. L. J. 294.
(4) 17 C. 580 (P. C.); 5 Sar. P. C. J. 498; 8 Ind. Dec. (N. S.) 926.

28th March 1919 which is impugned as not properly signed and verified simply stated that the property sought to be sold was not mortgaged, sold or in any way transferred elsewhere. In order words, there was no incumbrance to be specified under sub-rule 2 (*c*) of rule 66, in the sale-proclamation. The defect in the verification and signature of this petition will not, in our opinion, vitiate the sale proclamation issued by the Court for the sale of the property.

Further, the appeal of the judgment-debtor against the order of the Court passed under Order XXI, rule 66, is incompetent. Order XLIII of the Code does not provide for an appeal against such an order, nor is the order a decree within the definition of 'decree' in the present Code.

The judgment-debtor ought to have raised his objection within the time fixed by the notice served upon him under Order XXI, rule 66. His agent refused, with the usual attitude of the judgment-debtor to avoid and delay the execution of the decrees, to accept the notice and, after the term fixed by the notice, on the 24th April the Court directed the decree-holder to file valuation affidavit. This being done and no objection having been taken, the Court had no option but to issue the sale proclamation. The orders of the Court of the 24th and the 28th April 1919 are, therefore, conclusive. The judgment-debtor cannot be permitted to re open the same.

The last objection of the judgment debtor is that the property cannot be sold by reason of the interpretation put on the decrees by the Hon'ble High Court (paragraph (*e*) of the objection petition.) There is no substance in this contention. The decrees in both these executions directed that the decree-holders do get from the defendant-judgment debtor maintenance allowance of a sum specified therein per month with a certain sum on account of the arrears of maintenance, with further order that the allowance decreed would be a charge on the property mentioned in the plaint, namely, Killa Anl, which is sought to be sold in execution of these decrees. In a previous execution, the judgment-debtor resisted the execution of the decrees on the ground that the property could not be attached and sold in execution of the decrees and that separate suits for the sale of the property in enforcement of the charge under section 67 of the Transfer of Property Act were necessary. The matter was concluded by the decision of this Court (Sharfuddin and Chapman, JJ.) in *Brajasunder Deb* v. *Sarat Kumari* (5) and it was held that the properties in dispute should be brought to sale in execution of the decrees and that there was no necessity of any separate suit for sale. There is no force in the contention that the property could not be sold in execution of the decrees or that the only course open to the decree-holders was to have the decrees realised from the profits of the property by an appointment of a Receiver. Neither the decrees nor the interpretation upon them by this Court lend support to such a contention. The decrees were personal, and it is open to the decree-holders to realise the amounts due thereunder in any way in which a decree for money is enforceable. This contention is, therefore, overruled.

The result is that all the objections of the judgment-debtor are disallowed and both the appeals are accordingly dismissed with costs. From the history of the litigation, it is obvious that the judgment-debtor has been trying at every stage to frustrate the decree-holders from realising the fruits of their decrees.

Appeals dismissed.

(5) 38 Ind. Cas. 791; 2 P. L. J. 55; (1917) Pat. 67; 3 P. L. W. 202.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 589 OF 1915.

March 30, 1917.

Present:—Mr Mittra, Offg. A. J. C.

Sheikh ISMAIL—PLAINTIFF—APPELLANT

versus

WASUDEO—DEFENDANT—RESPONDENT.

Benami *transaction—Fraudulent purpose—Plaintiff, when can succeed*—In pari delicto, potior est conditio defendentis.

Where the purpose of a *benami* transaction is fraudulent a party seeking the assistance of the Court in avoiding the transaction must show that

the purpose did not go beyond the stage of mere intention, otherwise the maxim *in pari delicto potior est conditio defendentis* will become applicable and will prevent the plaintiff from succeeding.

Appeal against the decree of the District Judge, Nagpur, dated the 16th June 1915, confirming that of the Senior Munsif, Nagpur, dated the 30th January 1915.

Messrs. *V. R. Pandit*, R. B., and *A. V. Zinjarde*, for the Appellant.

Mr. *M. B. Kinkhede*, for the Respondent.

JUDGMENT.—The plaintiff's case is that his deceased father had obtained two mortgage-deeds in the name of the defendant's predecessors-in-title upon which deeds foreclosure decrees have been obtained by the latter. The plaintiff, therefore, sues for a declaration that he is the owner of the foreclosed property. There is also a prayer for delivery of possession. It is admitted in the plaint that the plaintiff's father had the documents executed *benami* in order to shield his property from one Ghatate, who, it was anticipated, was going to make a claim against the plaintiff's father. Ghatate eventually obtained a decree against Mohammadali, the plaintiff's father. In execution of the decree a house was attached, but upon objection being raised was released from attachment. The two mortgage-deeds were never attached. It has, however, been found that Ghatate's decretal debt still remains unpaid. Upon this ground the Court of first instance held that the plaintiff was not entitled to maintain this suit, fraud having gone beyond the stage of intention. On appeal the learned District Judge held that the plaintiff has failed to prove that the transactions were really entered into by the defendant's predecessor on behalf of Muhammadali. But the learned District Judge thought that as no attachment of the mortgage-deeds was ever made and no titles under the mortgages were set up, the plaintiff would be entitled to maintain this suit. The suit, however, was dismissed upon the finding that the plaintiff has failed to prove his interest in the mortgage deeds.

In this second appeal the plaintiff challenges the finding of the lower Appellate Court as to whether the beneficiary under the two mortgages was the plaintiff's father or not. The respondent questions the finding of the lower Appellate Court as to the maintainability of the suit upon the admitted facts of the case.

Both the Courts below are agreed that the purpose of the *benami* transaction was a fraudulent one and the question remains for decision whether that purpose did not go beyond the stage of mere intention. In *Ragho Atmaram* v. *Purshotam Jairam* (1) it was held that where both the parties to a transaction are *in pari delicto*, the plaintiff, in order to be entitled to the assistance of the Court, must show that the illegal purpose did not go beyond the stage of intention. The learned District Judge relies upon *Banka Behary Dass* v. *Raj Kumar Dass* (2). In that case the fraudulent purpose was held to have been accomplished by having an objection preferred to the attachment of the property on the basis of the *benami* conveyance, which objection was successful. That case, was not meant to lay down that a fraud is successful only when a successful objection to attachment of property is made by the *benamidar*. That happened to be the fact of the case and the case was accordingly so decided. The District Judge also relies on the case of *Girdharilal Prayagdat* v. *Manikamma Narayansami* (3). In this case, although the objection based upon a fraudulent mortgage was successful, the creditor's decretal amount was actually paid off, hence it was held that the fraud was not carried out. This case distinguishes an earlier judgment of the Bombay High Court *Sidlingappa* v. *Hirasa* (4), from which this Court has dissented in *Maniram* v. *Ganesh* (5). In the Privy Council case of *Petherpermal Chetty* v. *Muniandy Servai* (6), the fraudulent purpose was not only not carried out but was "absolutely defeated," to use the words of their Lordships. There are certain observations of Mr. Justice Mookerjee in *Jadu Nath Poddar* v. *Rup Lal Poddar* (7), which support the view I have taken. At page 979 the learned Judge says: "In my

(1) 4 N. L. R. 26.

(2) 27 C. 231; 4 C. W. N. 239; 14 Ind. Dec. (N. S.) 153.

(3) 21 Ind. Cas. 50; 38 B. 10; 15 Bom. L. R. 805.

(4) 31 B. 407; 9 Bom. L. R. 542.

(5) 4 Ind. Cas. 238; 5 N. L. R. 146

(6) 35 C. 551; 10 Bom. L. R. 590; 12 C. W. N. 532; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 103; 35 I. A. 98; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).

(7) 33 C. 967; 10 C. W. N. 650; 4 C. L. J. 22.

opinion a mere intention not carried into effect, ought not to be sufficient to deprive the party of the assistance of the Court in enforcing his rights, and if he either abandons his fraudulent purpose before it is accomplished or pays his debts to the full value of the property conveyed, the fraud should be regarded as purged."

Here, although efforts were made by the decree-holder to realise his decretal sum, his decree remained unsatisfied and has now been barred by limitation. I am, therefore, unable to agree with the lower Appellate Court that fraud has not been successfully carried out.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 643 OF 1919.

February 26, 1920.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

LAKSHMINDRATHIRTHA SWAMIAR, MINOR, BY GUARDIAN *ad litem* RAJAGOPALA CHARYA—DEFENDANT—APPELLANT

versus

K. RAGHAVENDRA RAO—PLAINTIFF—RESPONDENT.

Hindu Law—Mutt—*Debts incurred by head of* mutt—Mutt *properties, whether liable.*

Debts incurred by the head of a *mutt* for necessary purposes of the *mutt* are recoverable out of the properties of the *mutt*, even though such properties are not charged with the debts. [p. 289, cols. 1 & 2.]

Second appeal against the decree of the District Court, South Kanara, in Appeal Suit No. 251 of 1918, preferred against the decree of the Court of the District Munsif, Udipi, in Original Suit No. 521 of 1917.

FACTS appear from the judgment.

Messrs. *O. V. Ananthakrishna Aiyar* and *K. Sundara Rao*, for the Appellants.—The lower Court was wrong in charging the *mutt* properties for the private debts of the *madathipatti*. He did not purport to pledge *mutt* properties. It was a simple money debt. He is in the position of a trustee or executor. See *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1), *Ammalu Ammal* v. *Namagiri Ammal* (2) and *Chidambaram Pillai* v. *Veerappa Chettiar* (3). The presumption is that money was lent on the personal credit of the head of the *mutt*.

Messrs. *B. Sitaram Rao* and *K. Y. Adiga*, for the Respondents.—The lower Court's decree is right. We are now dealing with the *sanyasi* head of a *mutt* whose position is not analogous to and must be differentiated from ordinary trustees. The *sanyasi madathipatti* has no property and the presumption is that in borrowing for the *mutt* he pledges the credit of the *mutt*. See *Shankar Bharati Swami* v. *Venkopa Naik* (4), *Pandara Sannathi* v. *Karutha Ravuthan* (5). The cases cited by the appellant's Vakil which relate to non-*sanyasi* heads of religious institutions do not apply to this case. Those were besides cases of promissory notes which devote personal liability.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant is the appellant. The suit was brought for the recovery of Rs. 1,500, and interest due thereon on loans of money advanced to the head of the *shirur muttam*, one of the eight *udipi muttams*. The Swami to whom the loans were made is dead and the suit was brought against his successor, the allegation in the plaint being that the debts were incurred for the benefit and the necessities of the *mutt*. The plaint prayed that a decree should be passed directing the defendant to pay the sum due to the plaintiff out of the estate of the god Vittalar of the defendant's *muttam*. The District Munsif found that, of the 76 items making up Rs. 1,500, the third item was clearly proved to have been borrowed for the necessities of the *muttam*. As regards the other items making up Rs. 1,000 they were borrowed from him for the ordinary expenses of the Muttam, but the creditor had not shown that the means then in the hands of the

(1) 38 Ind. Cas. 172; 32 M. L. J. 259; (1917) M. W. N. 278; 21 M. L. T. 91; 5 L. W. 323.

(2) 43 Ind. Cas. 760; 33 M. L. J. 631; 22 M. L. T 391; 6 L. W. 722; (1918) M. W. N. 110.

(3) 43 Ind. Cas. 865; 6 L. W. 640; (1917) M. W. N. 744; 22 M. L. T. 380.

(4) 9 B. 422; 5 Ind. Dec. (N. S.) 280.

(5) 9 Ind. Cas. 150; 21 M. L. J. 129; 9 M. L. T. 327.

Madhathipatti were not sufficient to meet those expenses. He, therefore, gave a decree as regards Rs. 500 against the defendant as the representative of the *muttam* to be recovered from the rents and profits of the *muttam*, but as regards the remaining Rs. 1,000 and interest thereon he directed the defendant to pay it out of the assets of the predecessor in his hands, such assets, according to the District Munsif, consisting of the income which accrued due from the *mutt* properties during the lifetime of the defendant's predecessor but not realised by that predecessor during his lifetime. The District Munsif in forming such an opinion was guided by the view of the law as it was understood in this Court prior to the decisions in *Ram Prakash* v. *Anand Das* (6) and *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal* (7) that view being that the head of a *mutt* is the private and absolute owner of the income of the *mutt* accruing during his lifetime.

The learned District Judge, on appeal, was inclined to hold that the sum of Rs. 1,000 made up of the items other than the 3rd item did not stand on a lower footing than the 3rd item itself and that the District Munsif would have been "justified in holding" that necessity had been proved for borrowing these sums also. As, however, the plaintiff had not filed any memorandum of objections in the District Court, the learned District Judge contented himself with confirming the District Munsif's decision.

In this second appeal several points were argued. Two of them were (1) that in the absence of any charge created by a trustee on the trust properties for loans obtained by him, the creditor cannot obtain a decree making the trust properties liable; (2) that the finding that there was necessity to borrow either the 3rd item or the other items was erroneous. (The other points argued by the appellant's Vakil need not be noticed as they do not arise if he failed on the second point, as he did in my opinion.)

As I understand the District Judge's judgment, he did not, in arriving at his finding on the second point, lose sight of the consideration mentioned in the decision in *Pandara Sannathi* v. *Karutha Ravuthan* (5) *viz.*, that it was not sufficient for the creditor to prove that the moneys were borrowed for the purposes of the *mutt*, but that it must also be found that there was an existing necessity for then incurring the debts, that is, that the necessary expenses could not have been met out of the *mutt* funds then available to the trustee. The learned District Judge has considered the evidence in the case, which shows that the defendant's predecessor was a prudent and honest man and has given weight to the fact that the defendant was withholding the temple accounts, and I cannot say that his finding of fact can be successfully attacked in second appeal.

Then, the only question remaining for consideration is, whether in a suit to recover simple money debts incurred by the *sanyasi* head of an institution, the trust itself can be made liable and, in considering this question, it is, of course immaterial whether the suit is brought during the lifetime of the trustee who incurred it or against his successor. If his position was wholly analogous to that of an executor or an administrator or the lay trustee of a charitable or religious institution, the answer must be in the negative. [See *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1), *Chidambaram Pillai* v. *Veerappa Chettiar* (3) and *Ammalu Ammal* v. *Namagiri Ammal* (2).] The principle underlying those decisions is, that such a trustee, or other person in the position of trustee, has got his personal credit to pledge and the presumption should be that, when he incurred a debt without charging the trust properties, the creditor lent the money on such personal credit and could look to that credit alone and to the principle of subrogation for recovery of his loan. I think the same principle would apply even to an ordinary trustee of a temple who is not a *sanyasi*. But as regards *sanyasi* trustees, a distinction has been suggested in the case in

(6) 33 Ind. Cas. 583; 43 C. 707; 43 I. A. 73; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267 (P. C.).

(7) 53 Ind. Cas. 288; (1919) M. W. N. 850; 37 M. L. J. 460; 17 A. L. J. 1097; 10 L. W. 642; 26 M. L. T. 479; 24 C. W. N. 249; 46 I. A. 204; 43 253; 22 Bom. L. R. 457; 2 U. P. L. R. (P. C.) 10 (P. C.).

Shankar Bharati Swami v. *Venkapa Naik* (4). I shall quote the following sentences from page 425 :—"The case was said to be similar to that of an executor contracting a loan for the purposes of the estate by English law. See *Farhall* v. *Farhall* (8) ; or that of the manager of a charitable institution incurring a liability for the purposes of the institution—*Strickland* v. *Symons* (9). It is sufficient for the present case to say that these decisions are, in our opinion, inapplicable to the case of the Swami of a Mutt who presumably has no private property, and must, therefore, be assumed to be pledging the credit of the *mutt* when he borrows money for the purposes of the *mutt*. That being so, the bond was binding on the Savasthanam, if the loan was for the purposes of the *mutt*, or the plaintiff had *bona fide* reason to suppose it was intended for such purposes." Again, in *Pandara Sannathi* v. *Karutha Ravuthan* (5), though the ultimate decision was in favour of the successor of the *mutt* who was the defendant in that case, the law laid down recognises that the loans incurred by the head of the *mutt* for necessary purposes of the *mutt* can be treated as pledging the credit of the *mutt* and as justifying a decree against the *mutt*. I find from the back of the printed papers in that case that *Shankar Bharati Swami* v. *Venkapa Naik* (4) was cited before the learned Judges and, though the loans in question in that case were obtained by the head of the *mutt* through merely signing acknowledgments of indebtedness in the plaintiff's account-books, the judgment proceeds on the footing that he thereby pledged the credit of the *mutt* and not any personal credit of his. I am clear that a Hindu *sanyasi* has no personal credit whatever of a monetary or proprietary character and that it is a contradiction in terms to state that any loan was made to a *sanyasi* on his personal credit. I would, therefore, hold that the case in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1) and the other cases already referred to do not apply when the question of the liability of the *mutt* or other institution for the debt incurred by a *sanyasi* as head of the institution comes into question.

In the result, I would dismiss the second appeal with costs.

SPENCER, J.—I agree with my learned brother in thinking that cases where the head of a *mutt* borrows money for purposes binding on the *mutt* without showing any indication that he intends to make himself personally liable, are distinguishable from cases of trustees borrowing money for the purposes of their trusts upon promissory-notes. In all the cases relied upon by the appellant's learned Vakil, *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1) and *Chidambaram Pillai* v. *Veerappa Chettiar* (3) and *Ammalu Ammal* v. *Namagiri Ammal* (2), there were promissory-notes executed by the trustees or executors concerned and in the case of such promissory-notes there is always a presumption that the promisor intended to make himself personally liable [see *Palaniappa Chettiar* v. *Shanmugam Chettiar* (10)] and this is especially so when the trust which he represents is an inanimate object which has no personal liability of itself. To the cases quoted by my learned brother I would add *Srimath Daivasigamini Pandarasannidhi* v. *Noor Mahomed Routhan* (11). All these are cases in which the head of a *mutt* either directly or by implication pledged the credit of the *mutt* in incurring debts for purposes necessary for the maintenance of the institution. In such cases there is no presumption that the head of the *mutt*, Mahant, Swamiyar (or whatever other title he may possess) intended to make himself personally liable. From this point of view, the decrees of the Courts below were right and the second appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

(8) (1872) 7 Ch. 123; 41 L. J. Ch. 146; 25 L. T. 685; 20 W. R. 157.

(9) (1884) 26 Ch. D. 245; 53 L. J. Ch. 582; 51 L. T. 406; 32 W. R. 889.

(10) 43 Ind. Cas. 23; 41 M. 815; 8 L. W. 317; 35 M. L. J. 90; 24 M. L. T. 51.

(11) 31 M. 47; 17 M. L. J. 553; 3 M. L. T. 95.

TILKDHARI SINGH *v.* GOUR NARAIN.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 646 OF 1918.

August 9, 1920.

Present :—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

TILKDHARI SINGH—DEFENDANT No. 5—APPELLANT

versus

Babu GOUR NARAIN—PLAINTIFF—RESPONDENT.

Mortgage—Suit for possession by prior mortgagee—Puisne mortgagee, rights of—Transfer of Property Act (IV of 1882), s. 54—Registration Act (XVI of 1908), s. 47—Sale-deed, whether operative from date of execution or date of registration.

A makes a simple mortgage in favour of *B.* and subsequently a similar mortgage in favour of *C*. *B.* sues *A* on the mortgage without impleading *C*. He obtains a decree, brings the property to sale and purchases it himself. By that purchase he acquires the right to possession of the mortgage property which up to that time had been enjoyed by the mortgagor. *C* not having been made a party to the suit brought by *B* had no opportunity of redeeming *B*, and in a subsequent suit brought by *B* to enforce possession of the property, *C* must be given an opportunity of redeeming *B*, but if he fails to redeem, *B.* will have a decree for possession of the property and not for sale of the property. [p. 290, col. 2; p. 291, col. 1.]

Under section 54 of the Transfer of Property Act acquisition of ownership can be effected only by a registered conveyance and the title does not pass to the vendee until the sale-deed is registered After the deed is registered it will become operative as from the date of its execution under section 47 of the Registration Act, but so long as it is not registered no title vests in the vendee and a suit brought in respect of the property after the execution of the sale-deed but before its registration will not be affected thereby. [p. 291, cols. 1 & 2.]

Appeal from a decision of the District Judge, Monghyr.

Messrs. *Fakhruddin*, Rai *Guru Saran Prasad*, *Jagannath Prosad* and *A. B. Mukerji*, for the Appellant.

Messrs. *Shiveswar Dayal* and *B. C. Sinha*, for the Respondent.

JUDGMENT.

SULTAN AHMED, J.—The suit out of which this appeal arises was instituted by the plaintiff for recovery of possession with mesne profits of the land in dispute on the allegation that the plaintiff obtained a mortgage-decree over the property in suit and that he was resisted by the defendant when the plaintiff went to take delivery of possession. There was an alternative prayer for redemption of plaintiff's dues if the Court could not give him *khas* possession. It appears that the mortgage bond in favour of the plaintiff was executed on the 2nd June 1902 and the due date was 7th June 1905. He filed a suit on the 7th November 1905 and obtained the mortgage decree on the 8th March 1907. He took out execution and purchased the property on the 11th May 1909 and obtained formal delivery of possession on the 10th September 1910 when he was resisted by defendant No. 5 on the allegation that the property in suit had been sold to him by a sale-deed executed on the 11th August 1906 though this document was not registered until the 22nd November 1906; hence the plaintiff filed the present suit on the 3rd March 1913 for ejectment of defendant No. 5 and for recovery of possession and mesne profits as stated above. Both the Trial Court and the lower Appellate Court have given a decree for possession with mesne profits to the plaintiff; hence defendant No. 5 files this second appeal.

The learned Vakil appearing on behalf of the appellant has firstly contended that the suit for possession was not maintainable. He submits that the plaintiff is not entitled to a decree for possession but only to a decree for sale and he relies on the cases of *Balli Singh* v. *Bindeswari Tewari* (1), *Bargu Lal Singh* v. *Gobind Rai* (2), *Madan Lal* v. *Bhagwan Das* (3) and I now proceed to consider whether these decisions are of any help to him. The case of *Balli Singh* v. *Bindeswari Tewari* (1) is clearly distinguishable On the other hand, the present case is fully covered by the supposititious case considered by their Lordships at page 136. Their Lordships observed as follows:—"*A.* makes a simple mortgage in favour of *B.* and subsequently a similar mortgage in favour of *C*. *B.* sues *A.* on the mortgage without impleading *C*. He obtains a decree, brings the property to sale and purchases it himself. By that purchase he acquires the right to possession of the mortgage property which up to that time had been enjoyed by the mortgagor. *C.* not having been made a party to the suit brought by *B.* had no opportunity of redeeming *B.*

(1) 35 Ind. Cas. 532; 1 P. L. J. 133 at p. 136; 2 P. L. W. 432.

(2) 19 A. 541; A. W. N. (1897) 154; 9 Ind. Dec. (N. S.) 350.

(3) 21 A. 235 (F. B.); A. W. N. (1899) 41; 9 Ind. Dec. (N. S.) 859.

and in a subsequent suit brought by *B.* to enforce possession of the property, *C.* must be given an opportunity of redeeming *B.*, but if he fails to redeem, *B.* will have a decree for possession of the property and not for sale of the property. The reason why he gets a decree for possession of the property is that at the date of the suit he was entitled to possession of the property." These are exactly the facts of the present case. In the present case, the District Judge directed that defendant No. 5 should pay the mortgage money with costs and interest within six months from the date of the decree and, on failure to do so, the plaintiff was to get possession of the disputed properties from the defendant. It is, however, urged by the learned Vakil appearing on behalf of the appellant that the plaintiff was, at the date of his mortgage-suit, not entitled to possession of the property against all the world inasmuch as the property had already been sold to the defendant No. 5 on the 11th August 1906. It must be remembered that this sale-deed, though executed on the 11th August 1906, that is, prior to the date of the institution of the plaintiff's mortgage-suit, was not registered until the 22nd November 1906, and this raises an important question whether at the date of the suit plaintiff was entitled to possession against the defendant or not. Section 54 of the Transfer of Property Act lays down that "sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised. Such transfer in the case of tangible immoveable property of the value of one hundred rupees or upwards or in the case of a reversion or other intangible thing, can be made only by aregistered instrument." and it has been laid down in *Papireddi* v. *Narasareddi* (4) and *Sheo Narain Singh* v. *Darbari Mahton* (5) that the acquisition of ownership can only be made by a registered conveyance, and that the title does not pass until the sale deed has been registered.

The learned Govenment Pleader, however, submits that, under section 47 of the Registration Act, the sale-deed executed on the 11th August 1906 became operative from that date on registration, that is, the ownership of the property vested in the vendee, defendant No. 5, on the 11th August 1906, immediately after the registration of the document on the 22nd November 1906. That the ownership will be deemed to be vested in the vendee from the 11th August 1906 after the registration on the 22nd November cannot be questioned, but, at the same time, it is obvious that on the 7th November 1906 when the suit of the plaintiff was filed the ownership had not legally vested in defendant No. 5. If the sale-deed of defendant No. 5 had been registered on the 11th August 1906, the ownership of the property would have vested in him on that date, and the plaintiff's case, on the authority of *Balli Singh* v. *Bindeswari Tewari* (1), could not have succeeded. That is the important fact which makes the present case distinguishable from the facts of that case and also the cases reported as *Hargu Lal Singh* v. *Gobind Rai* (2) and *Madan Lal* v. *Bhagwan Das* (3). The view that I have taken is not only supported by the suppositious case formulated in *Balli Singh* v. *Bindeswari Tewari* (1), but is also fully supported by the case in *Ram Prasad* v. *Bhikari Das* (6), where the earlier Allahabad cases referred to above were fully considered. This contention of the learned Vakil for the appellant must, therefore, be overruled.

The next ground urged is that the suit was barred by limitation. It is found by both the Courts below that, when the plaintiff's suit was filed, the plaintiff had no notice whatsoever of the transfer in favour of the defendant No. 5, and both have found that the plaintiff was apprised of the sale-deed on the 9th September 1910 when the plaintiff went to take delivery of possession, and the suit having been filed within three years from that date is clearly, therefore, within time. This ground therefore, must also fail. These are the two grounds upon which the decrees of the Courts below were assailed, and as they fail, I would dismiss this appeal with costs.

COUTTS, J.—I agree.

Appeal dismissed.

(4) 16 M. 464; 5 Ind. Dec. (N. S.) 1030.
(5) 2 C. W. N. 207.
(6) 26 A. 464; A. W. N. (1904) 108.

GAJINDRA SINGH *v.* AKAL KORR.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 736 OF 1919.

August 19, 920.

Present:—Mr. Justice Jwala Prasad.

Babu GAJINDRA SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat AKAL KOER, WIDOW OF JAI SINGH, AND ANOTHER—DEFENDANTS—RESPONDENTS.

Declaration of title, suit for—Plaintiff in possession—Defendant having no title—Suit, whether maintainable—Non-joinder of parties, effect of—Civil Procedure Code (Act V of 1908), O. I, rr. 9, 10.

A person who is in possession of land is entitled to maintain a suit for declaration of title and confirmation of possession as against a person who has neither title nor possession, and such a suit is not liable to dismissal merely because a third person who is alleged to be interested in the land has not been impleaded as a party. [p. 296, col. 1.]

Appeal from a decision of the District Judge, Muzafferpur, dated the 24th May 1919, reversing a decision of the Munsif, dated the 31st October 1918.

Mr. *Baikuntha Nath Mitter*, for the Appellants.

Messrs. *Kulwant Sahay* and *Nirsu Narain Sinha*, for the Respondents.

JUDGMENT.—This appeal arises out of a decision of the District Judge of Muzafferpur, dated the 24th May 1919, reversing that of the Munsif, dated the 31st October 1918, and dismissing the suit of the plaintiffs.

The plaintiff No. 2 is the son of plaintiff No 1. The plaintiffs brought the suit for a declaration that the property in suit is Kashat of the joint family of the plaintiffs acquired by purchase under a *kabala*, dated the 10th March 1890 and that no right had accrued to the defendants in respect thereof. They also prayed for confirmation of possession with respect to the property in suit and, in the alternative, for recovery of the same in case they were found to be out of possession.

The *kabala* referred to above was executed on the 10th March 1890 by Mr. Zira Lal in the name of plaintiff No. 1, Gajindar Singh.

The facts alleged in the plaint, on the basis of which the plaintiffs' reliefs were founded, are, that the plaintiffs' father Bal Narain Singh purchased the property on behalf of the joint family of the plaintiffs in the name of plaintiff No. 1; that out of the consideration-money mentioned in the deed, prior debts over the property due to one Thakur Sahu, Jai Singh, husband of defendant No. 1, and others were satisfied and mortgages and the documents relating to the prior debts were recovered and were in possession of the plaintiffs; that since the date of the execution of the said *kabala* the property in suit has been in possession and occupation of the joint family of the plaintiffs; that at the Cadastral, and at the preliminary stage of the Revisional, Survey the name of the wife of plaintiff No. 1, Phekan Kuer, was recorded, but on an objection under section 103 (*a*) of the Bengal Tenancy Act the name of the defendant No. 1 was directed to be entered in the Survey Record of Rights in respect of the land in suit.

Defendant No. 1, Akal Koer, is the wife of Jadu Singh and mother of the plaintiff's wife, Phekan Koer, defendant No. 2, Niras Koer, is the sister of Phekan Koer.

Their defence was that the land in suit was purchased by Jadu Singh, husband of defendant No. 1, from Zira Lal in the name of plaintiff No. 1; that the plaintiff No. 1 got possession of the sale-deed by underhand means through his wife; that the defendants have all along been in possession of the lands, and that the plaintiffs had neither any concern with the land nor were they in possession thereof.

The Munsif held that the land in suit was purchased by Bal Narain for the joint family out of the joint family fund in the name of the plaintiff No. 1. He also held that the plaintiffs were all along in possession of the property since the execution of the sale-deed in question and the defendants were never in possession of the property. Accordingly, he decreed the plaintiff's suit, declared their title to the property and confirmed their possession.

On appeal by the defendants, the learned Judge discussed the evidence on both sides and preferred that of the plaintiffs. He agreed with the finding of the Munsif "that the documentary evidence.....was much in favour of the plaintiff." He was further of opinion that "the oral evidence favoured the side of the plaintiffs and showed that the latter's family has been in possession of the land throughout."

The learned Judge has based his conclusions upon the possession of the sale-deed with the plaintiff, the endorsements on the prior mortgage-bonds showing that the money was paid by plaintiff No. 1, the purchaser of the land, and the recent rent-receipts produced by the plaintiff and the entry of Phekan Koer's name in the Survey Record of Rights and the landlord's *sherishta*. These the learned Judge calls the strongest evidence on the plaintiff's side and in this he is evidently right. The aforesaid conclusions arrived at by the learned Judge amount to findings of title and possession in favour of the plaintiffs and against the defendants

The plaintiff was evidently, upon the findings, entitled to the reliefs claimed by him. But the learned Judge says "unfortunately for the success of the plaintiff's case, however, he has made in his deposition a completely new case as compared with the case set forth in the plaint." For this he has referred to his statement in cross-examination: "My wife purchased the disputed land with her private money" and says that as was the plaintiff's case in the plaint "the plaintiffs have to show that the land is their joint family property..... and consequently they are not entitled to the declaration to the effect asked for with consequential relief of confirmation of possession." In this view the learned Judge is wrong.

The plaintiffs claimed two reliefs, *viz.*, (i) for a declaration of their title based upon the sale-deed in question, and (2) for confirmation of possession. The learned Judge has evidently agreed with the finding of the Munsif that the plaintiffs were "all along in possession of the property since the execution of the sale-deed (Exhibit 1)", and upon this finding the plaintiffs are entitled to a decree for confirmation of their possession in accordance with the decision in *Dehu Ghunya* v. *Srimati Barabihira Debi* (1) by Chamier, C. J., who held that in a case of this kind, namely, where declarations as to the title and for confirmation or recovery of possession are claimed "it was sufficient for the plaintiffs "to prove that they had held the lands for many years." The defendants have been held to have no title to or possession over the property in suit. They cannot, therefore, be permitted to challenge the possession of the plaintiffs, and, in order to safeguard against any trespass upon their possession, the plaintiffs are entitled to have their possession confirmed.

In the second place, assuming that the statement in the deposition of the plaintiff was true, that the land was purchased for the benefit of Phekan Koer and the sale-deed was executed in her husband's name, the plaintiff No. 1, as held by the learned Judge, Phekan Koer died during the Revisional Survey Proceedings in 1900 and the plaintiffs continued to be in possession of the property. The plaintiff No. 1 being her husband and plaintiff No. 2 being her son, are heirs and as such have succeeded to the property. As held by Mullick, J., in the case of *Bankey Behary Lal* v. *Bhagwandas Marwari* (2), the principle of estoppel by reason of inconsistent positions does not apply to a case of this kind and the plaintiff is entitled to apply the law to the facts established at the trial, even though he failed to prove what he came to prove. The case laid by the plaintiffs in the plaint was that they have title to the property under the sale deed as a joint family property of theirs and acquired by the father of plaintiff No. 1. If, upon the evidence, it is established that the plaintiffs have title to the land upon the death of Phekan Koer, the plaintiffs, upon the facts thus established in evidence, are entitled to the reliefs prayed for by them. It may be mentioned that the plaintiffs' case in the plaint was that, after the death of the father of plaintiff No. 1, they are in possession and occupation of the property. In the evidence the plaintiff has maintained it throughout that he has been in possession ever since the execution of the bond. In his examination-in-chief he clearly says: "The purchase was made in 1297 F. S. and I am in possession since that time. It was purchased in my name and in the Cadastral Survey my wife's name was entered and her name was registered in the *malik's serishta*." Again, he says that, "at the time of attestation my son's name was recorded in Survey as my wife died after *kanapuri*.....I am still in possession of the

(1) 38 Ind. Cas. 543; 2 P. L. J. 15.

(2) 34 Ind. Cas. 897.

disputed land." In the cross-examination he has maintained his possession and I do not think that the solitary statement "my wife purchased the disputed land with her private money," referred to in the judgment of the Court below, will make the case of the plaintiff different from what his case has been on the question of possession. The learned Judge, to my mind, has misconceived the passage quoted by it from the plaintiff's evidence and has violated the rule of construction that the evidence on the point should be judged from all the statements of the plaintiff taken as a whole, and not by a stray statement like the one that he has selected to base his conclusions on.

The relief claimed in the plaint is for a declaration of the right of the joint family of the plaintiffs Nos. 1 and 2, father and son. After the death of Phekan Koer the property did become the joint family property of both the plaintiffs. The fact that in the plaint the property was said to have been purchased out of the money of the father Balnarain, whereas in the deposition it is stated to have been purchased by the wife of plaintiff No. 1 out of her father's money, does not materially alter the case. So long as the property devolved upon the plaintiffs, whether by succession from the father or wife of plaintiff No. 1, it does not matter where the purchase-money came from. The Munsif has taken the same view as I do and has discussed it in detail in the judgment and has held that the statement in the deposition referred to by the Judge does not invalidate the claim for a declaration of title prayed for by the plaintiffs.

The learned Judge would also dismiss the plaintiff's case on account of defect of parties, on the ground that the plaintiff No. 1 admitted that he had another brother who was joint with him. Upon the view of the Judge, already referred to, that the purchase of the land in question was made out of the private money of Phekan Koer (wife of plaintiff No. 1) and that she was the real purchaser, the brother of plaintiff No. 1 had no interest in the property and was, therefore, not a necessary party. Even if he were joint with plaintiff No. 1 he did not inherit the property after the death of Phekan Koer. The property inherited by plaintiff No. 1 from his wife would be his self-acquired property under the Hindu Law. The learned Judge was, therefore, not right in throwing out the plaintiffs' case upon the finding of the Munsif or upon the statement of the plaintiff No. 1 in his cross examination when he had rejected that case. If, on the other hand, the view taken by the Munsif that the property was purchased out of the joint family fund by Bal Narain, father of plaintiff No. 1, for the benefit of the joint family of the plaintiffs, be accepted, then also the suit cannot be dismissed for defect of parties. The Munsif himself refused to dismiss the suit on this technical ground and, as a matter of fact, decreed the plaintiff's suit. In this he was perfectly right, for Order I, rule 9 distinctly lays down that, "No suit shall be defeated by reason of the misjoinder or non-joinder of parties." If the learned Judge on appeal by the defendants was of opinion, which evidently would be inconsistent with his finding that the property was of the wife of plaintiff No. 1, that the suit could not be decided without Jokhu Singh being a party to it, he had full power to bring him on the record under Order I, rule 10, clause (2). Under this rule the Court may at any stage of the proceedings of its own motion make any one a party whose presence the Court may consider to be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. In the present case the claim of the plaintiffs would have been well within time even if Jokhu Singh was brought on the record on the 24th May 1919 when the learned District Judge passed his decision, and will be still in time if he is now brought on the record, for the plaintiffs have been held to be in possession all along ever since the execution of the sale-deed, the Settlement Record also had recorded the name of Phekan Koer as being in possession. I do not think that the cases relied upon by the Courts below, *Romesh Chandra Mandal* v. *Bhuyan Bhaskar Mahapatra* (3) and *Bhagela Kuer* v. *Abdul Rahman* (4), apply to the present case. The latter related to the mortgage-suit in which, under Order XXXIV, rule 1 of the Code of Civil Procedure,

(3) 39 Ind. Cas. 225; 1 P. L. W. 346.
(4) 40 Ind. Cas. 79; 1 P. L. J. 472n.

every person interested in the property must be made a party. It is conceded that there is no similar provision in the Code of Civil Procedure applying to other kinds of suits. The point did not directly arise in the case of *Romesh Chandra Mandal* v. *Bhuyan Bhaskar Mahapatra* (3) inasmuch as it was held in that case that there was no defect of party and the placitum in the report has given undue weight to the solitary passage occurring in the body of the judgment.

Now, as to whether the plaintiffs were bound to join Jokhu Singh as a party to the suit. He never in the plaint or anywhere admitted that he had any interest in the property or that he was in possession of the same. Unless this was the plaintiffs' case, they were not bound to make him party to the suit. Order I, rule 1, is clear on the point that, in order to be joined as a plaintiff, there must be a right to relief in respect of or arising out of the same act or transaction whether jointly or severally. If the plaintiff's case is that Jokhu Singh, his brother, had no right to relief in respect of the property in suit, he was not a necessary party. Under rule 3 of Order I, a person against whom any right to relief in respect of or arising out of the same act or transaction is alleged to exist, may be joined as a defendant. Jokhu Singh was not said to have interfered with the plaintiffs' possession in any way nor to have any interest in the property. He was therefore, not a necessary party either as a plaintiff or as a defendant according to the case of the plaintiffs.

There is no express provision in the Code of Civil Procedure as to who should be considered necessary parties or that every person interested in the property must necessarily be made a party. It is said, however, that the case must be governed by the principle in Order II, rule 1, where it is said that, "Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them." That rule, obviously, does not deal with the persons to be made parties, but only requires that all matters in dispute between the parties to the suit must be comprised in it so far as possible in order that they may be disposed of in the same suit. The principle upon which the parties are to be made has been discussed in the case of *Jogendra Nath Singh* v. *Secretary of State for India* (5). That decision is based upon the following passage in Story's Equity Pleadings:—"It is not possible to formulate precise rules of universal application to the joinder of parties, and the only principle which can be safely adopted is that all persons materially interested in the suit or in the subject of the suit should be made parties..... In each case it must be determined whether a particular person is or is not a necessary party, *i. e.*, necessary for the determination of the question raised by the plaintiff and for the grant of the relief he claims. It may be laid down, however, as a general rule, that a person who is only indirectly or remotely interested is not a necessary party."

According to the plaint, the only persons interested were the plaintiffs Nos. 1 and 2, as the property was purchased by the plaintiffs' father for the joint family of the plaintiffs and hence, upon the plaint, Jokhu Singh was not a necessary party. The plaintiff No. 1 made the following statement in cross-examination: "Jokhu Singh, my brother, is separate from me since 15 or 16 years. Our lands are still *ijmal* and we are separate in mess only. My father was the *karta* of the family so long as he was alive." Upon this evidence the Munsif held that Jokhu Singh was a necessary party to the suit as he has got a share in the land, but the aforesaid statement does not necessarily lead to this conclusion, for, according to it, Jokhu Singh has been separate for the last 15 or 16 years. They may have some land in *ijmal*, but the land in dispute which is based upon the purchase in the name of Phekan Koer, has not been clearly specified to be held joint with Jokhu Singh. In order to apply the bar of defect of parties, the defendants would have pushed the cross-examination further and made out a clear case that Jokhu Singh had an interest in the land in suit and was holding it jointly with the plaintiffs in spite of his separation from the plaintiffs' family 15 or 16 years ago. No other evidence has been

(5) 17 Ind. Cas. 921; 17 C. W. N. 835 at p. 838; 16 C. L. J. 385.

referred to by the Munsif or the learned Judge for the finding that Jokhu Singh had a share in the land and was jointly interested in it, and the evidence of the plaintiff referred to above does not lead to this conclusion. The finding is, therefore, illegal.

Accepting, for the sake of argument, the finding to be valid, I think that "the matter in controversy so far as regards the rights and interests of the parties actually before it (Court) could be well dealt with and decided" within the terms of Order I, rule 9. Jokhu Singh, not being a party to the suit, is not affected by the decision of the case if he has any interest in the property in dispute. The defendants having neither title nor possession cannot be permitted to defeat the claim of the plaintiffs for a declaration of title and confirmation of possession. So far as the parties to the suit are concerned, the absence of Jokhu Singh does not affect the determination of the rights of the parties actually before the Court, and the Munsif apparently did not consider it necessary that he should be before the Court in order to enable him "to effectually and completely adjudicate upon and settle all questions involved in the suit," which is a condition precedent for insisting upon bringing Jokhu Singh upon the record, as laid down by Order I, rule 10 (2). I agree with the Munsif that the plaintiff's suit cannot be thrown out because Jokhu Singh is not a party to it.

In the result, the decision of the learned District Judge is set aside and that of the Munsif is restored. The appeal is decreed and the plaintiffs' suit is decreed with costs throughout.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 109 OF 1919.

May 14, 1920.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

Musammat AZIZ-UN-NISSA BIBI—APPLICANT—OBJECTOR—APPELLANT

versus

MR. O. M. CHIENE, OFFICIAL RECEIVER OF MUHAMMAD KHALIL AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Muhammadan Law—Will—Bequest to heir—Consent of other heirs—Bequest, validity of—Heirs consenting, insolvents, effect of—Provincial Insolvency Act (III of 1907), s. 16 (4).

Under the Muhammadan Law a bequest in favour of an heir to which the remaining heirs consent after the death of the testator is a valid bequest, and such consent does not operate as a transfer by the consenting heirs of a right which has vested in them, the legatee takes from the testator. The fact that the consenting heirs are insolvent at the time of giving their consent would not affect the validity of the bequest. [p. 297, col. 2.]

First appeal from the order of the District Judge, Allahabad, dated the 14th May 1919.

Mr. *Iqbal Ahmad*, for the Appellant,
Mr. *S. Raza Ali*, for the Respondents.

JUDGMENT.—This is an appeal in an insolvency matter. The insolvents are father and son, Muhammad Murtaza and Muhammad Khalil. It is sufficient to say that they were declared insolvents in separate proceedings. Muhammad Murtaza's wife, Hajira Bibi, was possessed of some immoveable property. She died on the 1st of November 1918. The Receiver has taken possession, we are told, of certain shares in Mauza Serai Abdul Malik as having devolved upon the two insolvents by inheritance from this lady. There were one or two other properties of lesser consequence involved when the case was heard in the Court below, but, practically, we are concerned only with the shares in the village above referred to. The Receiver's action is challenged by *Musammat* Aziz-un-nissa Bibi, the daughter of *Musammat* Hajira Bibi, and, therefore, the daughter of one insolvent and sister of the other. She says that the whole of the properties in question have passed to her under a Will executed by her mother on the 27th of October 1918, that is to say,

four days before her death. She further claims that, in any case, the whole of *Mussammat* Hajira Bibi's share in *Mahal* Bisheshar Dayal, one of the two *mahals* in question in the said village, is subject to a mortgage charge of Rs. 2,650 in her favour. The learned District Judge has found that there is no valid mortgage in favour of the objector. He has found that the deed of October the 27th, 1918, is proved but that it is on its terms a deed of gift *inter vivos* and not a Will; if a deed of gift, it is invalid for want of registration and delivery of possession. The findings of the District Judge on each of these points are challenged before us in appeal. The document is curiously drafted and it is not altogether easy to decide the meaning which ought to be attached to its various parts. As regards the property in *Mahal* Bisheshar Dayal we are clearly of opinion that the District Judge was right. The document recites the fact of a mortgage in favour of *Musammat* Aziz-un-nissa Bibi and purports to convey by gift the equity of redemption. It would undoubtedly operate, if at all, as a conveyance by way of gift, taking effect immediately, of whatever interest *Musammat* Jajira Bibi possessed in this *mahal*. We think, therefore, that nothing passed to *Musammat* Aziz-un-nissa Bibi in virtue of this part of the document and whatever rights her mother possessed in this *mahal* on the 1st of November 1918 have devolved upon her heirs, that is to say, one-fourth on her husband, Muhammad Murtaza, one-half on her son, Muhammad Khalil, and one-fourth on her daughter, the appellant, Aziz-un-nissa Bibi. With regard to *Musammat* Hajira Bibi's interests in the other *mahal* in the same village, we think we must interpret the document as testamentary in its character. Unless, therefore, it can be challenged on some other ground it would operate to pass this property to the legatee from the date of the testator's death. It has been contended before us that, considered as a testamentary disposition, the document is invalid, being a bequest to an heir. This point has been gone into on evidence and we are satisfied that it has been rightly found that the remaining heirs both consented beforehand to the making of the Will in these terms, and gave an effective consent after the death of the testatrix.

An ingenious argument has been pressed upon us on behalf of the respondent to the effect that the only consent which would make the bequest valid was the consent given after the death of the testatrix, and, inasmuch as the bequest was invalid until that consent was given, the provisions of section 16, clause 4, of the Insolvency Act came into operation and their shares under the Muhammadan Law vested in the two respondents, and therefore, in the Receiver, on the death of the widow, before the insolvents could possibly have validated the bequest by their consent. We think this argument ought not to prevail. It is an established principle of Muhammadan Law that, once the consent of the heirs has been signified the legatee takes from the testator, and that the consent does not operate as a transfer by the heirs of a right which has, in the meantime, vested in them. There may be, perhaps, some conflict between this principle of Muhammadan Law and the strict wording of section 16 (4) of the Insolvency Act, but we think the principle of Muhammadan Law ought to be applied and that, in view of the consent signified by the heirs, we must take it that the property in the other *mahal* passed to *Musammat* Aziz-un-nissa Bibi as legatee of her mother on the death of that lady. There remains the question of the mortgage on the share in *Mahal* Bisheshar Dayal. We think it sufficient to say that the learned District Judge has fully discussed the very curious and involved proceedings leading up to the execution of the said mortgage-deed, and that, in our opinion, he has rightly inferred, on the evidence as a whole, that there was no genuine mortgage, that no consideration passed and that the whole transaction was never intended to be anything but a fictitious transfer, made probably by way of precaution in view of the insolvency of the male heirs. The result of this is that, we partly allow and partly dismiss the appeal. We think the appellant is right in saying that it ought to be made quite clear that she takes her own share under the Muhammadan Law in the property in both *Mahals* of Sarai Abdul Malik. The learned District Judge probably intended this, but the point should be put beyond doubt. Our order is that the Receiver is entitled to take free of any mortgage charge one half of the pro-

perty in *Mahal* Bisheshar Dayal as that of the insolvent, Muhammad Khalil, and another one-fourth as that of the insolvent Muhammad Murtaza Husain, but that the share in the other *mahal* must be released from the claim of the Receiver and left to *Musammat* Aziz-un-nissa Bibi as legatee under the Will. The appeal is therefore, partly decreed and partly dismissed. The parties should bear their own costs in this Court. The Receiver will be entitled to take his costs out of the estate.

Appeal partly allowed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 153 OF 1917.

July 22, 1920.

Present:—Mr. Justice Das and Mr. Justice Adami.

Musammat BIBI WAKILAN—PLAINTIFF—APPELLANT

versus

Babu DEO NANDAN PROSAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Survey map, evidentiary value of—Record of Rights, entry in, whether operates between landlords of neighbouring estates—Bengal Alluvion and Diluvion Act (IX of 1847), s. 3, scope of—"Changes", meaning of—Map prepared under section, value of.

Maps and Surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible as valuable evidence of the state of things at the time they were made. Therefore, unless such a map is shown to be wrong it may be properly judicially received in evidence as correct when made. [p. 299, col. 2.]

An entry in the Record of Rights operates in the same way between landlords of neighbouring estates as between landlord and tenant, or between landlords of the same estate or between tenant and tenant. [p. 300, col. 2.]

The word "changes" in section 3 of the Bengal Alluvion and Diluvion Act means, changes brought about by the action of the river or the sea, and not changes by the act of one proprietor in annexing to his estate the property belonging to another proprietor. [p. 304, col. 1.]

Therefore, a map prepared under section 3 of the Bengal Alluvion and Diluvion Act unlike a Revenue Survey map or a map prepared under the Bengal Survey Act, can never be said to be a map according to possession of the parties. [p. 304, col. 2.]

Appeal from a decision of the Subordinate Judge, Monghyr, dated the 14th April 1917.

Messrs. *Wasi Ahmad*, *C. C. Das*, Syed *Mohamad Tahir*, *Fakhr ud-Din*, and *Mohesh Chandra Dutta*, for the Appellant.

Messrs. *S. M. Mullick*, *Jagannath Prosad*, Rai *G. S. Prosad*, and *S. N. Bose*, for the Respondents.

JUDGMENT.

DAS, J.—This was an action by the appellant for declaration of her title to, and for recovery of possession of, approximately 436 *bighas* of land as appertaining to her *mouzah* Khutia. The suit was resisted by the defendants substantially on the ground that the land in dispute appertained not to the plaintiff's *mouzah* Khutia, but to their *mouzah* Tikarampore. The learned Subordinate Judge has held that the river Boor Gandak was the boundary between the two estates in 1856-66 and continued to be so until the lands were completely washed away in 1308 and 1309. Relying upon the report and the map prepared by a Pleader Commissioner, he has come to the conclusion that the bulk of the disputed land is situated south of the southern line of Boor Gandak as it existed from 1865-66 to 1900-01 and that it accordingly falls within *mouzah* Tikarampore. In that view, the learned Subordinate Judge has dismissed the plaintiff's claim to the bulk of the property claimed.

The plaintiff relies upon the Revenue Survey Map of 1832 and on the Cadastral Survey Map of 1903. The defendants, on the contrary, rely upon the Gangetic Survey Map of 1895-6. The Pleader Commissioner has shown that, according to the Revenue Survey Map and the Cadastral Survey Map, the bulk of the disputed land lies within the plaintiff's *mouzah*, but that, according to the Gangetic Survey Map, the bulk of the disputed land lies within the defendants' *mouzah*. Mr. Wasi Ahmed, who has argued the case on behalf of the plaintiff with conspicuous fairness and ability, has put forward the following propositions before us: first, that the Revenue Survey Map must prevail over the Gangetic Survey Map, secondly, that the Gangetic Survey Map cannot be relied upon on the question of boundaries between different *mouzahs*; third-

ly, that as there is a conflict between the two maps, the Cadastral Survey Map ought to be regarded as conclusive on the question, and, lastly, that, assuming that the Gangetic Survey Map is regarded as authentic on the question of boundaries, the Pleader Commissioner has not correctly shown the disputed land with reference to the *mouzahs* in question. Mr. Sushil Madhab Mullick, on behalf of the respondents, has argued first, that the map relied upon by the appellant as the Revenue Survey Map is not a Revenue Survey Map and has been found to be unreliable and ought not to be regarded by us; secondly, that, assuming it is reliable, all that it does show is that the plaintiff was in possession of the bulk of the disputed land in 1838 and not later than 1838; thirdly, that the Gangetic Survey Map was in substance a Revenue Survey Map and must be regarded as establishing that *mouzah* Tikarampore was bounded on the north by Boor Gandak; fourthly, that there is no real conflict between the Revenue Survey Map and the Gangetic Survey Map for, on the assumption that both are reliable, it is possible to hold that, between 1838 and 1865 the position has changed to the detriment of *mouzah* Kutia; fifthly, that, assuming that the Gangetic Survey Map correctly shows the position of Tikarampore as bounded on the north by Boor Gandak, it must be held, on the evidence of both sides, that the same position continued unchanged up to the diluvion in 1900-01 so as to confer a good and indefeasible title on the defendants by long possession, and, lastly, that the Cadastral Survey Map, in the circumstances of the case with which I shall have to deal, is not a reliable map, and even if it be reliable, it cannot operate so as to defeat the title of the respondents acquired by long possession from 1865 down to the date of the diluvion, especially as the plaintiff was ousted before she had time to acquire a title by adverse possession after the lands re-appeared and became fit for cultivation. On the question of the identification of the disputed land, Mr. Mullick relied on the report and the map of the Pleader Commissioner.

It will be necessary then to consider the reliability of each of the maps that has been put forward in this case. The plaintiff relies upon the Revenue Survey Map of 1838, and it is admitted that, according to that map, the bulk of the disputed land falls within the plaintiff's *mouzah*. It is of course a question of fact, in each case, whether lands were included in the Permanent Settlement, but, as the Judicial Committee has pointed out, 'Maps and Surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible as valuable evidence of the state of things at the time they are made," *Jagadindra Nath Roy* v. *Secretary of State* (1). Therefore, unless this map is shown to be wrong, it may, to adopt the words of the Judicial Committee in the same case, "be properly judicially received in evidence as correct, when made."

The respondents rely upon Exhibit A, a letter from the Deputy Surveyor General to the Collector of Monghyr, dated the 21st January 1859. In order to appreciate the importance of this letter it is necessary to remember that the Survey of 1838 was conducted by Lt. Egerton and embraced the whole of Parganna Pharkia, which in 1838 included not only the plaintiff's *mouzah* Kutia, but also *mouzah* Phulwaria, which is now known as Tikarampore. Tikarampore is now included within Parganna Monghyr, but in 1838 it formed part of Parganna Pharkia and was surveyed as such by Lt. Egerton. That survey was determined upon in order to demarcate certain tracts of waste land outside the ambit of the settled and cultivated villages to which, it was held, that the Permanent Settlement did not extend (*District Gazetteer Monghyr*, page 158). Although, therefore, for the special purpose for which the survey was determined upon, it was not necessary for Lt. Egerton to show the internal matters within each village, it was imperatively necessary for him to show the exterior boundaries of each village. In his letter of the 21st January 1859, the Deputy Surveyor General complained that many intervening *jheels* and rivers were not taken note of by Lt. Egerton, and he suggested that an entirely new survey should be made of this Parganna. It may be conceded that this survey had neither the accuracy nor the completeness of the subsequent Revenue Survey, but I do not think that it

(1) 30 C. 291 (P. C.); 30 I. A. 44; 7 C. W. N. 193 5 Bom. L. R. 1.

has ever been pointed out that, so far as the demarcation of the boundaries of the villages is concerned, it was in any way inaccurate and unreliable. That survey was confessedly confined to boundaries of villages and, so far as boundaries of villages are concerned, it has never been suggested that Lt. Egerton's survey failed to accomplish its object. There was a survey of the rest of the District by Captain Sherwill in 1845-47, but Pargannah Pharkiya was excluded from its operation, and, as we read in the *District Gazeteer*, the survey of Parganna Pharkiya was formally given the dignity of a Revenue Survey. In my judgment, the decision of the Revenue Authorities, not to carry out another Revenue Survey of Parganna Pharkiya, but to confer on the work of Lt. Egerton the title of Revenue Survey must be regarded as establishing the accuracy and correctness of the maps prepared by Lt. Egerton on the question of boundaries of villages. It must follow, therefore, that the predecessor-in-title of the plaintiff was in possession of the bulk of the disputed land in 1838.

Before discussing the Gangetic Survey Map of 1865, it will be convenient to deal with the Cadastral Survey of 1900-03. It is conceded that the result of the Cadastral Survey of 1900-03 is unfavourable to the defendants; but, it is argued, that neither the final entry in the Record of Rights recording the disputed land as in the possession of the plaintiff nor the Cadastral Survey Map showing the disputed land as part of the plaintiff's *mouzah* is admissible in evidence, inasmuch as the Bengal Tenancy Act deals with the relation of landlords and tenants, and not with disputes between rival proprietors. Such an argument overlooks the point that the first stage in the preparation of the Record of Rights is the Cadastral Survey and demarcation of boundaries, so that there may be no difficulty about the identification of lands. I may usefully refer to the unambiguous words employed in section 101 (1) of the Bengal Tenancy Act giving power to the Local Government to direct "that a *survey be made* and a Record of Rights be prepared, by a Revenue Officer, in respect of the lands in any local area..." A survey is, in my view, an indispensable necessity for the preparation of the Record of Rights, and I am by no means prepared to admit that the proprietor of one estate has nothing whatever to do with the preparation of the Record of Rights of another estate belonging to a neighbouring proprietor, since the preliminary survey must determine the boundary between the two estates. It is only when the exterior boundaries of the villages are ascertained that the preparation of the Record of Rights can be commenced, and, in my view, the rival proprietors incur a grave risk in not putting forward their evidence of possession at the time of the demarcation of the boundaries.

The result of the Cadastral Survey of 1900-03 can be looked at from two points of view; first, as bearing on the survey, and secondly, as bearing on the preparation of the Record of Rights. But from whichever point of view the matter is looked at, the result is equally favourable to the plaintiff. I will take the question of the Record of Rights first. Section 106 of the Act, in my view, makes it quite clear that an entry in the Record of Rights affecting the proprietor of a neighbouring estate is admissible in evidence against him and must be presumed to be correct until the contrary is shown. This section gives a remedy for the correction of an entry after the final publication of the Record of Rights and provides that a suit may be instituted before a Revenue Officer at any time within three months from the date of the certificate of the final publication of the Record of Rights for the decision of any dispute regarding any entry which a Revenue Officer has made in, or any omission which the said officer has made from, the record, whether such dispute be between landlord and tenant, or between *landlords* of the same or of *neighbouring* estates, or between tenant and tenant. I can hardly imagine the Legislature solemnly giving a right to the landlord of estate A. to bring a suit before the Revenue Officer against the landlord of estate B. regarding any entry made or omitted to be made in any record, unless the entry was intended to have some effect against the landlord of estate A., under the law. In my view, an entry in the Record of Rights operates in the same way between landlords of neighbouring estates as between landlord and tenant, or between landlords of the same estate or between tenant and tenant. Such an entry must accordingly

be presumed to be correct until it is shown by evidence to be incorrect.

When we look at the operation from the point of view of the actual survey made, the result is equally favourable to the plaintiff. Demarcation of boundaries and identification of lands constitute the first stage in a Cadastral Survey. Section 189 of the Act gives power to the Local Government to make rules, consistent with the Act, to regulate the procedure to be followed by Revenue Officers in the discharge of any duty imposed upon them by or under the Act, and by such rules, to confer upon any such officer, power to enter upon any land, and to survey, demarcate and make a map of the same, and any power exercisable by any officer under the Bengal Survey Act, 1875. It will be seen on a reference to the rules as they existed in 1900 that the Local Government conferred on the Revenue Officers all the powers mentioned in section 189 of the Act. They had, therefore, all the powers exercisable by any officer under the Bengal Survey Act, 1875, and had express power to enter upon any land, and to survey, demarcate and make a map of the same. In my view, the procedure for a survey, though directed to be made under the provisions of the Bengal Tenancy Act, must be that laid down in the Bengal Survey Act and it must be conducted with all the publicity and notice to all the parties concerned as laid down in that Act. It is, therefore, necessary to turn to the Bengal Tenancy Act to see what are the acts required to be done before a survey can be effected. Under section 5, the Collector, before entering on the lands, is required to publish a proclamation addressed to the occupants of the lands which are about to be surveyed and *of the conterminous lands*, and to all persons employed on or connected with the management of, or otherwise interested in, such lands calling upon them to attend during the demarcation and survey of the land, for the purpose of pointing out the boundaries. Under section 6, the Collector may enter upon the land after the issue of the proclamation, and do all things and make all inquiries necessary for effecting the survey and demarcation of the boundaries thereof After the actual survey and on receipt in the Collector's office of the maps or papers showing any boundaries which have been demarcated, the Collector has, under section 12, to post notification informing all persons concerned that the maps and papers relating to the boundaries in the village or tract specified are open to inspection, and requiring any person who may have any objection to prefer, to prefer such objection within a specified time. It is obvious that very great care is taken to correctly demarcate the boundaries as between different villages, and it is not lightly that we ought to set aside the work done with such publicity and notice to persons interested.

As regards the procedure for demarcation, the rules framed under section 189, Bengal Tenancy Act, as they existed at the time of the survey, provided as follows:—

"4 (*a*). In the demarcation of village boundaries the area contained within the exterior boundaries of the village maps of the Revenue Survey shall be preserved as far as possible as the unit of survey and record.

"(*b*). Where there is no dispute the boundary of the village according to possession shall be followed, and, where that boundary does not differ substantially from the boundary of the Revenue Survey, the latter will not be separately shown in the map.

"(*c*). Where there is considerable difference between the boundary according to the Revenue Survey Map and the existing boundary of the village as ascertained by the Revenue Officer, the latter shall be followed for the purposes of map and record ; but the boundary of the Revenue Survey Map shall also be marked on the new village map.

"(*d*). Where there is dispute as to village boundaries, the Revenue Officer shall decide the dispute under the Bengal Tenancy Act".

In this case there was no dispute before the survey authorities as to the boundary between the two villages with which we are concerned. We are accordingly entitled to presume that boundary according to possession was followed, and, as that boundary did not differ from the boundary of the Revenue Survey, as the Commissioner in this case has shown, the latter was not separately shown in the map. In my view, great

weight must attach to the Cadastral Survey map, not only because the work in connection with the map was done with due publicity and full notice to the persons interested, but also because that map has received strong support and corroboration from the Revenue Survy Map.

It was argued, however, by Mr. Sushil Madhab Mullick that no importance ought to be attached to the Cadastral Survey Map as the disputed land was admittedly under water at the time of the Cadastral Survey. The Cadastral Survey Map shows that Plot No. 1286 was then under water, but that the plot to the south of Plot No. 1286, namely, Plot No. 1287, as well as the plots to the north and east of Plot No. 1286 were dry lands when the map was prepared. Now the important plot is undoutedly Plot No. 1287 which lies to the north of Tikarampore as shown in the Cadastral Survey Map.

If the defendants' case is true, namely, that they were in possession of the disputed land at the time of the diluvion, they would undoubtedly have claimed Plot No. 1287 as appertaining to their *mouzah* Tikarampore, and, if they had done so, some argument might have been founded on the undoubted fact that Plot No 1286 was then under water and was difficult of identification. But, so far as Plot No. 1287 is concerned, there was no difficulty in identifying it as part of Tikarampore. Their failure to do so suggests an inference that they were not in possession of it as part of Tikarampore. If they thought that Plot No. 1287 was part of Kutia, they must have thought that Plot No. 1286, which was north of Plot No. 1287, and, therefore, further away from Tikarampore was part of Kutia.

I am, therefore, not inclined to attach much weight to the fact that a portion of the disputed land was undoubtedly under water at the time of the survey operations. I do not for a moment believe that landlords do not keep careful note of the fact that there land has gone under water. In the course of survey operations, survey authorities have frequently to consider questions of possession in connection with land covered with water; and if, as is suggested, it is impossible for a landlord to identify land covered with water as his, the law, I apprehend, would have imposed a restriction on the power of the survey authorities to survey such land. In any event, the northern, the southern and the eastern portions of the disputed land were all dry land at the time of the survey. If the survey authorities were justified in showing these portions as appertaining to Kutia, they were equally justified in showing Plot No. 1286 as part of Kutia. In my judgment, the Cadastral Survey Map is important evidence in plaintiff's favour and ought not to be ignored.

The effect of accepting the Cadastral Survey Map is that the plaintiff shows that she was in possession of the disputed land not only in 1838, but also in 1903. In considering the reliability of the Gangetic Survey Map, we are bound to take into consideration the fact that the plaintiff has shown that she was in possession of the disputed land at two different points of time. It may be that the Court will not assume that the state of things existing in 1838 continued till 1865, but, as Lord Lindley once suggested, no Court can properly act on the assumption that in 1865 a state of things existed different from that in 1903. It must, I think, be assumed, until the contrary is shown, that the plaintiff continued to be in possession on between 1838 and 1903 and was in fact in possession in 1865.

And this brings me to the Gangetic Survey Map on which the defendants strongly rely. They say that it does not matter very much whether the plaintiff was in possession in 1838. According to them, the Gangetic Survey Map shows that the disputed land appertains to their *mauzah*, and, connecting that map with the oral evidence in the case, they argue that they have been in possession of the land in dispute from 1865 up to the diluvion. Their next branch of the argument is that, if they have satisfied the Court that the disputed land was demarcated as part of their *mauzah* in 1865 and that they have been in possession of the disputed land from 1865 up to the diluvion, the Cadastral Survey Map must be wrong. They then argue that, even if the Cadastral Survey Map be correct as showing the state of things in 1903, all that would follow from it would be that they were dispossessed by the plaintiff in 1903, and would have been entitled, in a properly constituted action, to recover possession of the property from the plaintiff, a course

which was rendered unnecessary by the fact that they recovered possession of the disputed property from the plaintiff.

It will be noticed that the success of the argument wholly depends on whether we can accept the Gangetic Survey Map as correctly showing the state of things in 1865. If we can, and if the Pleader Commissioner has rightly identified the disputed land as falling within the defendants' *mauzah*, then there is no escape from the conclusion that the defendants must succeed.

It is necessary, therefore, to consider the scope of the Act under which the Gangetic Survey Map was prepared. That Act is called the Bengal Alluvion and Diluvion Act (Act IX of 1847). To quote the words of the full title, it was "an Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction within the Provinces of Bengal, Bihar and Orissa". These words, to my mind, clearly indicate the scope of the Act. It was not an Act regarding the assessment of lands generally, but an Act regarding the assessment of lands "gained from the sea or from rivers by alluvion or dereliction". The Act had no operation where, by change of possession, lands forming part of one estate became annexed to another estate. There would be no question of a fresh assessment in such a case, and the Act would have no application to such a case.

The first section runs as follows:—"It is hereby enacted that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for investigations regarding the liability to assessment of lands gained from the sea or from rivers by alluvion or dereliction, or regarding the right of Government to the ownership thereof, shall, from the date of the passing of this Act, cease to have effect within the Provinces of Bengal, Bihar and Orissa.....and that no measures shall hereafter be taken for the assessment of such lands, or for the assertion of the right of Government to the ownership thereof except under the provisions of this Act". Wilson, J, in his elaborate judgment in *Fahamidannissa Begum* v. *Secretary of State* (2), has shown that prior to the passing of this Act, there existed a set of complicated rules distributed in various regulations for the determination of two questions, first, the question of the liability of lands gained by alluvion or dereliction to assessment, and, secondly, the question of the actual assessment. In his view, a view which was upheld by the Judicial Committee in the same case, see *Secretary of State* v. *Fahamidannissa Begum* (3), section 1 of the Act repealed such parts of the Regulations as prescribed rules of procedure for investigation regarding the liability to assessment with a view to provide a convenient and a simple procedure for the determination of such liability. The new procedure provided by the Act is laid down in sections 3, 5 and 6. Section 3 runs as follows:—"Within the said Provinces it shall be lawful for the Government of Bengal, in all districts or parts of districts of which a Revenue Survey may have been or may hereafter be completed and approved by Government, to direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and to cause new maps to be made according to such new survey". It is this section under which the Gangetic Survey Map was prepared. Now, it seems to me that there are two things which are perfectly clear from this section; first, that the previous Revenue Survey Map must be taken as the basis for deciding whether there has been any gain by alluvion or dereliction, and, secondly, that the "changes" referred to in the section are changes by alluvion or dereliction, and not changes by possession. To take the second point first; it seems to me that this is a construction which must be adopted when once the scope and the object of the Act are understood. If it was the object of the Act to bring into existence a convenient procedure for determining if the land in question is liable to assessment, not by reason of the fact that possession in respect of it has changed, but by reason of the

(2) 14 C. 67 (F. B.); 7 Ind. Dec. (N. s.) 46.

(3) 17 C. 590 (P. C.); 17 I. A. 40; 5 Sar. P. C. J. 391; 8 Ind. Dec. (N. s.) 933.

fact that it is land gained from the sea or from rivers by alluvion or dereliction, it must follow that the changes which have to be ascertained and shown on the new map are changes, not by possession, but by the action of the river or the sea in either throwing up and annexing land to permanently settled estates or in carrying away by encroachments portion of land from such estates. In other words, where the proprietor of estate A. dispossesses the proprietor of estates B. of 100 *bighas* of land, and there is consequently a change brought about by such act of dispossession, that is not a change which the survey under Act IX of 1847 will take note of, the reason being, of course that such land, not being land gained from the sea or from rivers by alluvion or dereliction, is not liable to assessment under that Act. But where, by the action of the river or the sea, 100 *bighas* of land are thrown up and annexed to estate A. and such lands may properly be called lands gained from the sea or from rivers by alluvion or dereliction, and a change takes place which may be noticed by comparison with the previous Revenue Survey Map, that is a change which the survey under Act IX of 1847 will take note of in the map to be prepared under the Act. That this is so will be made clear by reference to the antecedent legislation. I will refer to one of them, Regulation II of 1825. The preamble of that Regulation speaks of the changes which take place in the channels of the principal rivers, in consequence whereof *churs* or small islands are thrown up by alluvion and large portions of land are carried away by an encroachment of the river. In my view, having regard to the object and the scope of Act IX of 1847, the word "changes" must mean changes brought about by the action of the river or the sea, and not changes by the act of one proprietor in annexing to his estate the property belonging to another proprietor.

Also, it must be remembered that the survey under Act IX of 1847 must take the previous Revenue Survey as its starting point. The previous Revenue Survey must be accepted as correct and the changes brought about by the action of the river shown in relation to the previous Revenue Survey. It was not the object of the survey under Act IX of 1847 to supply the omissions or correct the mistakes of the Revenue Survey. There was no power in the survey under Act IX of 1847 to pronounce the previous Revenue Survey to be inaccurate or wrong. It is necessary to refer to this matter because Mr. Mallick at one stage of his argument suggested that the Government did not follow the advice of the Deputy Surveyor General to the effect that an entirely new survey should be made of Pergunnah Pharkiya, because they contemplated a survey under Act IX of 1847.

It must follow from what I have said that a map prepared under Act IX of 1847, unlike a Revenue Survey Map or a map prepared under the Bengal Survey Act, can never be said to be a map according to possession of the parties. Either that map must show the changes that may have taken place since the date of the last previous survey, that is to say, changes by alluvion or diluvion, so that the revenue authorities may either allow a deduction from the *jama* under section 5 or assess additional revenue under section 6, or it ought to correspond with the last previous Survey Map. If I have understood the scope of the Act, there is no power to show the changes by encroachment by one proprietor on the land belonging to a neighbouring proprietor.

It is necessary, therefore, to consider whether the "gain" to Tikarampore shown by the Gangetic Survey Map can be said to be a gain from the sea or from the rivers by alluvion or dereliction. If it can, then the map is established and it must operate to the prejudice of the plaintiff. If it cannot, then the map must go, though the defendants may still establish that they have acquired a title to the disputed land by long possession from 1865 to 1900.

In my opinion, there cannot be any possible doubt that the disputed land does not represent land gained from the sea or from rivers by alluvion or dereliction. According to the Commissioner, the bulk of the disputed land falls within the plaintiff's *mauzah* by the Revenue Survey Map, although it falls within the defendants' *mauzah* by the Gangetic Survey Map. In other words, there were no changes that were or could be ascertained sine

the date of the last previous survey. The last previous survey of Tikarampore or Foolwaria, as it was then called, showed that the Ganges was then flowing to the south of the *mauzah*. That map must have been taken as the starting point for the Gangetic Survey Map of 1865. The last mentioned map also shows that the Ganges was flowing to the south of the river. It is the case of both the parties that there was no change in the position of the river Ganges between 1865 and 1903. It must follow, therefore, that the disputed land does not in fact, and could not, in the opinion of the Survey authorities, represent land gained from the sea or from rivers by alluvion or dereliction. The result is that, in so far as it differs from the Revenue Survey Map, it cannot be accepted as reliable or accurate.

The rest of the evidence on behalf of the defendants consists of oral evidence, the measurement *khasra* of Tikarampore prepared in 1866, and of the *kistwar* map of Tikarampore. All these establish that the plaintiff was in possession of the land north of Boor Gandak, and that the tract of land south of Boor Gandak was treated as appertaining to Tikarampore. This evidence does not, in my view, solve the problem, since the question remains, where was Boor Gandak in 1866? The only answer is that the Gangetic Survey Map of 1865 shows where Boor Gandak was in 1865 and that the Commissioner has relaid Boor Gandak in his map which has been made part of the decree by the learned Subordinate Judge. But, if I am right in holding that the Gangetic Survey Map cannot be accepted as reliable, the Commissioner's map can contribute nothing to the solution of the question. My view is strengthened by the fact that the Cadastral Survey which was conducted with considerable publicity and due notice to all the parties concerned is completely in favour of the plaintiff.

The conclusion at which I have arrived is that the plaintiff has proved her title to such portion of the disputed land as has been found by the Commissioner to fall within her *mauzah* by the Revenue Survey Map and the Cadastral Survey Map, that is to say, 401 *bighas*, 15 *cottas* out of 436 *bighas*. My conclusion is based on the following reasons :—*first*, that the Cadastral Survey Map must be assumed to be correct until the contrary is shown ; *secondly*, that the Cadastral Survey operation having shown that the plaintiff was in possession of the disputed land in 1903, it cannot be assumed that a different state of things existed at any period prior to 1903 ; *thirdly*, that the presumption is all the stronger in favour of the plaintiff when we take note of the fact that she was undoubtedly in possession of the disputed land in 1838 as established by the Revenue Survey Map of that year ; *fourthly*, the object of the Gangetic Survey operation being to ascertain lands gained from the sea or from rivers by alluvion or dereliction, that map cannot operate to the prejudice of the plaintiff when, admittedly, the disputed land was not land gained from the sea or river by alluvion or dereliction ; *fifthly*, the object of the Gangetic Survey Map not being to show boundaries of villages by possession, that map cannot be relied on on a question of possession, especially when it is in conflict both with the Revenue Survey Map and the Cadastral Survey Map which agree with each other, and, *lastly*, the oral evidence in the case, the measurement *khasra* of Tikarampore and the *kistwar* map of Tikarampore depending, as they do, on the Gangetic Survey Map, are not sufficient to rebut the presumption of the correctness of the Cadastral Survey.

I would allow this appeal, set aside the judgment and decree of the Court of first instance, and give the plaintiff a decree for 401 *bighas*, 15 *cottas* out of the land claimed in this action with costs throughout.

In the view which I have taken of this case, I have not thought it necessary to deal with the Commissioner's map and report. I ought to mention, however, that there are strong grounds for rejecting his report in so far as he has proceeded on the maps supplied by the defendants. So far as his work, based on the Revenue Survey Map and the Cadastral Survey Map, is concerned, the result is in favour of the plaintiff and has not been challenged before us by the defendants. We have accordingly relied on it for coming to the conclusion that the plaintiff is entitled to

a decree in respect of 401 *bighas* 15 *cottas* out of the land claimed in this action.

ADAMI, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1813 OF 1918.
May 20, 1920.

Present :—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

ASHIRUDDIN MOHAMMAD—DEFENDANT—APPELLANT

versus

TAHER MOHAMMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Minor—Mother, whether can alienate property of minor.

Under the Muhammadan Law, a mother, as the *de facto* guardian of her minor daughter, cannot alienate the property of the minor. [p. 306, col. 2.]

Appeal against the decree of the Subordinate Judge, Dinajpur, dated the 16th of July 1918, modifying that of the Munsif, Thakurgaon, dated the 31st of March 1917.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Choudhuri* (with him Babu *Indu Bhusan Roy*), for the Appellant.—The defendants are appellants. This appeal arises out of a suit for arrears of rent. The plaintiffs purchased the property from the son, widow and daughters of one Rasul Bukhsh. There were five daughters two of whom assigned their interest to their brother. The other three were minors and their interest was sold by their mother, their natural guardian. The lower Court has held that the entire interest in the property passed to the plaintiffs. My first submission would be that the suit is not maintainable as the interest of the daughters was not affected where the mother as guardian sold their interest, under no circumstances can a Muhammadan mother sell the interest of a son or daughter. See *Imambandi* v. *Mutsaddi* (1). The three daughters have got 6 annas share. They are not even parties to the suit. The suit must be dismissed on this ground also. Refers to *Nepal Chandra Ghose* v. *Mohendra Nath Roy Chowdhury* (2).

Babu *Atul Chandra Gupta*, for the Respondents.—I submit, in view of the decision of the Judicial Committee, I cannot support the judgment of the lower Court. I pray that the case may be remanded to the lower Court to amend the plaint by adding the three minor daughters as parties to the suit.

JUDGMENT.—The plaintiffs-respondents purchased the property (in respect of which rent has been claimed against the appellant for the years 1319 to 1322 B. S.), from the son, the widow and the daughters of one Rasul Bukhsh. There were five daughters, two of whom had assigned their interest to their brother. The other three daughters were minors, and their interest was sold by the mother as their natural guardian.

The Court below has held that the plaintiff had acquired title to the entire property and was entitled to maintain the suit for rent.

But, having regard to the decision of the Judicial Committee in the case of *Imambandi* v. *Mutsaddi* (1), there is no doubt that the mother cannot alienate the property of her minor daughters as their *de facto* guardian. That being so, the plaintiff did not acquire the interest in the property to more than 10 annas; in other words, the plaintiff did not acquire the interest of the three minor daughters, which amount to six annas.

It is contended on behalf of the appellant that, in the absence of any evidence that there was separate realisation in respect of the 10-annas share, the plaintiff cannot maintain the suit.

This appears to be so, but the learned Pleader for the respondent has asked us to remand the case to the lower Court and that he may be permitted to amend the plaint by adding the three minor daughters as parties to the suit.

Having regard to the fact that the decision of the Judicial Committee came out after the present case had been decided by the lower Appellate Court, we think that the plaintiff should be permitted to amend the

(1) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L T. 330; 28 C. L. J. 409; 28 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R 622; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

(2) 31 C. 707.

plaint, as prayed. But this must be on terms.

We accordingly direct that, upon the plaintiff-respondent paying to the defendant-appellant costs of the lower Appellate Court and of this Court within a month of the arrival of this order in the Court of first instance, the plaintiff be permitted to amend the plaint by adding the three minor daughters of Rasul Bukhsh as parties to the suit, subject to any objection that may be legally raised by the defendant, and then the case be decided according to law.

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 387 OF 1919.

August 11, 1920.

Present:—Justice Sir Abdur Rahim, KT., and Mr. Justice Oldfield.

GOVINDA MALAVARAYAN—PLAINTIFF—APPELLANT

versus

VELU MAZHAVARAYAN AND OTHERS—DEFENDANTS NOS. 4, 5 AND 38—RESPONDENTS.

Madras Revenue Recovery Act (II of 1864), ss. 1, 2, 39—Arrears of revenue, sale for—Holder registered pattadar *and alienee from Hindu widow—Interest, nature of, which passes to purchaser.*

Where a registered *pattadar*, who is an alienee from a Hindu widow, makes default in payment of the revenue and the land is sold under the Madras Revenue Recovery Act, the interest which passes to the purchaser is the full proprietary interest and not merely the interest which the registered *pattadar* had. [p. 308, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge Kumbakonam, in Appeal Suit No. 107 of 1918, preferred against the decree of the Court of the District Munsif, Valangiman, in Original Suit No. 466 of 1916.

FACTS appear from the judgment.

Mr. *K. S. Jayarama Aiyar*, for the Appellant.—The person who made default, *viz.*, the registered *pattadar*, was only an alienee from a Hindu widow. The right, title and interest he had in the land was only the widow's life-estate. The revenue sale could have passed the full proprietary right in the land. Section 39 of the Act requires that the notice to be published should contain, among other things, a declaration of the lawful succession of a purchaser to all the rights and property of the former land-holder. The former land-holder in this case was the widow, and only the widow's interest must be deemed to have passed under the sale. See *Zamorin of Calicut* v. *Sitarama* (1), *Secretary of State* v. *Ashtamurthi* (2), and *Muthunaiyan* v. *Sinna Samavaiyan* (3).

Messrs. *S. Rangachariar* and *M. Balasubramanyan*, for the Respondents.—The term "land holder" as defined in section 1 of the Revenue Recovery Act includes full proprietary rights. It would be against the scheme of the Act to restrict the fact of sales under the Act to the rights of the registered *pattadar*. Under section 2 the revenue is a first charge on the land.

JUDGMENT.

ABDUR RAHIM, J.—The question argued before us relates to the effect of a sale for arrears of revenue under the Revenue Recovery Act. The registered *pattadar* was an alienee from a Hindu widow and he made default in payment of the revenue and thus brought about a sale. It is contended by the learned Vakil for the reversioner, the appellant before us, that what passed under the sale was merely the right, title and interest, and nothing more, of the alienee from the widow and that, inasmuch as that alienation was made for necessity, his estate was confined to the lifetime of the widow. In support of this contention, which is in violation of the whole scheme of the Revenue Recovery Act, section 39 is relied on. Section 39 says: "that in cases of revenue sales a notice shall be published giving the name of the purchaser and the date of purchase together with a declaration of the lawful succession of such purchaser to all the rights and property of the former land-holder in the said land." It is argued that the former land-holder here is the widow and, therefore, all that passed was the widow's interest. To my mind this is an absolutely untenable proposition. The revenue is made a first charge on the land (see section 2). Section 3 requires

(1) 7 M. 405; 2 Ind. Dec. (N. S.) 865.
(2) 13 M. 89; 4 Ind. Dec. (N. S.) 772.
(3) 28 M. 526; 15 M. L. J. 419.

the land-holder to pay the revenue on the dates fixed. The land-holder is defined in section 1 and the definition, to my mind, means full proprietor of the land. Even the very decision relied on by Mr. Jayarama Aiyar in *Zamorin of Calicut* v. *Sitarama* (1) makes it clear that what is sold is the proprietary interest in the land, and not merely what interest the registered *pattadar* actually had. The decision in another case, *Secretary of State* v. *Ashtamurthi* (2), was cited to us but that proceeded upon the peculiar rights of the *jenmi* in the Malabar Districts and on the practice on the part of the Collector to settle the lands to *cowldars*. The *ratio* of that decision seems to be that where the Collector has proceeded behind the back of the *jenmi* to settle with the *cowldar* and issued *patta* to him, if the *cowldar* makes default in payment of the revenue, the *jenmi* who had no notice of such settlement would be in no way bound by the engagement and was under no obligation to pay the revenue. According to the learned Judges, his interest in the land will not be affected. There is another case which has been cited before us, *Muthnaiyan* v. *Sinna Samavaiyan* (3); it is sufficient to say that the case has really no bearing on the question we have got to decide in this case. If there was any foundation for the contention of Mr. Jayarama Aiyar, we would have had many cases in which the same question was raised and some reported decision would be forthcoming. His contention, to my mind, is entirely untenable and unsustainable. The appeal is dismissed with costs.

OLDFIELD, J.—I agree.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1737 OF 1917.

August 5, 1919.

Present :—Mr. Justice N. R. Chatterjea, and Mr. Justice Duval.

KALI KANT CHAKERBUTTY—PLAINTIFF—APPELLANT

versus

RAJANI KANTA CHAKRAVARTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, construction of—Life-interest, forfeiture of—Remainderman, suit by, to recover estate—Limitation.

A testator by his Will gave certain properties to his mother and widow absolutely and further provided that—

"The tank and the homestead which belongs to me will remain in half and half share in possession of my mother and my wife but they will not have the power to sell the properties. On the death of both my heirs will get it. If in the meantime they go elsewhere by leaving my homestead they will not get this property."

Some time in 1867 the mother sold the property and left the house, the widow ratified the sale and also left the house. The mother died more than 12 years before the institution of the present suit, and the widow died in 1908. In 1915 plaintiff, the heir of the testator, instituted the present suit to recover possession of the property from the purchasers from the mother and widow :

Held, upon a proper construction of the Will, that it was the intention of the testator that the interest of the mother and widow should cease in the event of their death and also in the event of their leaving the family-house; that there was a forfeiture of the estate by the widow and the mother leaving the house in 1867, and that the suit having been brought more than 12 years from that time was barred by limitation. [p. 310, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Chittagong, dated the 12th of June 1917, affirming that of the Munsif, South Raozan, dated the 10th of December 1915.

FACTS appear from the judgment.

Babu *D. L. Kastgir* (with him Babu *Nripendra Chandra Das*), for the Appellant.—The plaintiff is the appellant. This appeal arises out of a suit for declaration of tittle and recovery of possession of certain properties left by a testator to his widow and to his mother, who sold the properties to the defendants. The plaintiff-appellant is the heir of the testator.

The testator, one Kalikinkar, a Hindu governed by Diabhaga Law, died childless having a widow and mother. By Will each of them got one-half share of the property.

KALI KANT CHAKERBUTTY v. RAJANI KANTA CHAKRAVARTY.

First Court held that the suit was barred by limitation while the lower Appellate Court held that it was not barred, at least, in the case of the wife as the suit was instituted within 12 years after her death.

The mother transferred her share of the property in 1864 and the sale was ratified. The appellant is the reversioner. The question for decision would be whether there was forfeiture.

My submission would be that there was no valid bequest and it is a case of intestacy.

The condition of forfeiture according to the terms of the Will was that if any of the two leaves the homestead there will be forfeiture.

Both of them left after the sale.

[CHATTERJEA, J.—You say that the mother left first.]

There is one *kabala* by the mother, dated 1226 B. S. and the next one is dated 1228 B. S.

By these two *kabalas* mother transferred her 16 annas share and there is no finding who left first.

The question is, if there is forfeiture under the Will who will get the property?

[CHATTERJEA, J.—Supposing the mother forfeits the property under the Will the question would be whether she is entitled as an heir under the provision of the Will.]

There are conflicting decisions on this point.

The Will does not say anything as to what will take place after the forfeiture. Hence the case of intestacy will arise in that event.

In a previous suit with regard to these questions it was found that the sale took place first and abandonment afterwards and hence there was no forfeiture.

My submission is that, in the event of forfeiture, the property would still pass not to the plaintiff's father as reversionary heir but to Karatara, the widow, as heir.

The intention of the testator was that they would not get the property in case they left the house.

Hence after the forfeiture it will be purely a case of intestacy and the heir at-law will be the widow, Karatara, according to the general provision of Hindu Law.

Since there is no gift over, she is entitled under Hindu Law as heir at law. *Jotendromohun Tagore* v. *Ganendromohun Tagore* (1), *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (2), *Ramlal Mookerjee* v. *Secretary of State for India in Council* (3).

This is with respect to 8 annas share. As regards the other 8-annas share after forfeiture of the interest of Karatara it goes to the mother and after mother's death it passes to the widow, Karatara, again and after Karatara's death it goes to the mother again.

As regards forfeiture, if the previous decision is binding there has been no forfeiture.

Under the Will they had no power to transfer. They get only life interest and hence the purchasers also got life interest.

My cause of action arose only after widow's death even with respect the mother's share. *Bibi Sahodra* v. *Rai Jang Bahadur* (4).

Persons who take any interest under the Will will be bound by the terms of the Will even on transfer.

Casperez's Estoppel, 220; *Lart, In re; Wilkinson* v. *Blades* (5).

The previous suit is *res judicata*.

[DOVAL, J.—You can cite that as a sort of evidence.]

No suit can be brought in the face of those findings.

The question as to whether there was any just cause to go for the homestead ought to have been gone into.

[CHATTERJEA, J.—Had these questions been raised in the lower Court.]

The lower Court dismissed the suit on the ground of limitation.

Babu *D. N. Chakravarty* (with him Babu *Chandra Sekhar Sen*), for the Respondents.—Both the Courts below decided the question of limitation as well as that of forfeiture.

(1) 18 W. R. 359 at p. 374; 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82.

(2) 24 C. 646 at p. 658; 1 C. W. N. 578; 12 Ind. Dec. (N. S.) 1100.

(3) 7 C. 304 at p. 316 (P. C.); 8 I. A. 46; 10 C. L. R. 349; 4 Sar. P. C. J. 225; 5 Ind. Jur. 327; 3 Ind. Dec. (N. S.) 744.

(4) 8 C. 224 (P. C.); 8 I. A. 210; 4 Sar. P. C. J. 294; 6 Ind. Jur. 108; 4 Ind Dec. (N. S.) 143.

(5) (1896) 2 Ch. D. 788; 65 L. J. Ch. 846; 75 L. T. 175; 45 W. R. 27.

KALI KANT CHAKRBUTTY v. RAJANI KANTA CHAKRAVARTY.

The whole case rests upon the construction of the Will.

Both the widow and the mother forfeited their rights under the Will.

"Intention is the pole-star of the Will."

There cannot be any doubt that the testator intended that the life interest in the property will only remain in the mother and the widow.

It is not a case where half share was given to each but a joint interest was given to both.

"*Ardhansha*" means equally otherwise how could the interest go to the heirs after forfeiture.

[CHATTERJEA, J.—Supposing it would mean half share for each then on the death of one, her share would devolve on the other.]

That would make the Will legal and valid. The proper construction would be that the heirs will get if there is forfeiture.

The construction must be such that the Will may be valid and legal.

[CHATTERJEA, J.—You say there is a gift over after the death as well after they left the house.]

Yes. In *Jotendromohun Tagore's case* (1) some impossible cases were contemplated. Construction must be such as it makes the Will valid. *Jotendromohun Tagore* v. *Ganendromohun Tagore* (1).

Reply.—Babu *D. Kastgir*, in reply. From clause (4) of the Will it is clear that joint possession was not intended. There is no unity of possession.

JUDGMENT.—The question involved in this appeal turns upon the construction of the Will of one Kali Kinkar Chakravarty.

Kali Kinkar died leaving his mother, Tori, and his widow, Karatara. By his Will he gave certain properties to the mother and the widow absolutely. The 4th paragraph of the Will provides as follows:—"The tank and the homestead in Betagi which belongs to me will remain in half and half share in possession of my mother Sreemoti Tori and my wife Karatara but they will not have the power to sell the properties. On the death of both, my heirs will get it. If in the meantime they go elsewhere by leaving my homestead, they will not get this property."

It appears that the mother sold the property and left the house, the widow then ratified the sale and also left the house. That was some time in 1867, the exact year being unnecessary for the purpose of the present case. The mother died more than 12 years before the suit but the widow died in 1908, *i. e.*, within 12 years of the suit.

The plaintiff is the heir of Kali Kinkar and on the death of the two ladies he brought the suit for recovery of possession of the properties from the defendants who are purchasers from the mother and the widow. Both the Courts below have decided the case against the plaintiff and the plaintiff has appealed to this Court.

It is contended on behalf of the appellant that, on the mother leaving the house, her share devolved upon the widow, that on the widow leaving the house, her share devolved on the mother, that on the mother's death her share devolved on the widow by right of inheritance and that, on the widow's death, again, the entire property was inherited by the plaintiff as heir.

This argument is ingenious, and of course, a person can take as heir although the Will expressly provides that he should not get the estate, provided there is no gift over. In this case, however, we are of opinion, upon a proper construction of the Will, that it was the intention of the testator that the interest of the mother and the widow should cease in the event of their death and also in the event of their leaving the family-house. The words "on the death of both my heirs will get the property" certainly refer to heirs other than the mother and the wife. Then the Will says: "If in the meantime they go elsewhere by leaving my homestead, they will not get this property."

It seems to us that the heirs were to come in not only in the event of the death of the widow and the mother but also in the event of their leaving the family house. The idea that some one of his family should reside in the *bastu bhita* was uppermost in the mind of the testator, as is generally the case with Hindus, and that is the reason why the testator provided for forfeiture of the rights of the mother and the widow in case of their leaving the house. In such a contingency, it was but natural of the testator to desire that his heirs should take the homestead.

On the whole, we are of opinion that there was a forfeiture of the estate by the widow and the mother leaving the house in about the year 1867 and that the heirs ought to

have come in within 12 years from that time. The suit, therefore, was properly held to have been barred by limitation, This disposses of the appeal.

It has, however, been contended on behalf of the appellant that with regard to the *jala* (the watery portion of tank) the case ought to go back to the Court below for a consideration of the question of confirmation of possession.

It is admitted on behalf of the respondent that there is no dispute as to the possession of the plaintiff in the *jala* although the extent of his share is disputed. The learned Pleader for the respondent says that, for the purpose of avoiding a remand, he will admit the share in the watery portion of the tank, claimed by the plaintiff.

The result is that the plaintiff's title to the extent of the share claimed by him in the watery portion of the tank will be declared and his possession in respect of that share confirmed. In other respects, the appeal will stand dismissed with costs.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1834 OF 1919.

August 19, 1920.

Present :—Justice Sir Abdur Rahim, KT., and Mr. Justice Oldfield.

DHADA SAHIB—DEFENDANT No. 1—APPELLANT

versus

MUHAMMAD SULTAN SAHIB—PLAINTIFF—RESPONDENT.

Vendo and purchaser—Title, want of, in vendor—Vendee, right of, to damages.

Where the title of a vendor of land is superseded by a superior title, the vendee is only entitled to be indemnified in damages for breach of warranty of title, and to ask that the damages be assessed at the enhanced value of land at the time of the suit. He is not entitled to recover the property which his vendor has obtained in substitution for the property sold. [p. 312, col. 2.]

Second appeal against the decree of the Court of the District Judge, Coimbatore, in Appeal Suit No. 28 of 1919, preferred against the decree of the Court of the District Munsif, Tiruppur, in Original Suit No. 839 of 1917.

FACTS appear from the judgment.

Messrs. *V. Ganapathi* and *G. Krishna Aiyar*, for the Appellant.—The lower Court erred in giving a decree for possession. By the partition in the family of first defendant's vendor, the latter got a different land for his share. He had, therefore, no title to convey the suit land. Whatever might be the equities between the first defendant and her vendor, entitling the former to the substituted land, it is clear that the plaintiff could have no right to it. He is not a vendee from a Hindu co-parcener and he could only have his remedy against his vendor for a breach of warranty of title. *Nanjaya Mudali* v. *Shanmuga Mudali* (1) does not affect the circumstances of the present case. The plaintiff is not entitled to any property other than what he bargained for.

Messrs. *T. R. Krishnaswami Aiyar*, and *N. A. Krishna Aiyar*, for the Respondent.—*Nanjaya Mudali* v. *Shanmuga Mudali* (1) lays down that where the vendor got property other than what he sold at a partition and the vendee is deprived of what he purchased, the vendee could claim to be put in possession of the substituted property. The equity in favour of the first defendant enures for the plaintiff's benefit.

In any event, the plaintiff is entitled to full compensation at the current market value of the land.

JUDGMENT.—The plaintiff bought certain specific lands from the first defendant, a widow. The first defendant had bought this land from a co-parcener in a Hindu family. The other co parceners instituted a suit for partition and it was during the pendency of that suit that the first defendant sold the land to the plaintiff. By the decree in the suit for partition the land with which we are concerned was not allotted to the vendor of the first defendant but some other land was given to him instead. According to the dictum of the learned Judges of this Court in *Nanjaya Mudali* v. *Shanmuga Mudali* (1), under such circumstances, so far as any question lay between the first defendant and the co parcener from whom they bought the

(1) 22 Ind. Cas. 555; 38 M. 684; 26 M. L. J. 576; 15 M. L. T. 183; (1914) M. W. N. 356.

land, the first defendant would be entitled to whatever was substituted by any decree for partition for the land which he had bought from the co-parcener. The principle seems to have been acquiesced in in two other decisions of this Court, one of which is reported in *Subapathi Pillay* v. *Thandavaroya Odayar* (2) and we are prepared, for the purposes of this argument, to assume that that proposition of law is correct. Even then it is difficult to see how it awails the plaintiff in this suit. The plaintiff has not bought the land from a Hindu co parcener who, according to Hindu Law, would have a right to demand partition of the family property and to get the share due to him. The plaintiff has bought certain specific land from the first defendant who is a Muhammadan and between them there can be no question of working out any such equity as is mentioned in *Nanjaya Mudali* v. *Shanmuga Mudali* (1). When analysed, the position is simply this. *A.* sells a particular parcel of land to *B.* It is found that *A.* has no title to the land. Can it be said that *B.* is entitled to ask *A.* to convey to him some other land in place of what he bought? When stated in these words, the position of the plaintiff would be quite untenable and it is difficult to see why the character of the superior title by which the title of the vendor in the land which he purported to sell is defeated, should make any difference to the vendee's rights. As the vendor's title to the land in dispute has been superseded by a superior title, the only remedy open to the vendee is damages for breach of warranty of title. It is brought to our notice that in *Sabapathi Pillay* v. *Thandavaroya Odayar* (2) the plaintiff was a purchaser from a purchaser at Court auction in execution of a money decree againt a Hindu co-parcener, and it was apparently not argued before the learned Judges that a vendee of a purchaser from a Hindu co-parcener could not claim against his vendor any such equity as was mentioned in *Nanjaya Mudali* v. *Shanmuga Mudali* (1). The case was argued on the basis that, in the case of a purchaser at Court auction, there is no warranty of title. We do not see much significance in the fact that the question now raised before us was not raised before the learned Judges who decided the case reported as *Sabapathi Pillay* v. *Thandavaroya Odayar* (2). We are of opinion that, if we were to hold that the plaintiff is entitled to whatever land the first defendant might have got in substitution for what he had purchased from his vendor, we would be giving him property which he never bargained for. We, therefore, set aside the decree of the District Judge and give the plaintiff, in its stead, a decree for damages which he has asked for in the plaint as an alternative remedy. He claimed Rs. 300 as damages and we think he is entitled to it. The learned District Judge is evidently wrong in saying that, in assessing damages, the plaintiff is not entitled to ask that they should be assessed at the present enhanced value of the land. Surely he is entitled to full compensation, so that he might be restored pecuniarily to the same position as if he had recovered the land which the first defendant sold to him? We also direct that 6 per cent. interest on this sum be allowed to the plaintiff from the date of the plaintiff.

The appeal is allowed to this extent. Each party will bear his own costs throughout.

M. C. P.

Appeal partly allowed.

(2) 54 Ind. Cas. 515; 43 M. 309; 37 M. L. J. 620; 11 L. W. 108; 43 M. 309.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 4 OF 1918.

June 9, 1920.

Present :—Mr. Justice Teunon and Justice Sir Asutosh Chaudhuri, Kt.

BASANTA KUMARI CHAUDHURANI AND ANOTHER, EXECUTRIXES OF THE WILL OF LATE SAS. BHUSAN CHAUDHURI—PLAINTIFFS—APPELLANTS

versus

KRISHNA NALINI DASSYA AND, ON HER DEATH, BANGESWAR GHOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Rent, suit for—Surrender

BASANTA KUMARI CHAUDHURANI v. KRISHNA NALINI DASSYA.

and dispossession, allegations of, disproved—Landlord, failure of, to identify holdings, whether sufficient to deprive him of rent.

Where in a suit for rent the defendants' allegations of surrender and dispossession are not proved, and he is in possession of the holdings, the mere fact that the plaintiff is unable to establish the identity of the holdings is no reason for depriving him of the rent therefor. [p. 313, col. 2.]

Appeal against the decree of the District Judge, Murshidabad, dated the 20th of September 1917, modifying that of the Munsif, 2nd Court, at Kandi, dated the 29th of January 1917.

FACTS appear from the judgment.

Babus *Tarak Chandra Chakravarty* (with him Babu *Profulla Chandra Chakravarty*), for the Appellants.—Both the Courts below have totally ignored the decree of 1902. In that suit the predecessor-in-interest of the plaintiffs obtained a decree against the predecessor of the present defendants. Under illustration (*d*) to section 114 of the Evidence Act, it is open to the Court in a subsequent suit between the parties to presume that that state of things has continued. See *Hiranmoy Kumar Saha* v. *Ramjan Ali Dewan* (1). See also section 109 of the Evidence Act. It is not open to the tenant to deny the landlord's title so long as he has not openly restored possession by surrender to his landlord. See section 116 of the Evidence Act. See also *Bilas Kunwar* v. *Desraj Ranjit Singh* (2). It is not enough for the tenant to say that the lands of the tenancy do not exist, he is bound to show what has become of them. See *Dugappa Chetti* v. *Vidhia Purna Tirthasami* (3). If the tenants have mixed up the lands of the tenancy with their other lands, that is no reason why the landlord's suit for rent should fail.

Babu *Panchanan Ghose* (with him Babu *Ram Chandra Mazumdar*), for the Respondents.—The suit has been rightly dismissed as the plaintiffs have failed to establish the identity of the holdings. They ought to have produced their *chittas*. The decision of 1902 is not *res judicata*. It can at most raise a presumption.

(1) 29 Ind. Cas. 694; 20 C. W. N 48; 43 C. 170.
(2) 30 Ind. Cas. 299; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 37 A. 557; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.).
(3) 6 M. 263; 2 Ind. Dec. (N. S.) 482.

Babu *Taruk Chandra Chakravarty* replied.

JUDGMENT.—This appeal arises out of a suit for arrears of rent. The plaintiffs sue as *patnidars* of a *debutter mahal* dedicated to a deity spoken of as Kali Doyamoyi. It appears that the predecessors of the plaintiffs obtained this *patni* from one Manik, the *shebait* of the idol, sometime in the year 1885. In 1889 the *patni* was sold for arrears and bought in by Manik, who next transferred it in the year 1890 to one Panchuram whose son Soshi Bhusan sold to the plaintiff.

In this suit we are concerned with four holdings bearing annual rentals of Rs. 6, Rs. 12, Rs. 4 and Rs. 19·9·10½, respectively.

In a suit brought in 1902 in respect of these same holdings Soshi Bhusan obtained a decree against the predecessor of the present defendant but a second suit brought in 1904 was dismissed on the ground that the *patni* had merged in the superior interest on the purchase by Manik in 1889 and that the conveyance of the *patni* to Panchuram conferred no title upon him. The plaintiffs had the defect in their title remedied with retrospective effect and now bring the present suit.

The main defence was that, though the defendants had originally held three *jamas* of Rs. 4, Rs. 6 and Rs. 12, respectively, under the plaintiffs' predecessor-in-interest, they had surrendered the same, and that the lands described in the plaint were not the lands of the said three *jamas* but were comprised partly in other holdings held by the defendants, under other landlords, partly within their *lakheraj* and partly within the holding of Rs. 19·9 10½. Of this last holding it was alleged that Soshi Bhusan has taken *khas* possession in whole or in part.

Both Courts below have found that the alleged surrender and the alleged dispossession have not been proved. But, on the finding that the plaintiff had failed to establish the identity of the holdings, the Court of first instance dismissed the suit as regards the holding of Rs. 6 and Rs. 12 and the Court of first appeal further dismissed the suit as regards the holding of Rs. 19 also.

The plaintiffs now appeal to this Court, and we are of opinion that he must succeed.

MIDNAPUR ZAMINDARY COMPANY LD. *v.* JAGA NATH SARANGI.

It is admitted by the defendants that all four holdings had a real existence, and were held by their predecessor in interest under the predecessor in title of the plaintiffs. That also was decided between the parties in the suit of 1902. The allegations of surrender and dispossession having been disbelieved it follows that they are still in possession of the holdings, and if they, the defendants, have mixed up the lands of the holdings with their other lands that is no reason why the plaintiffs should not have their rents.

The situation, quality and boundary of the lands of the several holdings may be determined in appropriate proceedings under section 158 of the Bengal Tenancy Act.

For the foregoing reasons, this appeal is decreed with costs. Plaintiffs will have a decree for the rents of the four holdings at the rate of Rs. 19-9-10½ *gandas*, Rs. 4, Rs. 6 and Rs. 12, respectively, for thelperiod in suit, with cesses and damages at 25 per cent. and proportionate costs in all Courts.

The cross-appeal was not mentioned or pressed and is, therefore, dismissed : No order as to costs.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 714 OF 1919.

August 17, 1920.

Present :—Mr. Justice Jwala Prasad.

MIDNAPUR ZEMINDARY COMPANY, LTD.—PLAINTIFFS—APPELLANTS

versus

JAGA NATH SARANGI AND OTHERS —DEFENDANTS—RESPONDENTS.

Chota Nagpur Tenancy Act (VI of 1908), ss. 52, 234—Landlord and tenant—Rent, suit to recover arrears of—Limitation—Co-sharer landlords—Suit for apportionment of rent—Right to recover rent, whether suspended.

Under section 52, read with section 234, of the Chota Nagpur Tenancy Act, rent falls due on the last day of each quarter of the agricultural year, and a suit for arrears of rent should be brought within three years from the end of the agricultural year in which the arrears become due. Where, however, a co-sharer landlord brings a suit for apportionment of rent making the tenants and the other co-sharers parties to the suit, the right to recover rent is deemed to be held in suspense till a decree is passed in the suit. [p. 315, col. 1.]

Appeal from a decision of the Judicial Commissioner, Ranchi, reversing a decision of the Deputy Collector, Purulia.

Mr. *S. N. Palit*, for the Appellants.

Mr. *G. C. Pal*, for the Respondents.

JUDGMENT.—The only contest in this case is as to whether the claim for rent for the years 1319 to 1321 was barred by limitation or not. The learned Judicial Commissioner, disagreeing with the Deputy Collector, has held that it was barred.

The plaintiffs have appealed and dispute the correctness of the view taken by the Judicial Commissioner. Their contention is that, the period of limitation should be computed from the 5th February 1918, when their share of the consolidated rent payable by the defendants jointly to them and the other landlord, Zemindar of the Barabhum Estate, was determined by a decree in an apportionment suit instituted by them against the defendants and the said Zemindar, and that the suit instituted in September 1918 is within time. The contention appears to be well founded.

The defendants are tenure holders of two Mouzas, Baram and Sarangidih, bearing Touzi No. 307, for which they used to pay a consolidated annual *jama* and cess of Rs. 80 odd jointly to the plaintiffs and the Zemindar of Barabhum under the Chota Nagpur Encumbered Estate Mangement. At the last Settlement in 1910, the *mouzas* were separately recorded ; Baram in the name of the plaintiffs and Sarangidih in the name of the Barabhum Zemindar, but the rental payable to the two landlords was not apportioned.

The plaintiffs thereafter sued the defendants for rent for the years 1319 and 1320, making the Barabhum Zemindar a *pro forma* defendant. That suit was contested by both the sets of defendants and was dismissed by the Trial Court on the 6th June 1913 on the ground that it was not in proper form and the plaintiffs' share of rent was not specified. This decision was upheld by the Appellate Court on the 8th February 1915, pointing out that the plaintiffs were not entitled to institute the suit

unless their share of rent in respect of village Baram was apportioned and the plaintiffs' prayer for amendment of the plaint by framing it according to section 142 of the Chota Nagpur Tenancy Act was rejected. Consequently, the plaintiffs instituted a suit for apportionment of rent and for determination of their share of the rent payable by the defendants.

The judgment (Exhibit 2) shows that both the sets of defendants, the tenure-holders and the Barabum proprietor resisted the plaintiffs' claim for apportionment, the former on the ground that the rent was payable in one lump and should not be apportioned, and the latter on the ground that the plaintiffs were not entitled to the proportionate share claimed by them. Their objections were overruled and the rent was apportioned and the plaintiffs' share was determined on the 5th February 1918. No doubt, under section 52 read with section 234, of the Chota Nagpur Tenancy Act, the rent falls due on the last day of each quarter of the agricultural year and the suit for arrears of rent should be brought within three years from the end of the agricultural year in which the arrear became due. But the right to recover rent is, under certain circumstances, such as those in the present case, deemed to have been held in suspense and when the right is revived a fresh cause of action arises and the time to bring an action for rent commences from the date of revival of the right. This principle is to be gathered from the decision of their Lordships of the Judicial Committee in the case of *Ranee Surnomoyee* v *Shooshee Mokhee Burmonia* (1). In that case the Zamindar had purchased the holding in execution of his rent-decree. The sale was subsequently set aside on the application of the judgment-debtor. The suit for arrears of rent which accrued during the pendency of the proceedings to set aside the sale was necessarily instituted after more than three years from the date they became due. Their Lordships held that section 32 of Act X of 1859, similar in its provision to section 234 of the Chota Nagpur Tenancy Act, did not bar the suit, and that the arrears of rent were suspended and became actually due when the sale was set aside and the holding was restored to the tenant. The principle enunciated by their Lordships was applied in the cases of *Eshan Chunder Roy* v. *Khajah Assanoollah* (2), *Deen Dyal Paramanick* v. *Radha Kishoree Debee* (3), *Rangayya Appa Rao* v. *Bobba Sriramulu* (4) and *Raghunath* v. *Sarva* (5). Some of these cases are directly applicable to the present case.

In order to enforce the share of rent in respect of a portion of the holding falling in the Takbata of a proprietor, he must get his share of rent determined in a proper apportionment suit, making the tenant and the other co-proprietors parties thereto and, unless that is done, he cannot institute a suit for his share of the rent. This is a familiar procedure and is applicable to the present case. The plaintiffs, therefore, could not enforce their share of the rent due from the defendants without having it determined in the apportionment suit, the decree wherein was passed on the 5th February 1918. As a matter of fact, the plaintiffs' attempt to recover the rent without the apportionment suit failed and the objection to the maintainability of the suit without the rent having been apportioned in a proper suit prevailed, I do not understand how the plaintiffs could have succeeded in recovering their share of the rent by bringing a suit under section 142 of the Chota Nagpur Tenancy Act for, after the *mouzahs* were separately recorded at the Settlement of 1910, the plaintiffs ceased to be co-sharers with the Barabhum Estate.

Apart from this, the Appellate Court in the rent suit clearly held that the claim for separate rent was not maintainable unless the plaintiffs' share was determined. I am, therefore, afraid the Court below is wrong in thinking that there was no necessity for the plaintiffs "to go to Court to have the proper rent determined," and that they could have sued for rent making the Encumbered Estate a *pro forma* defendant. In the apportionment suit itself both the sets of defendants objected to the maintainability

(1) 11 W. R (P. C.) 5; 2 B. L. R. (P. C.) 10; 12 M. I. A. 244; 2 Suth. P. C. J. 173; 3 Sar. P. C. J. 424; 20 E. R. 331.

(2) 16 W. R. 79; 8 B. L. R. 537 note.
(3) 17 W. R. 415 at p. 416; 8 B. L. R. 536.
(4) 27 M. 143 (P. C.); 8 C. W. N. 162; 14 M. L. J. 1; 6 Bom L. R. 241; 31 I. A. 17; 8 Sar. P. C. J. 617.
(5) 12 Ind. Cas. 804; 7 N. L. R. 169.

of the suit and raised a distinct issue (No. 1) in that case. The Court overruled the objection and held that the suit was necessary, inasmuch as without it the plaintiffs could not institute a suit for recovery of their share of the rent. It is no longer open to the defendants to say that the plaintiffs could bring a suit for rent without having recourse to the apportionment suit.

It is then said that the plaintiffs could institute the suit during the pendency of the apportionment proceedings before three years, which elapsed from the date the arrears became due. Such a contention was overruled by their Lordships of the Privy Council in the cases referred to above. Their Lordships pointed out the fact that the Zemindar in that case could sue for rent during the pendency of the proceedings, did not bar his right to institute a suit after the determination thereof.

I, therefore, disagree with the view taken by the Court below and agree with that taken by the Trial Court, and hold that the plaintiffs' right to bring the present suit for rent accrued on the 5th of February 1918 and their claim for rent for the years in suit is well within time.

The result is, that the appeal succeeds and the plaintiffs' suit is decreed with costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.
APPEALS FROM APPELLATE DECREES
Nos. 661, 1029 TO 1033 OF 1917.
August 6, 1919.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

DINESH CHANDRA BANERJEE AND OTHERS—DEFENDANTS—APPELLANTS
versus
ROMESH CHANDRA DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Res judicata—*Previous rent suit—Subsequent suit for possession—Appeal, second—Point involving question of fact whether can be raised for first time.*

A decision in a rent suit as to the length of the defendant's occupation, the main issue in which was whether the relationship of landlord and tenant existed between the parties, does not operate as *res judicata* to bar a subsequent suit between the same parties to recover possession by ejectment, the main issue in which is, whether plaintiff's possession is within 12 years of the institution of the suit. [p. 317, col. 2· p. 318, col. 1]

A point involving a question of fact not taken in the Courts below cannot be raised in second appeal for the first time. [p. 318, col. 2; p. 319, col. 1.]

Appeals against the decrees of the Subordinate Judge, 1st Court, Faridpur, dated the 15th of December 1916, modifying that of the Munsif, 1st Court, at Chekandi, dated the 24th of March 1915.

FACTS appear from the judgment.

Babu *Sarat Chandra Rai Chowdhury* (with him Babu *Troylokhya Nath Ghose*), for the Appellants.—The appellants are defendant No. 1 (the tenant) and defendants Nos. 2—6 (landlords). The plaintiffs are the owners of *Touzi* No. 6308 and defendants Nos. 2—6 those of *Touzi* No. 6307. The suit was for declaration of title and recovery of possession of 34 *bighas* of land after ejecting defendant No. 1. The lands were under water till 1901 when they re-appeared and defendant No. 1 had since been cultivating them. In 1904 the plaintiff was recorded as landlord and defendant No. 1 his tenant in the Settlement proceedings. The defendants objected to the correctness of the record, and in 1912 in a fresh Record of Rights the defendants Nos. 2—6 were recorded as landlords and defendant No. 1 as their tenant. In a rent-suit by the plaintiff in 1912 against defendant No. 1 the defence was that he was a tenant of defendants Nos. 2-6. The suit was dismissed, it being found that defendants Nos. 2—6 were the landlords of defendant No. 1 for 20 years and that the entry in the Record of Rights in 1912 was correct. This judgment was affirmed on appeal. The present suit was instituted on 5th August 1913. A Commissioner was appointed, who reported that part of the lands belonged to plaintiffs' *touzi* and part to defendants' *touzi*. My points are that the suit is barred by limitation, the plaintiff not being in possession within 12 years, that the defendant No. 1 is not liable to be ejected, inasmuch as he has been found to be a tenant from a long time as a cultivating *ryot*. My next point is that the question of title was gone into and decided in our favour in the previous rent-suit. The plaintiff

cannot, by making defendants Nos. 2-6 parties, re-agitate the matter.

Babu *Jogesh Chandra Roy* (with him Babu *Suresh Chandra Das*), for the Respondents. The case is wholly concluded by findings of fact. The point of *res judicata* was not raised in either of the Courts below. Further, there could be no *res judicata*. See *Dwarkanath Roy* v. *Ram Chand* (1). On the question of possession it has been found in my favour.

Babu *Sarat Chandra Rai Chowdhury* in reply.—It is not necessary for me to distinctly raise the ground of *res judicata* inasmuch as there were the decrees in the rent suits. See *Ekabar Sheikh* v. *Hara Bewah* (2), *Dhora Kairi* v. *Ram Jewan Kairi* (3), *Debiruddi* v. *Abdur Rahim* (4). Denial does not work forfeiture. See also *Nilmadhab Bose* v. *Ananta Ram* (5), *Fayz Dhali* v. *Aftabuddin Sirdar* (6), *Srimatti Mallika Dassi* v. *Mukham Lal Chowdhry* (7). Plaintiff cannot succeed except upon proof of his own title. As regards my second point, defendant No. 1 is admittedly cultivating *ryot* and has been in possession according to plaintiff since 1902. I submit that the *ryot* having acted *bona fide* all along he can't be ejected. See *Krishna Nath Chakravarti* v. *Muhammad Wafie* (8).

JUDGMENT.

IN No. 601 OF 1917.

SANDERSON, C. J.—This is a second appeal by the first defendants, who are the sons of one Raj Chandra Bhakta. The suit was brought by the plaintiffs, Romesh Chandra Das and Jogesh Chandra Das, sons of the late Radhaballav Dass, against the first defendants, the Bhaktas, and against the other defendants, who may be called defendants Nos. 2 to 6.

The plaintiffs are the proprietors of an Estate No. 6305 and defendants Nos. 2 to 6 are the proprietors of the adjoining Estate No. 6307 and the suit was brought by the plaintiffs to establish their right to about 34 *bighas* and also to recover possession, and to eject the first defendants from the lands.

It has been held by the lower Appellate Court that the plaintiffs have established their title to a portion of the 34 *bighas*, and that such portion formed part of the plaintiff's Estate No. 6308 and that finding of the lower Appellate Court is not contested. But it is alleged on behalf of the first defendants that the plaintiffs cannot recover possession in this suit, because it is barred by the Act of Limitation, and it is said that the plaintiffs were not in possession of the land in dispute within twelve years before the institution of the suit.

The argument may be divided into two portions: It it first said that the matter is *res judicata* and then it is argued that if it cannot be said to *res judicata* there was no evidence upon which the lower Appellate Court could hold that the plaintiffs were in possession within twelve years of the institution of the suit. As regards the question of *res judicata* it arises in this way: In 1912 some suits were brought by the predecessor of the plaintiffs, as I understand he was the grandfather of the present plaintiffs, against Raj Chandra Bhakta, who is the father of the first defendants. Those suits were for rent alleged to have accrued in respect of the years 1909 to 1912 and the main issue in those suits was whether the relationship of landlord and tenant existed between the plaintiff and the defendant, and that issue was decided in favour of the defendants, namely, that the relationship of landlord and tenant did not exist between the plaintiff and the defendant. But the learned Judge held, as one of his reasons for deciding that issue, that the defendant had produced evidence and satisfied him that he was in possession of these lands for something like twenty years before the institution of those suits. The learned Vakil who argued this appeal relied on that finding and argued that the question of whether the plaintiffs had been in possession of the lands in suit within twelve years before the institution of this suit was *res judicata* in the rent-suit by reason of the finding that the defendant in that suit had been in possession for twenty years before the institution of the rent-suit. In my judgment, it is not *res judicata*. The issue in the rent-suit was whether at the date of the institution of the rent suits, the rela-

(1) 26 C. 428 (F. B.); 3 C. W. N. 266, 13 Ind. Dec. (N. S.) 876.
(2) 8 Ind. Cas. 660; 15 C. W. N. 335; 13 C. L. J. 1.
(3) 20 C. 101; 10 Ind. Dec. (N. S.) 68.
(4) 17 C. 196; 8 Ind. Dec. (N. S.) 669.
(5) 2 C. W. N. 755.
(6) 6 C. W. N. 575.
(7) 9 C. W. N. 928; 2 C. L. J. 389.
(8) 31 Ind. Cas. 789; 21 C. W. N. 93; 23 C. L. J. 563.

tionship of landlord and tenant existed between the plaintiff and the defendant and whether rent was due from the defendant to the plaintiff for the period mentioned in the suit, and the question whether the plaintiff had been in possession within twelve years of the institution of this suit, which was in August 1913, was not in issue in the rent suit, although that question may have been considered by the learned Judge as one of the reasons which induced him to come to the decision upon the issues in the rent-suit. Consequently, I think that the learned Vakil's first point is not good.

Then the question arises whether there was evidence upon which the learned Judge could come to the conclusion that the plaintiffs had been in possession within twelve years of the institution of the suit.

In 1904 there was a publication of the Record of Rights, and in that Record of Rights the plaintiffs were entered as being the owners of the land in question and the first defendants were entered as being tenants under them; and the learned Judge relied upon that entry as evidence showing that the plaintiffs were in possession, at all events in 1904; and, inasmuch as the present suit was brought in August 1913 he held that the plaintiffs were in possession within twelve years of the institution of the suit. The learned Vakil argued that, although the Record of Rights, which was published in 1904, would raise a presumption that at that time the plaintiffs were in possession, the Record of Rights was shown to be inaccurate and it was cancelled, to use his words, by the subsequent Record of Rights which was published in 1912. I do not think that the Record of Rights in 1904 was cancelled by the subsequent Record of Rights. I think the subsequent Record of Rights merely dealt with the state of affairs as existed in 1912, which was the date of the subsequent Record of Rights. The other point upon which he relied in this respect was that, although a presumption would arise from the publication of the Record of Rights in 1904 that the plaintiffs were then in possession, that presumption would be completely destroyed by the decision which was given by the learned Munsif in the rent-suit. There, again, I do not agree with the learned Vakil's argument, because the judgment only went to this extent that, at the time the suit was instituted, the relationship of landlord and tenant did not exist between the plaintiff and the defendant, and that was in 1912; and I think it is impossible to say that there was not some evidence by reason of the publication of the Record of Rights in 1904 before the learned Subordinate Judge from which he could conclude that the plaintiffs were in possession within twelve years prior to the institution of the suit. Consequently, I think the second ground which the learned Vakil urged cannot be upheld.

Finally, the learned Vakil urged that the first defendants were cultivating *raiyats* and that, inasmuch as they had taken a settlement of the lands in suit from the defendants Nos. 2 to 6 in good faith, they ought not to be disturbed in their possession of the lands in suit. I do not think that this point is open to the learned Vakil, because it appears that in the lower Appellate Court his client relied upon five grounds which are set out in the learned Subordinate Judge's judgment, none of which covers this point. For that reason, I do not think that we ought to entertain it now, for the first time, in second appeal.

For these reasons, I think that this appeal should be dismissed with costs.

This judgment, it is conceded, will govern the other five Appeals (Nos. 1029 to 1033 of 1917) which are accordingly dismissed with costs.

WOODROFFE, J.—I agree. The title to the lands mentioned in the Subordinate Judge's judgment is not in question. The point taken is that the plaintiff, whose title has thus been established, was not in possession within twelve years of the institution of the suit. The answer to that objection is that the plaintiff was in fact in possession, as is shown by an entry in the Record of Rights of the year 1904. Now, if there were no other evidence in the case of possession than this Record of Rights of the year 1904, and if such record was (as one part of the argument goes) wholly inadmissible, then the appellant might have made out a case for consideration in second appeal. It is not, however, shown and this is necessary for the argument that the Record of Rights was wholly inadmissible. In the first place, the Record of Rights of 1904 was not in fact cancelled: and, secondly, the subsequent suit to which reference has been made did not operate as *res judicata* or wholly

negative such effect as the law attributes to an entry in the Record of Rights. The issue in the rent-suit was confined to the years in that suit, and the fact that in coming to a finding on the necessary issues the Court may have gone into the consideration of the state of facts in an earlier period as reasons for its finding or otherwise, does not make the decree *res judicata* and cannot have the effect of fully negativing the effect of the Record of Rights of 1904. Therefore, in my opinion, the Record of Rights of 1904 was legally admissible in evidence. If that be so, the only other question as to the weight of evidence, as to whether the presumption the law attaches to the Record of Rights has in fact been rebutted by other circumstances in the case. This is not, however, in this case a question of law and is not a subject of consideration in second appeal. Therefore, I am of opinion that the ground taken as regards limitation fails.

The second point was this: So far as defendant No. 1 is concerned, even if the plaintiff's title is established, still defendant No. 1 could not be ejected, because a cultivating *raiyat* taking from a third party *bona fide* must be retained in possession. This point, as already mentioned in the judgment of the learned Chief Justice, was not taken in any of the Courts below, and involves a question of fact, namely (possibly amongst other questions) that of good faith. Therefore, this is not a question which can be raised for the first time in second appeal.

On these grounds, I think the appeals fail and should be dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 377 OF 1919.

May 21, 1920.

Present:—Mr. Justice Newbould and Mr. Justice Buckland.

BALAI CHAND PAL—DEFENDANT No. 1.—APPELLANT

versus

PANCHU GOPAL SEAL AND OTHERS —RESPONDENTS.

Right of way, not appurtenant to dominant tenement, nature of.

Private rights of way, not appurtenant to a dominant tenement, like public rights of way, are not easements but rights in gross and can be enforced as such. [p. 320, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 25th of November 1918, reversing that of the Munsif, 1st Court, at Hooghly, dated the 24th of November 1916.

FACTS appear from the judgment.

Dr. *Jadunath Kanjilal*, for the Appellant.—My client is in the position of servient owner and my learned friend's client is in the position of dominant owner. A right of way along a private road does not give the dominant owner a right that the road shall not in any way be interfered with, that is to say, that its width cannot be altered as is sought to be done in the present case. My contention in this respect is supported by Goddard in his celebrated work on Easements. Refers also to *Doorga Churn Dhur* v. *Kally Coomar Sein* (1). Under the circumstances, the owner of the servient tenement is within his rights to alter the road. Moreover, the plaintiff's suit must fail as defendant No. 9 was not made party in the lower Appellate Court. He was not before the Court, and so the decree is bad and must be set aside.

Babu *Devendranath Mandul*, for the Respondents,—My learned friend cannot get round the findings of fact and it will not do for him to misapply principles of law. There is no question of dominant tenement and servient tenement in the present case. Defendant No. 1 is not the owner of the servient tenement. The property purchased by him did not include any portion of the pathway. Plaintiff claims 'rights in gross' against defendant No. 1. The owners of servient tenement are defendants Nos. 2 to 9 and have not preferred any objection. It was a mere mistake that defendant No. 9 was not made a party. But he has been brought before your Lordships. Moreover this sort of objection requires to be taken at an earlier stage.

Dr. *Jadunath Kanjilal* replied.

JUDGMENT.

NEWBOULD, J.—This appeal is against a decree declaring the plaintiff's right of way over certain land and also granting

(1) 7 C. 145; 8 C. L. R. 375; 3 Ind. Dec. (N. S.) 643.

him a mandatory injunction against defendant No. 1 for the demolition of a wall. Defendant No. 1 is the appellant.

The facts which are now undisputed are as follows :—There was formerly a *bari* belonging to one Shyam Chand Mullick, the predecessor-in-interest of defendants Nos. 2 to 8. The west portion of this *bari* was sold to the predecessor of the plaintiff. At that time, a passage for *mehters* was reserved between the land sold to the plaintiff's predecessor and the land reserved by Shyam Chand Mullick. Subsequently, the land to the east of the passage was sold to the defendant No. 1. The question in dispute is the width of the northern portion of this admitted passage.

The finding of the lower Appellate Court is that at the time of the sale to the plaintiff's predecessor, Shyam Chand accommodated him by allowing him the use of the entire land including plots A, B, C, D. The plots A, B, C, D is the plot in dispute. It is also found that the plaintiff has succeeded in proving that he used the entire pathway for a long time and certainly for more than twenty years openly, peaceably, as of right and without interruption. Those findings are conclusive in second appeal.

The learned Pleader for the appellant relies on a passage in Goddard on Easements which was quoted with approval by a Bench of this Court in *Doorga Churn Dhur* v. *Kally Coomar Sein* (1). This passage is to the effect that "a right of way along a private road belonging to another person does not generally give the dominant owner a right that the road shall in no respect be altered, or the width decreased." But that principle, in our opinion, cannot be applied to the present case because, as between the contending parties, the plaintiff and defendant No. 1, it is not a question between the owners of a dominant and a servient tenement. It is found that the property purchased by defendant No. 1 did not include any portion of the pathway or any portion of the disputed plot A, B, C, D. If, as found, this plot was made a part of the pathway when the original homestead was divided, the defendant No. 1, as purchaser of the eastern portion of the homestead excluding this pathway, is not the owner of the servient tenement. The same author, Goddard, in his Law of Easements, 5th Edition, at page 101, remarks—"Private rights of way not appurtenant to a dominant tenement, like public rights of way, are also not easements, but rights in gross," and that is the right here claimed as against the defendant No. 1. The owners of the servient tenement are apparently the defendants Nos. 2 to 9 and they have taken no objection, nor apparently have they appeared at any stage of the suit. On the findings, therefore, the plaintiff is entitled to have his right of way over this land declared and to have an injunction against defendant No. 1 for the removal of the wall which is built obstructing this right of way.

The second point taken is that, the suit must fail because defendant No. 9 was not made a party in the lower Appellate Court. Apparently, by some mistake, defendant No. 9's name was not entered in the decree and this was the reason why he was not of the respondents when the plaintiff appealed. Reliance is placed on the decision in *Madon Mohan Chattopadhya* v. *Akshoy Kumar Baruri* (2). But in that case all the servient owners were not before the Court when it finally dealt with the matter. Defendant No. 9 has, however, been made a party before us. That, in our opinion, remedies the formal defect. And I must also point out that this objection, being one of the non-joinder, should have been taken in the lower Appellate Court when it could have been remedied there.

The appeal fails on both the points argued and is dismissed with costs.

BUCKLAND, J.—I agree.

Appeal dismissed.

(2) 5 Ind. Cas. 23; 14 C. W. N. 15.

GOKAL CHAND *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 435 OF 1920.
August 19, 1920.
Present :—Mr. Justice Gokul Prasad.
GOKAL CHAND—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 323, 353—Public servant, not acting as such, assault on—Offence.

A Tahsildar was requested to procure some camels for military purposes; he deputed some of his peons to procure the camels, and while they were persuading the owners to take their camels to the Tahsil, the accused, who was unconnected with the camel owners, assaulted one of the peons. He was tried and convicted under section 353 of the Penal Code:

Held, that the peon was not acting in the discharge of his duty as a public servant, and that the conviction could not be sustained, but as some injury was inflicted by the accused he was liable to conviction under section 323 of the Penal Code.

Criminal revision against the decision of the Sessions Judge, Agra, dated the 2nd of July 1920.

Mr, *Ram Nama Prasad*, for the Petitioner.

Mr. *R. Mulcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case the applicant has been convicted and sentenced for assaulting a public servant in the discharge of his duty. The case for the prosecution was that some camels were required for military purposes and the Tahsildar of Agra was instructed to secure some for selection and purchase. He sent a Jamadar with some peons to procure camels and persuade the owners to take them to the Tahsil for the purpose. It appears that near the shop of the accused, which is in Mohalla Tajganj, some camels were found standing and the Tahsil Chaprasis were persuading the owners to take the camels to the Tahsil. The owners were not willing to do so and a sort of argument ensued between them. On this the accused came down from his shop and struct one of the peons twice with a stick and the owners of the camels, taking advantage of the opportunity, disappeared. This story has been believed by the two Courts below and the accused has been convicted and sentenced to six weeks' rigorous imprisonment and a fine of Rs. 50. He comes here in revision. The first point taken by Mr. Ram Nama Prasad, who has argued the case with his usual great care and ability, is that it has not been shown that the Tahsil Chaprasis were acting as public servants when they wanted to take the camels to the Tahsil and he has referred to certain cases in which I do not think it necessary to enter into detail. Mr. Malcomson on behalf of the Crown relies upon Regulation XI of 1806 as being one which shows that it was the duty of Tahsildar or a like officer to supply the Military Authorities with facilities for transport, etc., when required to do so. I gave the learned gentlemen who appear on either side an opportunity to show what the exact military necessity was for which these camels were required and to see whether the case came within the purview of Regulation XI of 1806. The result was not at all satisfactory as the record does not disclose the reason why these camels were required. The conviction, therefore, cannot stand under section 353 of the Indian Penal Code as it has not been shown that the Chaprasis were acting as public servants in the discharge of their duties. It is, however, urged by Mr. Malcomson in reply that, even if that is not so, the accused who had nothing to do with the camels had no business to come forward and attack the Tahsil Chaprasis, and be liable to be convicted under section 323 of the Indian Penal Code. He relies upon a case of *Queen Empress* v. *Dalip* (1) in which the conviction of the accused was upheld under section 323 of the Indian Penal Code. The injury was a very trifling one. The accused is a young man who has just attained majority and was possibly carried away into assaulting the Chaprasis who were, as I have said above, not justified in taking the camels to the Tahsil. I, therefore, alter the conviction from one under section 353 of the Indian Penal Code to one under section 323 of the same Code. He has had five or six days in jail and I believe it will be a sufficient warning to him for interfering with the affairs of others in future. In other respects the application is dismissed.

Conviction altered;
Sentence reduced.

(1) 13 A. 245; A. W. N. (1893) 43; 8 Ind. Dec. (N. S.) 871.

PATNA HIGH COURT.
CUTTACK CIRCUIT.
SPECIAL BENCH.
CIVIL REVISION No. 62 OF 1919.
May 5, 1919.
Present :—Sir Dawson Miller, KT.,
Chief Justice, Mr. Justice Coutts
and Mr. Justice Das.
MOHAN DAS PUJHARI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), s. 36—Tout—Procedure in declaring person a tout—District Magistrate, whether can delegate his powers to Subordinate Magistrate.

Before directing the inclusion of a person's name in the list of touts, it is necessary that proceedings should be taken in accordance with section 36 of the Legal Practitioners Act, and the person be given an opportunity of showing cause against the inclusion. [p. 323, col. 2.]

The duties to be undertaken under section 36 of the Legal Practitioners Act cannot be delegated by any of the officers mentioned therein to their subordinates. [p. 323, col. 1.]

Appeal against the order of the District Magistrate, Balasore, dated the 4th January 1919.

Mr. *Gajendra Prosad Das*, for the Petitioner.

JUDGMENT.

MILLER, C. J.—This is an application in revision on behalf of one Mohan Das Pujhari asking us to set aside an order of the District Magistrate of Balasore including the name of the petitioner in the list of touts framed under section 36 of the Legal Practitioners Act. The case for the petitioner is that there is nothing to show that the District Magistrate could be satisfied by any evidence that the petitioner was a tout; secondly, that there was no evidence recorded in accordance with the provisions of that section; thirdly, that, in so far as any inquiry was held or any evidence recorded, this inquiry was held and the evidence recorded not by the District Magistrate himself but by the Sub-Divisional Officer, and that the District Magistrate had no power under the section to delegate his authority to the Sub-Divisional Officer.

What happened was that, upon an anonymous petition being sent to the District Magistrate complaining of the action of the petitioner, the Deputy Magistrate, who appears to have dealt with the case, ordered the Police to make an inquiry and report. That was on the 14th November 1918. The Police apparently made some inquiries and sent a report signed by a Sub Inspector on the 2nd December 1918 in which they reported that inquiries had been made from the village *chaukidar* and *daffadars* and some villagers and they had ascertained that the petitioner was a tout and very often visited Court. Thereupon, the petitioner was called upon to show cause before Mr. Bose, the Sub-Divisional Officer of Balasore. On the 14th December, he seems to have appeared before the Sub-Divisional Officer and filed a petition to the effect that the charges against him were not true and that he was not a tout. Mr. Bose, the Sub-Divisional Magistrate, thereupon ordered Mr. Samad, a Deputy Magistrate, to make an inquiry and report and on the 3rd January, Mr. Samad reported that he had inquired of clerks and *peshkars* in several Courts and public offices and that nearly all of them said that the petitioner was a tout and frequently came to Court and that, in his opinion, the petitioner was a professional tout and he recommended that he should be so declared. This report was made to, and received by, the Sub-Divisional Officer either on the same day or the following day and on the following day, the 4th January, Mr. Bose, the Sub Divisional Officer, passed an order to this effect—

"The cause shown by Mohan Das Pujhari cannot be accepted. Maulvi A. Samad, Deputy Magistrate, made a local inquiry and his report shows that accused habitually acts as a tout. His name may be included in the list of touts under section 36 of the Legal Practitioners Act. Submitted to District Magistrate.

(Sd.) S. C. BOSE,
Sub-Divisional Officer."

In the margin of that order appear the following words: "Approved. (Sd.) M. K. Deb" and the date, the 4th January 1919. Mr. Deb is the District Magistrate of Balasore.

Turning to section 36 of the Legal Practitioners Act, it is quite clear that the only person in the present instance who would be entitled to place the petitioner's name on the list of touts would be the District Magistrate himself. That section provides that a District Magistrate (amongst other officers) may frame and publish list of

persons proved to his satisfaction by evidence of general repute or otherwise, habitually to act as touts, and may, from time to time, alter and amend such lists. It is quite clear, from what I have just said, that it would be very difficult, indeed, to say that there had been any proof whatever to the satisfaction of the District Magistrate that the petitioner was a tout. The District Magistrate held no inquiry, he recorded no evidence, he had no opportunity of seeing the witnesses who gave evidence before Mr. Samad, the Deputy Magistrate, and all he did was to approve and sign an order made by the Sub-Divisional Officer. Further, the section nowhere provides that these duties, which are to be undertaken by the officers who are mentioned therein, can be delegated by any of those officers to their subordinates and it seems to me that in both these respects this order which was not made by Mr. Deb, the District Magistrate, but merely had his approval cannot possibly stand. The matter has been before the High Court of Calcutta on more than one occasion on facts very similar to the present and, in the case of *Chandi Charan Dey, In re*(1), there is a decision of the Acting Chief Justice, Rampini and Mr. Justice Ryves which appears to me to apply to the circumstances of this case. In that case a Sub-Divisional Officer called on a person to show cause why he should not be declared a tout. He shewed cause and the Sub-Divisional Officer after recording evidence on both sides, submitted the proceedings with his report to the District Magistrate who, after perusing them, passed orders declaring the person to be a tout. In such circumstances the High Court of Calcutta, acting upon the authority of an earlier unreported decision of the Chief Justice and Mr. Justice Banerjee in 1897, set aside the order on the ground that it was made in contravention of the powers granted by section 36 of the Legal Practitioners Act. I am unable to distinguish the facts of the present case from the material facts in the case just referred to and, in my opinion, this order must be set aside on the grounds already stated. We have no materials before us, nor is it any part of our duty to express any opinion, as to the conclusiveness or otherwise of the evidence upon which the Sub-Divisional Officer and the Deputy Magistrate acted. However that may be, before the petitioner can be declared a tout it is necessary that proceedings should be taken in accordance with section 36 of the Legal Practitioners Act; and, moreover, that he should be given an opportunity of showing cause against the inclusion of his name in the list of touts.

COUTTS, J.—I agree.

DAS, J.—I agree.

(1) 12 C. W. N. 842.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 820 OF 1918.

October 1, 1918.

Present:—Mr. Justice Fletcher, and Mr. Justice Walmsley.

RADHA KISSEN GOENKA—COMPLAINANT—PETITIONER

versus

FATEH CHAND BORAH—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403—Plea of previous acquittal—Magistrate, duty of.

A decision that a prosecution is barred under the provisions of section 403 of the Code of Criminal Procedure ought not to be arrived at without an investigation of the facts put forward on behalf of the complainant.

Rule against the order of the 2nd Presidency Magistrate, Calcutta, dated the 12th June 1918.

Babus *Dasrathi Sanyal*, and *Bodhi Satwa Sen*, for the Petitioner.

Babus *Manmatha Nath Mukerjee* and *Heramba Chandra Guha*, for the Opposite Party.

JUDGMENT.—We make the Rule absolute in these terms: In our opinion, the learned Magistrate struck too early in deciding that, having regard to the provisions of section 403, Criminal Procedure Code, the present prosecution could not be maintained. It is quite clear that the Magistrate ought not to have arrived at such a conclusion until he had an investigation of the facts put forward on behalf of the complainant. The order of the learned Magistrate must be set aside and the case remitted to his Court for being disposed of according to law.

Rule made absolute.

EMPEROR *v.* CUNNA.

BOMBAY HIGH COURT.

CRIMINAL CONFIRMATION CASE NO. 4 OF 1920
WITH CRIMINAL APPEAL NO. 61 OF 1920.
March 21, 1920.

Present :—Sir John Heaton, KT., Acting Chief Justice, Mr. Justice Shah and Mr. Justice Hayward.

EMPEROR—PROSECUTOR
versus
CUNNA—ACCUSED.

Evidence Act (I of 1872), ss. 24, 132—Criminal Procedure Code (Act V of 1898), ss. 164, 339 (2)—Confession, what is—Confession recorded by Magistrate, procured by Police Officer, admissibility of—"Compelled to answer," meaning of—Approver, confessional statement of, admissibility of, in subsequent trial.

Any statement made by a person which would suggest an inference as to his guilt may be a confession within the meaning of section 24 of the Indian Evidence Act. [p. 327, cols. 1 & 2.]

If it is found that a confession recorded by a Magistrate under section 164 of the Criminal Procedure Code was procured by a Police Officer by the offer of an inducement, the confession becomes inadmissible under section 24 of the Evidence Act. [p. 326, col. 1.]

Unless a person objects to any question the answer to which is likely to criminate him he cannot be said to have been compelled to give such answer within the meaning of the proviso to section 132 of the Evidence Act. [p. 329, col. 2.]

Per *Shah, J.*—Section 24 of the Evidence Act would apply even if the person who is said to have made the confession was not an accused person at the time that he made the confession. It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession. [p. 327, col. 2.]

Though the statements made by an approver may be given in evidence against him under sub-section (2) of section 339 of the Criminal Procedure Code, it cannot be said that the operation of section 24 of the Indian Evidence Act, is altogether excluded. Ordinarily, the inducement that would appear on the surface would be the inducement of the pardon legally tendered and accepted under the provisions of the Criminal Procedure Code. But if it is shown in any case that there was some other influence simultaneously proceeding from any other authority which would invite the application of section 24 of the Indian Evidence Act, then the confessional part of the statements would become inadmissible by virtue of the provisions of that section. [p. 327, col. .]

Per *Heaton, Actg. C. J.*—(*Hayward, J.*, Semble).—A statement falling within clause (*c*) of section 339 of the Criminal Procedure Code is removed from the operation of section 24 of the Evidence Act. [p. 334, col. 2.]

Criminal confirmation case from conviction and sentence passed by the Sessions Judge, Kanara.

Mr. *Y. N. Nadkarni*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—It will be convenient to give a brief statement of the facts relating to this case. The accused, Cunna, and the deceased, Dev Naik, went together from Halgeri to Byadgi. The purpose of the trip was to sell the betel nuts belonging to the deceased Dev Naik. They returned from Byadgi to Halgeri on the morning of the 4th of January 1918. The deceased had with him nearly Rs. 400, being the proceeds of the sale of his betel-nuts; and this fact was known to the accused. The deceased went in the afternoon of that day to Husur, an adjoining village, and returned in the evening back to the house of Cunna. The deceased left the house of the accused during the night for his native place Hukli, and on the way from Halgeri to Hukli he was murdered on the night of the 4th 5th of January 1918. The news of his death was received on Sunday the 6th of January. His body was found with a number of wounds, but the money was not found. A report was sent by the Police Patel. But that report was sent back for an entirely unsatisfactory reason. A second report was sent on the 7th, and the Sub-Inspector, Malhar Bhatt, arrived on the 7th. Thereafter, the accused was arrested and he was sent up in due course to the Magistrate to have his confession recorded. The accused reached the Magistrate whose camp was at Sampkhand and made a confession on the 11th of January 1918. In this confession he implicated three persons, Narsappa, Abdul Ajij, and Faridsab, as being concerned in this murder, and, briefly speaking, he admitted that he was present, and saw the actual commission of the crime by these three persons. This confession is very long and full of details describing fully the first meeting of the deceased and the accused at Halgeri, the trip to Byadgi, the business done at Byadgi, the return journey from Byadgi to Halgeri, his movements at Halgeri on the 4th January, his journey from Halgeri at night towards Hukli, and the details connected with the occurrence of the murder of Dev Naik. Then, on the 1st of February 1918, the Committing Magistrate, to whom the case was sent up against the three persons named by him and the present accused

tendered a pardon to him under section 337 of the Criminal Procedure Code; and he was specifically warned that the essential condition of the tender of the pardon was that he was to make a true and full disclosure of the whole of the circumstances within his knowledge relating to the murder of Dev Naik and that, if he failed to fulfil that condition, he would forfeit the pardon, that he would be liable to be tried on the charge of murder, and that his statement could be used in evidence against him. He accepted the pardon and he was then examined by the Committing Magistrate on the 1st and 2nd of February 1918. He substantially repeated the story told by him in his confession in the same detailed manner. Ultimately, at the trial of Narsappa, Abdul Ajij and Faridsab, on the charge of murder of Dev Naik, he repeated the same statement in March 1918. This statement also is detailed and substantially a repetition of the story told by him in the first confession. The result of the trial, however, was that the three accused who were then charged with the murder of Dev Naik were acquitted and the learned Sessions Judge suggested that the proper authorities should investigate into the conduct of the investigating Sub-Inspector, Malhar Bhatt, and various matters connected with the investigation. At the end of the trial apparently the present accused was allowed to go. There is no mention made in the judgment as to the opinion formed by the Judge about the effect of his view of the case on the pardon tendered to Cunna.

Subsequently, there was an investigation by a Sub Inspector belonging to the Criminal Investigation Department apparently against Malhar Bhatt. There is no evidence in this case as to the details of this investigation, nor is there anything to show as to when exactly it was definitely realised by the Crown that the story told by Cunna at the murder trial was positively false. We find that proceedings were initiated against Malhar Bhatt in the beginning of the year 1919. In January 1919 the present accused was examined as a witness in the case before the Committing Magistrate when in effect he stated that the murder was committed by him and two others whose names he was not prepared to mention, and he gave a detailed account as to how he was induced by Malhar Bhatt to put forward the detailed story which he had put forward in his confession and how Malhar Bhatt had promised to see him safe with reference to the charge of murder. He also narrated that he had given Rs. 350 as a bribe to Malhar Bhatt in consideration of the favour which he had undertaken to show to the accused. Malhar Bhatt was in fact charged with giving and fabricating false evidence, with falsifying official records with a view to save Cunna from legal punishment, with receiving bribes from the accused Cunna and his father, and with extorting money from Bira, the brother of the deceased, Dev Naik. Malhar Bhatt was committed to the Court of Session and at his trial the present accused made another statement in May 1919 in which he substantially adhered to the story which he had stated before the Committing Magistrate in that case. Malhar Bhatt was convicted of all the charges. The learned Judge observed at the end of his judgment that it would be obvious to all concerned that Cunna had not fulfilled the condition upon which his pardon depended.

Thereafter, apparently, proceedings were taken against the present accused on the charge of murder in December 1919, and as a result of those proceedings he was tried by the Sessions Judge of Kanara with the aid of Assessors. The Assessors were divided in opinion. One was of opinion that the accused was guilty: the other was of opinion that he was not guilty. The learned Sessions Judge came to the conclusion that the charge against the accused was established and sentenced him to death subject to confirmation by this Court. We have considered the appeal preferred by accused as also the question of the confirmation of sentence.

There can be no doubt in the case that Dev Naik was murdered on the night of the 4th-5th January 1918. He was last seen before he left Halgeri for his native village of Hukli on the evening of the 4th by the wife of the present accused at her place, and subsequently was found dead with a number of wounds on his person without the money which he had with him. The medical evidence also indicates that, in all probability, there were more persons than one concerned in this crime. The evidence in the case, apart from the statements of the accused, with which I shall presently deal, is meagre as to the

identity of the murderer. That evidence is sufficient to suggest a suspicion against the accused. But, apart from his statements, the evidence, in my opinion, is wholly insufficient to establish the guilt of the accused. That is the view taken by the Sessions Judge, and with that view I agree. There is nothing definite against the accused in his immediate conduct after he was seen by the Police Patel when the information of the death of Dev Naik was received and after the Sub Inspector arrived on the scene. In the present proceeding he has denied his guilt; and his having pointed out the two pieces of a scythe is not of any real importance to connect him with the crime in view of the disclosures as to the production of property and the stains of human blood on the scythe and the pen-knife in the proceedings against Malhar Bhatt. The witness, Kare Naik, has been examined to prove an oral confession made to that witness. The Judge has refused to rely upon that evidence and in my opinion rightly. The evidence of the witness, Ganesh, is not sufficient to establish any confession on the part of the accused, and if the other statements of the accused are not admissible, it is difficult to see how the evidence of Ganesh could be relied upon to establish any confession on the part of the accused.

The question of the admissibility and the weight to be attached to the various statements which the accused has made is very important in this case, because the conviction could be sustained, if at all, provided those statements are found to be admissible in evidence and reliable so far as they relate to his inculpation in this crime. I shall first deal with the confession made by the accused on the 11th of January 1918. That was a confession recorded by the First Class Magistrate under section 164 of the Criminal Procedure Code. The subsequent disclosures clearly establish the fact that that was a statement made by the accused when he was entirely under the influence of the then investigating Sub-Inspector, who undoubtedly had offered him inducement to make it, and that is enough to make the confession irrelevant under the provisions of section 24 of the Indian Evidence Act. I do not desire to elaborate this point because that view was not contested by the learned Government Pleader.

The next two statements in point of time are the statements which he made before the Committing Magistrate and the Sessions Court in the murder case against the three innocent persons. At that time he was examined as a witness because a pardon was tendered to him under the Code of Criminal Procedure, and it is clear to my mind that under section 339 the accused, by wilfully concealing essential information and making false statements with regard to those persons who were then under trial, did render himself liable to be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he might have been guilty in connection with the same matter. These statements which are made in the proceeding in which the accused was examined on oath as a witness in virtue of the pardon tendered to him may be given in evidence against him under section 339 (2), when the pardon has been forfeited.

I just pause here to deal with the point as to whether the pardon is forfeited. The accused has not relied upon the pardon at this trial; and it seems to me clear, in view of the statements which he subsequently made in Malhar Bhatt's case, that he failed to fulfil the condition of making a full and true disclosure of the whole of the circumstances within his knowledge relating to this murder and to every person concerned whether as principal or abettor in the commission thereof. Therefore, these statements may be given in evidence against him.

It is urged, however, on behalf of the accused, that the provision in section 339 (2) does not entirely abrogate or supersede section 24 of the Indian Evidence Act so far as these statements are concerned, and that the express provision is intended to make it clear that the tender of pardon would not make them inadmissible. It is argued that if it can be shown in a particular case that, apart from the inducement of the legal pardon, the witness has given his evidence under such other influence as would invite the application of section 24 of the Indian Evidence Act the particular statement which would amount to a confession on his part would be irrelevant. On the other hand, it is urged for the Crown that section 339, sub-section (2) of

the Criminal Procedure Code practically supersedes section 24 of the Indian Evidence Act when once a pardon is tendered to a person and accepted by him and that person has given evidence as a witness under the benefit of that pardon. This is by no means an easy point ; and, after a careful consideration of the arguments urged on both sides, I have come to the conclusion that though the statements made by an approver may be given in evidence against him under sub section (2) of section 339 of the Crimial Procedure Code, it cannot be said that the operation of section 24 of the Indian Evidence Act is altogether excluded. Ordinarily, the inducement that would appear on the surface would be the inducement of the pardon legally tendered and accepted under the provisions of the Criminal Procedure Code. But if it is shown in any case that there was some other influence simultaneously proceeding from any other authority which would invite the application of section 24 of the Indian Evidence Act. I do not think that the confessional part of the statements which can be given in evidence against the accused under section 339, sub section (2) of the Criminal Procedure Code can be treated as relevant in spite of the provisions of section 24 of the Indian Evidence Act.

In briefly stating the reason for this conclusion, at the outset, I desire to deal with the arguments urged by the learned Government Pleader with reference to the limitation of section 24 of the Indian Evidence Act. It was first suggested that the statements made on oath, even though of an incirminating nature, is not a confession contemplated by section 24 of the Indian Evidence Act. In my opinion, the provisions of section 24 are general and are intended to exclude confessions which have been improperly obtained. The word "confession" means an admission of a criminating circumstance which suggests the inference that the person making the statement committed the crime. The observations in *Queen-Empress* v. *Nana* (1) and *Imperatrix* v. *Pandharinath* (2) show that any statement made by a person which would suggest an inference as to his guilt may be a confession within the meaning of section 24 of the Indian Evidence Act. In the present case the confessional part of these two statements is clear. The accused admits therein his presence at the murder, but not any active participation in the commission of the crime. That is clearly a confession.

The second general consideration urged by the learned Government Pleader is that section 24 applies only to the case of an accused person, who is charged as an accused person at the time when he makes his confession, and in support of this argument he has relied upon the observations of Mr. Justice Maclean in *Empress* v. *Nobin Chundra Banikya* (3), and certain remarks in *Emperor* v. *Mahamadbuksh Karimbuksh* (4). In my opinion, however, section 24 would apply even if the person who is said to have made the confession was not an accused person at the time that he made the confession. It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession. In fact, if the argument that the person accused was not an accused person at the time when he gave his evidence as a witness to whom a pardon is legally tendered were a sufficient answer to the application of section 24, it might almost establish that the provision in sub-section (2) of section 339 of the Criminal Procedure Code would be superfluous. The object and scope of section 24, in my opinion, clearly indicate that it would not be right to read such a limitation as the argument urged by the Government Pleader in my opinion involves. The section does not refer in terms to any particular time when the confession, in order to be within the scope of the section, must be made. It is quite enough that the confession is subject to the infirmities which are laid down in that section, and if it is made by an accused person either at a time when he was an accused person, or before he came to be accused, or even at the time when he was under the benefit of the pardon, in my opinion it could not be said that section 24 on that ground would not apply. The observation in *Emperor* v. *Maham dbuksh Karimbuksh*

(1) 14 B. 260 at p. 263 (F. B.); 7 Ind. Dec. (N. S.) 632.

(2) 6 B. 34 at p. 37; 3 Ind. Dec. (N. S.) 479.

(3) 8 C. 560 at p. 565; 10 C. L. R. 369; 4 Shome L. R. 232; 4 Ind Dec. (N. S.) 360.

(4) 8 Bom L. R. 507 at p. 512; 4 Cr. L. J. 49.

(4) must be read with reference to the context, and I do not think that the point was decided in that case in the sense in which the learned Government Pleader has contended before us.

The question really is, whether the application of section 24 of the Indian Evidence Act is completely excluded in the case of statements to which the provisions of section 339 (2), Criminal Procedure Code, apply. I do not think so. Section 339 (2) simply provides that when the legal pardon is forfeited the statement may be given in evidence against him, which in substance means that, in virtue of the tender of pardon, which the person concerned has subsequently forfeited under the section, he will not be protected from the effect of having made the statement on oath when he was under the benefit of that pardon. But there is nothing either in the terms or the reason of the rule to indicate that section 24 cannot apply to a confession contained in the statement, even though the facts necessary to invite its application are established. If it can be shown in any case that the person making the statement was at the time under inducement other than and in addition to the inducement of a legal pardon, I do not see any reason why section 24 should not apply. No doubt, very strong and clear evidence of the operation of such other influence would be required. But in law, I think, it is open to an accused person to establish the existence of such inducement. Thus, the question to my mind is whether it is shown on the evidence whether the conditions necessary to invite the application of section 24 have been fulfilled.

Before I proceed to deal with this question, I desire to say a word with reference to the decision in the case of *Fakira Appaya Emperor* v. (5). That was a case relating to a statement made by an accused person before the Committing Magistrate with reference to which section 287 of the Criminal Procedure Code provides that it shall be tendered by the prosecutor and read as evidence Whether in the case of such a statement there is any real scope for a possible application of section 24 of the Indian Evidence Act or not is a matter upon which it is not necessary to express any opinion in this case. In *Fakira Appaya Emperor* v. (5) my brother Hayward was of opinion that section 24 of the Indian Evidence Act would have no application. Mr. Justice Batchelor did not express any decided opinion on the point. It may be, as suggested by the learned Government Pleader, that the inclination of his opinion was in favour of the view that section 24 could not apply. But the phraseology of section 287 is different from that of subsection (2) of section 339; and the case has no direct application, in my opinion, to the question that arises in this case with reference to the statements made by an approver. I am unable to hold, on the strength of the opinon expressed in that case, that section 24 can have no application to the statements made by a person, who has accepted the tender of pardon and who has forfeited it. I have already given my reasons for the view which I take as to the possible application of section 24 in a case in which the necessary facts are established.

In the present case the question is, whether these two statements which the accused made as a witness in the murder trial are shown to have been improperly induced so as to invite the application of section 24 of the Indian Evidence Act. I am of opinion that it is shown that they were the result of improper inducement on the part of the investigating Sub Inspector, Malhar Bhatt. In coming to this conclusion I have given full weight to the circumstance that not only according to law, but in view of the explicit manner in which the conditions of the pardon were brought home to the accused, it may be said that the statements could not have been made under any other inducement. In spite of this clear warning of the Magistrate that he was expected to make a true and full disclosure of the facts relating to the murder, he straightway proceeded to make statements which are now shown and admitted to be false. Those statements are exactly in accordance with the previous confession which he had made before the Magistrate, and which was recorded under section 164. It is, in my opinion, difficult to resist the inference that at the time when he made

(5) 33 Ind. Cas. 309; 17 Bom. L. R 1059; 40 B. 220; 17 Cr. L. J. 133.

his statement on oath the real influence which was operating on his mind was not only the influence of the legal tender of pardon, but also the most objectionable influence of the Sub-Inspector. It is, in my opinon, not right to ignore the facts which are not now in dispute, and which clearly show how the Sub-Inspector was then exercising his influence on the present accused and how he was perverting the cause of truth and justice. Undoubtedly, the accused became a party to it, so much so that even at the risk of forfeiting the legal pardon he was prepared to make these false statements. In my opinion, the force of that inducement must have been simply irresistible at the time he made these statements before the Committing Magistrate and at the trial. It is on that basis that the series of lies which he has stated on oath on both these occasions can be truly explained. It is clear on the facts not now in dispute, that the confessional parts of these two statements could not be properly treated as having been the result of the legal pardon merely which was tendered to him to elicit the truth but to a great extent induced by the influence which the Sub-Inspector was then exercising over this accused. I fully recognize that the accused was undoubtedly ready and most objectionably ready to subject himself to this influence, as the Sub-Inspector was ready to exercise it. But even in the case of such a person I do not see how section 24 can be said to be inapplicable. In my opinion, it is not reasonably possible to avoid the inference which I have stated with regard to the application of section 24 as regards the confessional parts of these two statements.

Assuming, however, for the sake of argument, that these two statements are admissible under section 339, clause (2) of the Criminal Procedure Code, speaking for myself, I am not prepared to attach any weight whatever to these two statements. These statements are substantially repetitions of what was stated in the confession, and there are so many false statements relating to three innocent persons that it is not easy to separate the truth from the falsehood. It is no doubt a strong argument in favour of accepting these statements that a person would not lightly and wrongly inculpate himself. Ordinarily, it would be a strong consideration. But, having regard to the way in which the truth and the course of justice have been perverted in this case, under the objectionable influence of the then investigating Sub-Inspector, and the extent to which the accused has mixed up falsehood with such truth as there might be in the statements, I would consider it really unsafe to attach any weight to statements made under those circumstances.

I now come to the statements which the accused made in the case against Malhar Bhatt. These are, to my mind, the most important statements, and, if they are admissible in evidence, undoubtedly there is a strong case against the accused. The difficulty, however, with regard to these two statements, which presents itself to my mind, is as to the admissibility of the confessional parts thereof. At the time when these two statements were made, the legal position of the present accused was that he was liable to be tried on a charge of murder, and that he was a competent witness in the case against Malhar Bhatt. Ordinarily, if there was nothing else, his statement of an incriminating character made on oath without any objection raised by him as to his obligation to answer the question put to him as a witness, would be admissible. At one time I felt some doubt as to whether those statements would be admissible, in view of the proviso to section 132 of the Indian Evidence Act. But the learned Government Pleader has shown, in my opinion, satisfactorily that in spite of the diversity of judicial opinion on this point it is now a settled rule that unless a person objects to any question the answer to which is likely to criminate him, he cannot be said to have been compelled to give such answer within the meaning of the proviso. This diversity of judicial opinion is sufficiently indicated in *Queen-Empress* v. *Ganu Sonba* (6) and *Queen* v. *Gopal Dass* (7) and whatever may be my view as to the proper interpretation of section 132 of the Indian Evidence

(6) 12 B. 440; 16 Ind. Dec. (N. s.) 778.
(7) 3 M. 271 (F. B.); 2 Weir 782; 1 Ind. Dec. (N. s.) 744.

Act, including the proviso, I think that the position must be accepted that the answers which the witness has given, though of an incriminating character, could be proved against him in the trial to establish the offence to which those incriminating answers relate.

The difficulty, however, which remains with reference to these statements arises from the provisions of section 24 of the Indian Evidence Act. The learned Sessions Judge on this point has taken the view that the facts which would invite the application of section 24 with reference to these two statements are established, but in his opinion the statements are saved under section 339, sub-section (2) of the Criminal Procedure Code, and could be admitted in evidence under that sub-section. In my opinion, sub-section (2) of section 339 has no application to the statements made by the accused in Malhar Bhatt's case. They were not made by him as a person to whom any pardon was tendered with reference to the charge that was under investigation, and, reading section 339, clause (2) in relation to the context, it is clear to my mind that these statements could not be admitted in evidence in virtue of the provisions of section 339, sub-section (2) of the Code of Criminal Procedure.

The question is whether the confessional parts of these statements are irrelevant under section 24 of the Indian Evidence Act. If it appears to the Court that the statements were made as the result of any inducement having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him the confession contained therein would be irrelevant. I am clearly of opinion that section 24, as a matter of law, would apply if the conditions necessary for the application of that action are established and the question is purely one of fact as to whether the confessional part of these statements is shown to have been the result of such inducement as is described in section 24. The facts relevant, in my opinion, with reference to this point are that when the murder trial ended in favour of the three accused who were then charged, the present accused was allowed to go. There was no observation in the judgment that the pardon was forfeited and, according to the facts then known it was not clear that his pardon was forfeited. Though the accused must have known that he had not fulfilled the conditions essential to retain the benefit of the pardon, he could not be reasonably expected to believe that his pardon was forfeited. Then, nearly for a year, there were no proceedings. In the beginning of 1919 proceedings were taken against Malhar Bhatt. No evidence is adduced by the prosecution in the present case relating to the investigation carried on during this interval. It is not shown that anything was done either in the course of the investigation or at the trial of Malhar Bhatt to put this witness in mind of his real position that he had forfeited the pardon, and that at the date he was liable to be tried on a charge of murder. Under the conditions under which the accused came to be examined in Malhar Bhatt's case, it seems to me that the accused then had grounds which would appear to him reasonable for supposing that, by adhering to the incriminating statement as regards himself, he would gain some advantage or avoid some evil of a temporal nature in reference to the charge of murder. It seems to me that the learned Judge's conclusion that the impression produced by the pardon had not ceased to operate at the time is right. In my opinion, those two statements were made under the influence of the pardon which was in fact tendered, but with regard to the forfeiture whereof nothing had been done or said by any authority up to the time that he came to make those statements. The circumstances were peculiar, and on the special facts it is difficult to avoid the inference as to the inducement operating on his mind. To start with, there was a very improper inducement offered by the investigating Sub Inspector, then there was the tender of a pardon, and after the trial of the case in which he was examined as an approver, for nearly a year no steps had been taken against him to put him on his trial on the charge of murder. It is, in my opinion, quite natural for a person in that position to believe, though

there may be no legal justification for it that he was safe in adhering to the incriminating statement regarding himself. Thus, at the time of these statements, his liability to be tried on the charge of murder was there. His fate depended upon the will of the Crown, *i. e.*, as it would appear to the witness to a certain and appreciable extent upon the will of the then investigating officer. It was open to the Crown not to take any action against him: at least so it would appear to the person concerned. Under those circumstances, the Crown should have definitely made it clear to him that he was going to be prosecuted. In the absence of any such clear indication of his true position in fact, it is difficult to avoid the inference that the accused made his statements under an erroneous but honest belief that he was securing an advantage of a temporal character by adhering to the self inculpation and by exposing Malhar Bhatt; and it is difficult to dissociate this belief from the inducement which must be taken to have operated on his mind in consequence of the apparent silence of the investigating officer in Malhar Bhatt's case as to whether he was going to be tried on the charge of murder or not. It is true that there is no direct evidence of such inducement. But the situation that arose was such that, unless the impression created thereby was completely removed, its existence must be inferred. This brings me to the argument based on the words of section 28 of the Indian Evidence Act. I agree that the impression created by Malhar Bhatt was completely removed when the accused saw him in the dock and gave evidence against him. But the impression created by the tender of pardon, apparently not declared forfeited by any responsible authority with no proceedings against him for nearly a year, was not completely removed. At least, it is not shown by the prosecution that it was so removed. Section 28 shows that once an impression of any improper inducement is created, it is necessary to show that it is completely removed to make the statement relevant. The learned Government Pleader has relied upon section 29 to show that the confession does not become irrelevant merely because he was not warned that he was not bound to make such a confession and that evidence of it might be given against him. But this argument ignores the effect of the words "if such a confession is otherwise relevant" and of the expression "merely because." In the present case the confessions contained in the statements appear to me to fall within the scope of section 24, and are therefore, irrelevant: and the argument for the defence does not seek to make the statements irrelevant merely because the accused was not warned that he was not bound to make such confession and that the evidence of it might be given against him. The argument based on section 29 affords no sufficient answer to the difficulty which exists in the way of the prosecution in this case in asking the Court to take these statements into consideration against the accused so far as the charge of murder is concerned. It is with regret that I have felt myself constrained to come to this conclusion, because the result of it is that none of the statements made by the accused can be taken fairly into consideration against him in this case. Of whatever atrocious mendacity this accused may have been guilty, for which he may be still liable to be prosecuted, I find it difficult to avoid the conclusion that these confessions cannot properly be admitted in evidence against him, and the set of statements which he made at the murder trial, even if admitted in evidence, do not, in my opinion, afford any safe basis for his conviction.

The result is that this charge of murder is not established against the accused. I would, therefore, allow the appeal, set aside the conviction and sentence, and order him to be acquitted and discharged.

HAYWARD, J.—The accused, Cunna, appeals, against his conviction of the murder of his uncle, Dev Naik, on the early morning of Saturday the 5th January 1918 on the high road near the village of Mensi between Halgeri and Hukli in the Kanara District. The case comes before us also for confirmation of the sentence of death passed upon him by the Sessions Judge of Kanara under section 302 of the Indian Penal Code.

The accused Cunna lived in the village of Halgeri and his uncle Dev Naik lived about nine miles off at the village of Hukli in the jungles of Kanara. They had proceeded together on a journey of several

days to sell betel-nuts belonging to the deceased Dev Naik at the town of Byadgi in the Dharwar District. The accused Cunna and his uncle Dev Naik had returned together with certain purchases that they had made and with the remainder of the Rs. 400 obtained for the betel-nuts in the pocket of Dev Naik. The accused Cunna was the last person known to have been with his uncle Dev Naik when the latter set out alone with the remainder of the Rs. 400 in his pocket upon his return journey in the early morning of Saturday the 5th January 1918 from the accused Cunna's house in Halgeri to the deceased Dev Naik's village of Hukli. It was rumoured on the morning of Sunday the 6th of January 1918 that Dev Naik had been found dead upon the high road near the village of Mensi between Halgeri and his home at Hukli in the Kanara District.

Now the accused Cunna confessed in great detail in the course of the subsequent investigation that he and three others were concerned in causing the death of Dev Naik. It was an exculpatory confession laying the blame mainly upon the three other men. It was recorded on the 11th of January 1918 by the First Class Magistrate, who was subsequently the Committing Magistrate. It has since been established that this confession had been improperly obtained by the promise of security offered in consideration for his giving up the Rs. 400 that he had obtained by the murder to the investigating Sub-Inspector, Malhar Bhatt. It was accordingly held at the trial that the statement was inadmissible in evidence, and rightly so held in my opinion, in accordance with the provisions of section 24 of the Indian Evidence Act.

The accused Cunna was, however, offered a pardon on the 1st of February 1918, and the conditions of the offer were specific and were specifically accepted. The question put to him was—"Are you willing to accept a tender of pardon on condition of your making a true and full disclosure of the whole of the circumstances within your knowledge relating to the murder of Dev Naik?" He answered—"Yes. I accept tender of pardon and abide by the responsibility." He was then asked—"Do you understand that the said tender of pardon will be forfeited if you wilfully conceal anything essential or give false evidence and that you will be then tried for murder?" He answered—"I understand all this and accept the tender of pardon." He thereafter repeated the story, he had already told, in all its details on the 1st and 2nd of February and on the 4th of March 1918 before the First Class Magistrate, who was then the Committing Magistrate. He again repeated the statement in full detail on the 15th and 18th of March 1918 before the Sessions Court. It was then believed to be probably true as regards his own presence at the murder, but to have been wholly unreliable as to the part said to have been taken by the other three men who were then undergoing their trial for the murder of Dev Naik. These other men were accordingly acquitted upon the concurrent findings of both the Assessors and the Sessions Judge.

It has been urged before us on his behalf that these two statements also ought to be excluded as inadmissible by reason of the provisions of section 24 of the Indian Evidence Act. It has been urged, on the other hand, that there is a distinction between confessions made during investigations referred to in sections 24 to 30 of the Indian Evidence Act and section 164 of the Criminal Procedure Code, and statements formally recorded in trials referred to in sections 209 and 287 of the Criminal Procedure Code. It has been urged that while those made in the Courts of investigation might well be excluded from the trial, the latter hardly could be. They form in fact themselves a part of the incidents of the trial and there has been enacted the express legislative provision that they should be read as evidence in section 287 of the Criminal Procedure Code. It is not necessary for me to elaborate my opinion upon this point as these are not the kind of statements here in question, and the matter regarding them has been sufficiently dealt with for the present purposes in the case of *Fakira Appaya* v. *Emperor* (5). But there is this similarity between them and those here in question, namely, statements on oath under promise of pardon that it has similarly been expressly enacted that such statements should, when pardon has been forfeited, be admissible in evidence against the maker under section 339, clause (2) of the Criminal Procedure Code. It

would, in my opinion, be a straining of language to say that those statements were induced by the previous promise of obtaining a pardon held out by the investigating Sub-Inspector, Malhar Bhatt and so inadmissible under section 24 of the Indian Evidence Act, and that they were not induced by the pardon actually thereafter obtained from the Committing Magistrate. There would, in my opinion, be no doubt whatever that those particular statements, if induced by the pardon, having been false in respect of the three other men had worked a forfeiture of the pardon, and indeed the defence in the present trial had not endeavoured to rely upon the pardon. The issue was distinctly raised in these words—"Do you say that you have been pardoned for the offence charged against you?" The answer was—"I did not kill the man, and I, therefore, do not rely on that pardon." It seems to me, therefore, that there can be no doubt that those two statements were rightly admitted in evidence for what they were worth at the trial by the learned Sessions Judge under section 339, clause (2) of the Criminal Procedure Code.

If these had been the only statements made, it might have been argued with some force that they were not sufficient to bring home the charge to the maker. They had been held to be false in some material particulars. But there were two further statements made subsequently in the course of the proceedings taken for bribery and fabricating false evidence of murder against the investigating Sub-Inspector, Malhar Bhatt. Cunna admitted in those statements that he was himself guilty of the murder. He admitted that there were other men with him, but he also admitted that they were not the men previously mentioned and tried, and he declined to give the names of the men who were really his accomplices in the murder. He made these statements on the 27th and 28th January 1919 before the Committing Magistrate and on the 17th and 19th of May 1919 at the trial before the Sessions Court.

It has again been urged before us that these two statements ought to be excluded from evidence under section 24 of the Indian Evidence Act. It has been urged that they were made under the inducement proceeding from the previous pardon, and that, therefore, they were inadmissible, and that all they were not statements in the course of the trial for murder, they were not within the provisions of section 339, clause (2) of the Criminal Procedure Code. It seems to me, however that the fallacy of this argument lies in the first proposition that they were induced by the pardon within the meaning of section 24 of the Indian Evidence Act. It is true, no doubt, that he had been offered a pardon, but the terms of that offer were specific and had been specifically accepted. He then knew that if he made false statements he would forfeit his pardon. He must have known that he had made false statements when he implicated three innocent men at the trial for murder. He must, moreover, have been perfectly well aware that his statements were known to be false as the three men whom he had accused had been acquitted by the concurrent finding of both the Assessors and the Sessions Judge. He must have known that the force of the pardon was spent and this has been shown by the fact that he did not venture to rely upon that pardon at his trial. It seems to me, therefore, that it would be mere sophistry to say that the inducement to make the further statements implicating himself was the forfeited pardon. The inducement was, to my mind, sufficiently plain. It was his own self-interest. He was anxious at all costs to save his own skin, and he thought that there was just the possibility that he might do so by repeating the statements and turning upon his previous protector then in the dock, the investigating Sub-Inspector, Malhar Bhatt. This was no doubt the reason which prevented his having recourse to the provisions of section 132 of the Indian Evidence Act. It has been suggested that he ought to have been warned of his position and that as he was not warned he ought to be given the benefit of those provisions. But that has been held not to be the law by the concurrent decisions of all the High Courts. It has been held that if a man voluntarily makes an incriminating statement, he must take the consequences for it. He can only plead protection if he has specifically declined to make the statement, and has been specifically compelled to do so by the Court. He made no such effort in this case, and he is, therefore, not entitled to the benefit which has been pleaded for him of section 132 of the Indian

Evidence Act. It seems to me, therefore, that these two statements, made voluntarily in the subsequent proceedings for bribery and fabricating false evidence against his previous protector, the investigating Sub-Inspector Malhar Bhatt, were admissible and were rightly held to be admissible in evidence against him, and were not barred by the provisions of section 24 of the Indian Evidence Act. It is unnecessary, therefore, to discuss the further question raised whether they were or were not within the provisions of section 339, clause (2) of the Criminal Procedure Code. It seems to me sufficient to say that they have not been shown beyond all doubt to have been within them, and that it would not, in my opinion, be proper in this particular matter to rely upon the provisions of section 339, clause (2) of the Criminal Procedure Code.

It seems to me, if these statements were rightly admitted in evidence, that the guilt of Cunna was hardly disputable upon the merits. The details of his two statements in the original trial were too full and lurid to have been the pure invention of a person who had never been present and had taken no part in the murder, and they were confirmed as to his presence with the further indication that he must have taken a prominent part in the murder by his subsequent statements in the trial of the investigating Sub-Inspector Malhar Bhatt. It has also to be remembered that he was the last man known to have been with the deceased, that he was the man who knew that there were Rs. 400 in the pocket of Dev Naik, and that he was the man who on his own admission produced in the subsequent investigation the two pieces of broken sickle which, it was stated, had been used for the murder. It seems to me, therefore, that the guilt of Cunna has been fully established and that he has been rightly convicted of the murder of his uncle Dev Naik, on the opinion of one of the Assessors, by the learned Sessions Judge. It seems to me further after careful consideration that the sentence passed upon him was the right one. Consideration has been given to the delay. But it has only been too evident that the delay was of his own making for the purpose of saving his own skin and getting three innocent men hanged for the murder. Consideration has been given to the influence exercised upon him by the corrupt Sub-Inspector, Malhar Bhatt. But it has only been too evident that he readily fell in with the proposal to obtain security from punishment by the payment of the Rs. 400 obtained by the murder to the grasping Sub-Inspector, Malhar Bhatt. Consideration has also been paid to the fact that he was offered a pardon. But it has become only too evident that he forfeited that pardon by malicious perjury, that he knew that he had forfeited it. But that, nevertheless, with the hope of still saving his own skin he turned against his former protector, then impotent in the dock, the Sub-Inspector, Malhar Bhatt. It seems to me impossible in view of his conduct throughout and the brutality of the murder to record grounds which would be sufficient to justify us in holding that the sentence of death was not properly passed upon him by the learned Sessions Judge. It seems to me, therefore, that we ought to confirm the conviction and the sentence of death passed upon Cunna and that his appeal ought to be dismissed by this Court.

HEATON, ACTG. C. J.—There is no time left for me to state my reasons with any fullness, so that all I will say is that I doubt whether, although I agree with my brother Hayward, my reasons would altogether correspond with his. I largely disagree with my learned brother Shah. We are, however, all agreed that the confession made by Cunna in the course of the Police investigation conducted by Malhar Bhatt into the murder cannot be used as evidence. I hold that, in the particular circumstances of this case, the statements made by Cunna in the murder case when he deposed as a witness are not inadmissible in virtue of section 24 of the Indian Evidence Act, for they are removed from the operation of that section in virtue of clause (2) of section 339 of the Criminal Procedure Code. And I hold, in the particular circumstances of this case, that the two statements made as a witness by the accused in Malhar Bhatt's case were not caused by any inducement, threat or promise within the meaning of section 24 of the Indian Evidence Act. I will just add a word or two on this point. What the accused himself says about these statements, in so far as he says anything at all, is that they were induced, not by

anything that Malhar Bhatt had said, nor by the pardon offered him by the Magistrate but by what was done by a Criminal Investigation Department Officer in the course of the latter's inquiry. I think to hold that these statements were caused by the inducement offered by the Magistrate when the pardon was tendered is far too conjectural an inference. We do not know what was in the accused's mind. He has not told us himself. The circumstances are so complex and they cover so long a period of time that, speaking for myself, I feel it quite impossible to say with any degree of certainty what was in his mind, what he hoped to gain, what he hoped to avoid by making those statements. But, in so far as I can conjecture at all, I do not conjecture that he made those statements because of the pardon which had been twelve months eariler offered him by the Magistrate. When once those statements and the two earlier ones are admitted in evidence, the conviction of the accused is inevitable. I find nothing in this case to excite in my mind any feeling of commiseration. I find nothing that lightens the treacherous wickedness of the man who committed the murder and I think if there ever can be a case in which the punishment of death is deserved that this is such a case. Therefore, I think that not only the conviction but the sentence should be confirmed.

Conviction and sentence confirmed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 543 OF 1920.
October 1, 1920.
Present :—Mr. Justice Gokal Prasad.
BEHARI LAL—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 174—Summons not issued according to law—Accused's failure to appear—Offence.

Upon receipt of a petition complaining that accused had constructed a temple which, owing to its proximity to a mosque and graveyard, was objected to by the Muhammadans, and suggesting the likelihood of a breach of the peace, the Sub-Divisional Magistrate directed a Tahsildar to make inquiries, to record the statements of the persons complained against and to return the papers for orders. The Tahsildar sent his peon to fetch these persons, but as they failed to come, he issued a summons to them to appear, written on a form provided for cases under section 193 of the Land Revenue Act, and not purporting to be under any section of the Criminal Procedure Code, and on their failure to appear, he convicted them under section 174, of the Penal Code :

Held, that the proceedings were illegal *ab initio* that the order of the Sub-Divisional Magistrate was *ultra vires*, that there was no summons issued according to law, and that there could be no conviction under section 174 of the Penal Code. [p. 336, col. 2.]

Criminal revision against the order of the Session Judge, Moradabad, dated the 7th June 1920.

Mr. *S. C. Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The facts of this case are out of the common. It appears that on the 13th of October 1919 one Mianji Ali Khan presented an application to the Sub Divisional Magistrate of Najibabad complaining that one Behari Lal had constructed a temple in connection with a Dharmsala and that this temple was objected to by the Muhammadans owing to its proximity to a certain mosque and a cemetry. This application did not mention any section under the two Criminal Codes but suggested that the construction was likely to lead to a breach of the peace. The Sub Divisional Magistrate, instead of proceeding under section 107 of the Code of Criminal Procedure, which was the obvious course, sent the papers to the Tahsildar of Najibabad directing him to make inquiries from Behari Lal and his agent Makhan Lal; to record their statements and send them to him for orders. This order, too, curiously enough does not mention any section of the Penal or Criminal Procedure Code. On receipt of this order the Tahsildar issued an order to a Chaprasi directing him to inform Behari Lal and Makhan Lal to present themselves before the Tahsildar on the next day, that is, the 28th of October 1919. The Chaprasi made a return to the effect that he had informed Behari Lal but

could not find Makhan Lal, who was reported to have gone to Nagina and that he could not find out when the said Makhan Lal would return. Neither of these persons appeared before the Tahsildar on the 25th of October and he then issued summonses to them for their appearance on the 5th of November 1919. These summonses did not purport to be issued under any section of the Code of Criminal Procedure but were written on forms provided for issue of notices under section 193 of the Land Revenue Act. Behari Lal and Makhan Lal again failed to appear on the 5th of November and on the 20th of November proceedings were instituted against Behari Lal under section 174 of the Indian Penal Code. This was in connection with his non-appearance on the 5th of November. He was convicted of the offence on the 24th of January 1920. On the same date proceedings were instituted against him under the same section for failing to appear on the 28th October 1919 and he was convicted under that section on the 19th of March 1920. So far as Makhan Lal was concerned, he was convicted on the same day under section 174 of the Indian Penal Code because he had not appeared on the 5th of November 1919. The same Magistrate convicted Behari Lal on the 7th of February 1920 under certain sections of the Municipalities Act, the proceedings having been started on the 21st of November 1919. Applications in revision were put in before the Sessions Judge in all the four cases and he referred the case in which Behari Lal was convicted under the Municipalities Act for the orders of this Court and that order has, I am informed, been set aside by this Court. The learned Judge has confirmed the conviction and sentence passed on Behari Lal relating to his non-appearance on the 5th of November. He has recommended the setting aside of the conviction for the offence alleged to have been committed on the 28th of October on the ground that no case has been made out against Behari Lal on which he could be legally convicted. He has come to the conclusion that the starting of the proceedings regarding his non appearance on the 28th of October after he had already been convicted with regard to the events of the 5th of November savoured of prosecution. I am in full accord with his opinion. The learned Sessions Judge came to the conclusion that the mere fact that the summonses issued were written on a form provided for cases under section 193 of the Land Revenue Act was not at all material and was an irregularity. Having regard to all the facts which I have stated above, I cannot but come to the conclusion that the whole proceedings were illegal from the very beginning. There was no complaint of any particular offence and the order of the Sub-Divisional Magistrate on the petition put in by Mianji Ali Khan to call for an inquiry through the Tahsildar was *ultra vires*. If there was any complaint at all it was a complaint under section 107 of the Code of Criminal Procedure and the only course opened under the law to the Sub-Divisional Magistrate was to issue a notice himself to the accused to show cause why he should not be bound down to keep the peace. I cannot understand under what provision of law the Sub-Divisional Magistrate directed the Tahsildar to send for Behari Lal and Makhan Lal and record their statements and forward them to him. The whole action of the learned Sub-Divisional Magistrate seems to have been without authority and is quite inexplicable. The result is, that there was no summons issued according to law against the accused and, therefore, he could not be convicted of an offence under section 174 of the Indian Penal Code. I, therefore, set aside the conviction and sentence and direct that the fine, if paid, be refunded to the accused.

Conviction set aside.

INU MANDAL *v.* BIMALENDU ROY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 111 OF 1919.

May 19, 1920.

Present:—Mr. Justice Newbould and Mr. Justice Buckland.

INU MANDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Kumar BIMALENDU ROY BAHADUR—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 22—Purchase of raiyati *holding by co-sharer landlord prior to amendment of section—Landlord, status of.*

Under section 22 of the Bengal Tenancy Act, prior to its amendment by Act I of 1908 (E. B. A. Coun.) the status of a co-sharer landlord purchasing a *raiyati* holding was that of a *raiyat*, and as such he was able to grant an under-*raiyati* lease. [p. 337, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Rajshahi, dated the 9th of December 1918, reversing that of the Munsif, Naogaon, dated the 21st of August 1917.

FACTS appear from the judgment.

Babu *Hiralal Chakerbartty*, for the Appellants.—I submit that section 22 does not apply, it being a non-transferable holding. Even if section 22 applies, my friend's client is not in a better position. He being a superior landlord he cannot become a *raiyat*. My client cannot be treated as an under *raiyat* but as *raiyat*. The purchase is absolutely inoperative. Refers to *Girish Chandra Chowdhry* v. *Kedar Chandra Roy* (1) and *Lakhi Kant Das* v. *Balabhadra Prosad Das* (2). If section 22 applies, he would be the proprietor and my client would be *raiyat* in spite of the recital in the lease. His right is a bare right to hold the land subject to his paying rent to the co-sharer landlord. Reads section 178, clause 3, sub-clause (*a*), Bengal Tenancy Act. Refers to *Jawadul Huq* v. *Ram Das Saha* (3). A non-occupancy right which cannot ripen into occupancy right by twelve years' possession is not a non-occupancy right but a negation or a shadow of it. Refers to *Ram Lal Sukul* v. *Bhela Gazi* (4).

(1) 27 C. 473; 4 C. W. N. 569; 14 Ind. Dec. (N. S.) 311.

(2) 25 Ind. Cas. 546; 19 C. L. J. 400 at p. 401.

(3) 24 C. 143; 1 C. W. N. 166; 12 Ind. Dec. (N. S.) 761.

(4) 6 Ind. Cas. 370; 37 C. 703; 14 C. W. N. 814.

Babu *Ram Chandra Mazumdar* (with him Babu *Jatindra Mohun Choudhury*), for the Respondent.—The question is whether plaintiff was a *raiyat* or by his purchase of occupancy right there was merger. *Miajan* v. *Minnat Ali* (5), *Ram Mohan Pal* v. *Sheikh Kachu* (6) authoritatively say such a proprietor having purchased, have right to hold the land as a *raiyat*. The co-proprietor is a stranger with regard to the other co-owners. He steps into the shoes of his vendor There is no merger. How else could he hold the land except in the interest of his vendor? Even if section 22 does not apply, the law of merger does not apply in Mofussil.

Babu *Hiralal Chakerbartty* briefly replied.

JUDGMENT.

NEWBOULD, J.—This appeal arises out of a suit in ejectment. The plaintiff failed in the first Court but was successful in the lower Appellate Court, and the defendant now appeals. The plaintiff, who was a co-sharer landlord purchased a *raiyati* holding in execution of a mortgage, decree in 1904. In 1905 he granted the defendant an under-*raiyati* lease for nine years. He brought this suit to eject the defendant on the expiry of the term. The contention of the defendant which was upheld by the first Court was, that the plaintiff's status could not be that of a *raiyat* and that consequently he, the defendant, was not an under-*raiyat* but a *raiyat*. The only question argued before us has been as to the status of the plaintiff. The case has been argued on the assumption that section 22 of the Bengal Tenancy Act, as it stood before the amending Act I (E. B. and A.) of 1908, applies to this case. It is contended on behalf of the appellant that the effect of the amendment was not to alter the law but to make it more clear. Under clause (2) of the amended section of the Act, a purchaser in the plaintiff's position would have no right to hold the land as a *raiyat*. The corresponding provision before the amendment was: "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist." The meaning of this provision has been considered by a Special Bench in the case of *Miajan* v. *Minnat Ali* (5)

(5) 24 C. 521; 12 Ind. Dec. (N. S.) 1015.

(6) 32 C. 386; 9 C. W. N. 249; 1 C. L. J. 1

and by a Full Bench in *Ram Mohan Pal* v. *Sheikh Kachu* (6). In both these cases it has been held that, "by the transfer of the occupancy right to a person jointly interested in the land as proprietor or permanent tenure-holder, the holding does not cease to exist, but only the occupancy right is terminated." It seems to us that, on the authority of these rulings, the plaintiff by his purchase in the present case obtained the *raiyati* right of the judgment-debtor. We may refer to the remarks of Ghose, J., at page 393 of the Full Bench decision where he says, "the co sharer landlord having acquired the rights of a *raiyat* could hold the land as a *raiyat*, if not to himself certainly to the other co-sharer landlord." It is argued for the appellant that, though by his purchase, the co sharer landlord got a right to occupy the land he only had the right to occupy as a tenant and not as a *raiyat*. But these remarks are clearly against this contention. It is further argued that as it has been held that a co sharer landlord purchasing the *raiyati* right can never become an occupancy *raiyat*, therefore, he cannot be a *raiyat* since every *raiyat* has a right to become an occupancy *raiyat*, and in support of this contention reference is made to the decision in *Ram Lal Sukul* v. *Bhela Gazi* (4). But an examination of that case shows that it is further authority against the appellant's main contention. In that case the *jote* of a tenant with rights of occupancy was purchased at an execution-sale by some co-sharer landlords called Dichits and it was held that these Dichits, by reason of their subsequently continuous holding of the land as *raiyats* for a period of twelve years and more from the date of their purchase, had not acquired an occupancy right. The plaintiff in that suit purchased the right of the Dichits and it was held the plaintiff had purchased a *raiyati* holding without occupancy right. This further supports our view that the right purchased by the plaintiff at the sale was a non-occupancy *raiyati* right. Taking this view, we must uphold the decision of the lower Appellate Court and dismiss this appeal with costs.

BUCKLAND, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 618 OF 1919.

August 6, 1920.

Present :—Mr. Justice Jwala Prasad.

GULAB CHAND RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PANCHAM RAM—DEFENDANT—RESPONDENT.

Mortgage, usufructuary—Redemption, right of, loss of, on failure to pay on certain date—Condition, validity of.

The law views with jealousy the right of redemption vested in the mortgagor and repudiates all attempts to do away with that right. [p. 339, col. 2.]

The condition in a usufructuary mortgage that the mortgagor would lose his right to redeem in default of payment of the mortgage-money on a certain date, is invalid and inoperative. [p. 339, col. 2.]

Appeal from a decision of the District Judge, Gaya, reversing a decision of the Munsif, Gaya.

Mr. *Kailas Pati*, for the Appellants.

Mr. *Kulwant Sahay*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption. The plaintiff deposited Rs. 37 in Court under section 83 of the Transfer of Property Act and thereafter brought the suit for redemption.

The defendant denied the right of redemption on the ground that, under the terms of the mortgage, he became the absolute owner of the property after the expiry of the due date of payment (written statement paragraph 4). He also denied the right of the plaintiff to redeem on payment of the principal sum of Rs. 37 and stated that he had re-built the house, which was in a dilapidated condition at the time of the mortgage, at a cost of Rs. 124-4-0 and that he had added a second storey to it at a further cost of Rs. 120-12-0 and that the total cost with principal and interest came to Rs. 1,841-2-6.

The Munsif decreed the suit holding that the defendant was not entitled to the additional sum claimed by him over and above the principal sum of Rs. 37 and that the right of redemption was not lost to the plaintiff.

The District Judge reversed the Munsif's decision. The plaintiff has, therefore, come to this Court in second appeal.

GULAB CHAND RAM *v.* PANCHAM RAM.

The plaintiff alleged that the terms of the mortgage between the parties were reduced to writing, a *chithi*, bearing one anna stamp and that it was with the defendant mortgagee. The defendant denied this and produced an unregistered bond, dated the 1st of Asin 1308 (1901). The document was put to the plaintiff in the witness-box and he denied it. The execution of the document was proved by the defendant and the marginal witness. The terms of the document were also proved by the witnesses on behalf of the defendant. The document was filed in time but was rejected and returned by the Munsif on the 9th May 1918, without any reason having been given. The defendant re filed the document in appeal before the Judge. The plaintiff objected to the acceptance of it and the point was ordered to be decided at the time of the hearing, but nothing was done and ultimately the document was again returned to the defendant. The learned Judge very rightly observes that the document, being of a date prior to the Transfer of Property Act (VI of 1904), which for the first time required a mortgage-bond below Rs. 100 to be effected by a registered document or by delivery of the property, did not require any registration, I agree with the learned Judge that it is not known why the document was not admitted by the Munsif. I called for the document and the defendant has produced it in this Court, but I cannot take it into evidence as none of the parties want it. The result is that the term of the mortgage is to be found upon the pleadings and the evidence in the case. It is admitted that the defendant entered into possession of the property as an usufructuary mortgagee as security for the loan of Rs. 37 advanced by him to the plaintiff. His status is also recorded as such in the Survey Record of Rights finally published on the 2nd September 1914. In that record the position of the defendant is stated to be that of a mortgagee for the principal sum of Rs. 37 on the basis of a bond, dated the 1st of Asin 1308. The document was produced before the Settlement Officer and the defendant claimed to be in possession as a mortgagee under it. This position is admitted in paragraph 4 of the written statement, and the account given at the foot of the written statement shows Rs. 37 as the mortgage-money advanced on the 1st Asin 1308. The Court below has dismissed the plaintiff's case on the ground that it must fail for want of evidence. In this the learned Judge is clearly wrong. The admission of the defendant that he was a mortgagee of the property in lieu of Rs. 37 relieves the plaintiff from giving any further proof. It was for the defendant to prove that the plaintiff lost his right of redemption. The ground for the extinction of the plaintiff's right is stated by the defendant in paragraph 4 of his written statement, that upon the terms of the mortgage he was to become the absolute proprietor after the due date of payment. No such clog upon redemption could be placed by the terms of the mortgage at its inception. The mortgagee's right as an absolute owner accrues only in the case of a mortgage by conditional sale. Such a mortgage is an ostensible sale and becomes absolute on failure to pay the mortgage-money on a certain date and becomes void on such payment, *vide* section 58 (*c*) of the Transfer of Property Act. In other words, in a mortgage by conditional sale the ownership of the mortgagee in the property is created from the very beginning. There may also be a condition for the re-conveyance of the property to the mortgagor on paying up the money on certain date. But it is not contended and upon the authorities and the terms set forth in the pleadings of the parties it is possible to hold that the mortgage in question between the parties was a mortgage by conditional sale. It was an usufructuary mortgage pure and simple, and the contention, if any, that the mortgagor would lose his right to redeem on default of payment of the mortgage money on a certain date was invalid and inoperative. The law views with jealousy the right of redemption vested in the mortgagor and repudiates all attempts to do away with that right. The authorities cited to me have confirmed me in this view. *Perayya* v. *Venkata* (1), *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (2), *Kanaran*

(1) 11 M. 403; 4 Ind. Dec. (N. S.) 281.
(2) 22 Ind Cas. 54; 38 M. 667; 14 M. L. T. 517; (1914) M. W. N. 81; 26 M. L J. 47.

v. *Kuttooly* (3), *Sarabdawan Singh* v. *Bijai Singh* (4) and *Sayad Abdul Hak Sardar Diler Jung Bahadur* v. *Gulam Jilani* (5).

I therefore, hold that the right of the mortgagor to redeem in this case remained intact.

The question is, on what terms he can redeem. The Court below is evidently of opinion that the evidence in this case established the fact that the defendant re-built the dilapidated house and added the second storey to it and that he is entitled to the expenses incurred by him in so repairing and improving the house. This certainly he is entitled to under the authorities on the subject, provided the improvements were lasting and reasonable and that it was not prohibitive so as to work as a clog upon the right of redemption. The fact that the parties had contemplated the re-imbursement to the mortgagee of such costs is evident from the proceedings in this case. On the 19th February 1918 both the parties filed a joint petition agreeing that the property should be redeemed on payment to the defendant of all costs incurred in the improvement effected by the defendant and the amount of costs should be settled by arbitration. The arbitration was, however, superseded. But the point has not been decided by the Court below on account of the view taken by it that the plaintiff's suit must fail for want of evidence.

The decree passed by the District Judge must, therefore, be reversed and the case remanded to him to determine the amount payable by the plaintiff to the defendant for redemption. The District Judge will be at liberty to accept the mortgage-bond, dated the 1st Asin 1308, if he thinks, upon the evidence in the case, that it has been legally proved. As the plaintiff has mainly succeeded, I think he is entitled to the costs of this Court as well as of the lower Appellate Court.

Decree reversed.

(3) 21 M. 110; 8 M. L. J. 62; 7 Ind. Dec. (N. S.) 434.

(4) 24 Ind. Cas. 705; 36 A. 551; 12 A. L. J. 927.

(5) 20 B. 677; 10 Ind. Dec. (N. S.) 1021.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 879 AND 1168 OF 1918.

August 20, 1919.

Present :—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Cuming.

IN No. 879 OF 1918.

NAGENDRA LAL DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF CHITTAGONG—DEFENDANT—RESPONDENT.

IN No. 1168 OF 1918.

SURENDRA LAL KASTAGIR—PLAINTIFF—APPELLANT

versus

THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF CHITTAGONG—DEFENDANT—RESPONDENT.

Bengal Municipal Act (III B. C. of 1884), ss. 290, 295—Local Government, power of, to make rules imposing conditions for water connections—High Court, interference by.

The Local Government has power, in making rules under section 290 of the Bengal Municipal Act, to impose conditions under which house connections with the service water pipe may be allowed, to define what are the fittings required for such connections, and to impose as one of the conditions the provision of a meter at the owner's or occupier's expense, and the fact that section 295 of that Act makes it lawful in certain cases to have a meter fixed at the expense of a Municipality does not preclude the Government from imposing such a condition. [p. 342, col. 2; p. 343, col. 1.]

The High Court will not interfere with rules and conditions authority for which is expressly provided unless they are in conflict with some legal principles. [p. 343, col. 2.]

Appeals against the decrees of the District Judge, Chittagong, dated the 5th of April 1918, reversing that of the Munsif, first Court at that place, dated the 8th of February 1918.

FACTS appear from the judgment.

Mr. *S. R. Das* (with him Mr. *B. Choudhuri*, and Babu *Kshitish Chandra Sen*), for the Appellants.—Section 290 does not give the Local Government power to define what fittings are. We have got to see what the Legislature says. The Court is bound to go wrong if it goes to find what is necessary or not, what ought or ought not to be done. The spirit of the Act is that the Municipality

will not charge but put in a meter at its own expense. The rules framed by the Local Government under section 290 directly oppose the clear provision of the Act as set forth in section 295. Rule 4 is *ultra vires* in so far as it entitles the Municipality to make a charge which it cannot under the Statute. By compelling the owner or occupier of the house to provide a meter, the Municipality is levying a new tax not authorised by the Act itself.

Mr. *T. C. P. Gibbons*, *K. C.*, Advocate-General (with him Babu *Ram Charan Mitra*, Senior Government Pleader), for the Respondent Municipality.—Government have direction and control of the Municipality. The rules and regulations in this case are those of Government. There are no words of limitation imposed by Statute on the power of Government to make rules and regulations. Refers to section 295 to prevent waste of water. Reads section 290, section 301, section 302. It was never the scheme nor intention of the Act that the person who was getting water was to go scot-free. The conditions laid by Government are legal and not *ultra vires*. There is nothing to prevent the Municipality from charging for water meter to be fixed. The word 'fitting' should include a meter. It is the consumer who requests for supply and it is not inconsistent to ask him to pay. As regards the power to make rules, refers to *Institute of Patent Agents* v. *Lockwood* (1). The power is given to a public body for public good. This is a reasonable exercise of power, Mr. Das's proposition is far too wide to say that Municipality cannot impose charge unless the Legislature provides for that in the Act itself. Refers to *London County Council* v. *Bermondsey Bioscope Co.* (2) and *Stiles* v. *Galinski* (3). The Commissioners can make such arrangements as are not inconsistent with the rules and regulations made by the Local Government, 'May' in present section 290: that shows they are not *bound* to, they can make reasonable conditions for the supply of water.

(1) (1894) A. C. 347; 63 L. J. P. C. 74; 6 R. 219; 71 L. T. 205.

(2) (1911) 1 K. B. 445; 80 L. J. K. B. 141 at p. 144; 103 L. T. 760; 75 J. P. 53; 9 L. G. R. 79; 27 T. L. R. 141.

(3) (1904) 1 K. B. 615 at p. 621; 73 L. J. K. B. 485; 90 L. T. 437; 52 W. R. 462; 68 J. P. 183; 2 L. G. R. 241; 20 T. L. R. 219.

Mr. *S. R. Das* in reply.—The Municipality have no contro ling power over the use of water, they can only prevent waste. Wastage and misuse are provided for in the Act. Can you impose a further burden by a rule? You cannot, unless you are empowered by the Act. Unless there is express authority, you cannot add to charge.

JUDGMENT.—The facts of the suit out of which Appeal No. 879 of 1918 has arisen are simple.

The plaintiffs are certain rate-payers of the Municipality of Chittagong, the defendants are Commissioners of the Municipality. The plaintiffs wished to have house connection with the main water service pipe. The Municipality were willing to allow the connection only on the condition that a water meter to measure the amount of water consumed was put in by the plaintiffs at their own expense in accordance with certain rules framed by the Local Government under section 290 of Act III of 1884 (The Bengal Municipal Act) as amended by Act IV of 1894.

The plaintiffs contended that these rules were *ultra vires* and that they were entitled to have the house connection they asked for without paying for the meter and they asked for an injunction to restrain the defendant Municipality from cutting off the water connection which the Municipality threatened to do if the price of the meter was not paid, the plaintiffs having been allowed the desired house connection on the understanding that they would pay for the meter if it was found that they were liable to pay for it. The Court of first instance decreed the suit holding that the rules framed under section 290 were *ultra vires*. On appeal the learned District Judge decreed the appeal and dismissed the suit. He held that the rules framed under section 290 were not *ultra vires* and they did not conflict with section 295 of the same Act.

Against this decree the plaintiffs have appealed to this Court. The question in controversy between the parties, though very simple, is a question of considerable importance and has been argued at some length.

Section 290 of the Bengal Municipal Act is as follow:—"Whenever the Commissioners deem it practicable and consistent

with the maintenance of an efficient water-supply, they may at a meeting, and subject to such rules and conditions as the Local Government may make and impose, allow the owners and occupiers paying the water-rate hereinbefore mentioned to lay down communication pipes from the service-pipes of the Commissioners, for the purpose of leading water to their premises for domestic purposes."

It is quite clear that this section by itself gives the Local Government power to make and impose rules and conditions under which the Municipal Commissioners may allow house connections with the service water pipes. Section 291, section 292 and section 293, which have been referred to by Counsel for the appellants, give the Commissioners the necessary powers to ensure the connection being properly made and kept in proper order and to prevent the water being wasted. Under the powers conferred on them by section 290, the Local Government did make certain rules which were made final on the 24th October 1916.

The two particular rules with which we have to deal are rule 4 and rule 9, which run as follows:—

"4 (1). The owner or occupier of the holding in respect of which the connection is required must bear the entire cost thereof including the cost of the supply and fixing of the fittings referred to in rule 9 (2). The applicant for the connection will also be liable for the cost of such alterations in, or repairs to, roads, drains, sewers, gas or water-mains, or pipes, and the cost of such other works as may be necessitated by, or result from the work of making such connection, and also all charges for which the Commissioners may become liable in respect of any of the matters referred to in this sub-rule.....

"9. A holding connection shall comprise the following parts or fittings:—(*a*) brass or gun-metal ferrule inserted in the main supply-pipe; (*b*) a galvanised-iron communication pipe from the ferrule to the meter; (*c*) a stop cock and its surface-box; (*d*) a meter; (*e*) service-pipes from the stop-cock to the taps; and (*f*) taps."

Thus rule 4 provides that the owner or occupier must pay the entire cost of fixing of the fittings as defined in rule 9.

Rule 9 (*d*) provides that a meter is one of the fittings necessary for a household connection. It has been argued that section 290 gives the Local Government no power to define what are fittings and, therefore, the Local Government are not empowered to make a rule under that section defining what are the fittings required for a house connection.

No doubt, the section does not provide that the Local Government shall define what are the fittings required for a house connection but it does empower the Local Government to make rules and conditions under which occupiers or owners may have a house connection and the provision of a meter at the occupier's or owner's expense is one of the conditions they impose.

It is quite immaterial whether a meter is called a fittings or not.

Neither can it be successfully contended that the rules in question are unreasonable.

It is the manifest duty of the Municipality to see that the public in general have their due supply of water. The capacity of any given installation is obviously limited, and unless the Municipality can prevent waste, the general public distributed over a large area are bound to suffer. The installation of a meter is one of the most obvious means of preventing waste and as a house connection must be regarded more or less in the light of a luxury, it is only reasonable that the person who has the benefit of it should pay all the necessary expenses. It would obviously be inequitable that the cost of a luxury should fall on the general body of rate-payers and not on the person who really gets the benefit of it.

It has also been contended that these rules, as framed by the Local Government, under section 290 contravene the express provisions of the Act as set forth in section 295.

Section 295, provides—

"The Commissioners at a meeting may determine what quantity of water shall be supplied to the occupier of every house, free of further charge, for every rupee paid to the Commissioners as water-rate on account of such house,

"If the Commissioners have reason to believe that the occupier of any house consumes more water than he is entitled to as aforesaid, it shall be lawful for them to provide a water-meter at their own expense, and to attach, the same to the water-pipes of the said house and any water which may be used over and above the quantity to which the occupier is entitled as aforesaid shall be paid for by him at such rate as the Commissioners at a meeting may determine."

It is argued that section 295 sets forth the circumstances under which the Commissioners may provide a meter, and this section states that they may do so at their own expense. It is said as this section provides that the Commissioners may have meters fixed at their expense, it is unlawful for the rules to order that a meter should be fixed at the consumer's expenses. There is, however, nothing inconsistent between the rules, as framed by the Local Government, and section 295. Section 295 makes it lawful, in certain circumstances, to have a meter fixed at the expense of the Municipality and to expend the Municipal funds for the purpose. That certainly does not preclude the Local Government from making it one of the conditions of a house connection that the occupier or owner shall provide a meter at his expense.

A further argument has been put forward that by insisting that the owner or occupier should provide the meter, the Commissioners are imposing a charge or tax on the rate-payer and that no charge or tax can be imposed which are not expressly and in very clear terms authorised by the Act itself. This argument has no substance. No one is obliged to have a house connection. Therefore, whether a person pays or does not pay, the charge is entirely within his own discretion. It is not a tax on the public. If the Municipality had to provide at their expense meters free of cost to the user, that would mean taxing the public. It is to prevent this that the rules seem to have been framed. It is also to be noted that the Local Government has control over the expenditure of Municipal funds under section 69 (1). We are, therefore, of opinion that the rules, as framed by the Local Government, under section 290 are *intra vires*, and the occupier or owner who wants house connection must pay for the cost of the meter. It has, lastly, been contended that the Municipal Commissioners cannot cut off the water supply in default of the plaintiff's paying the cost of the meter. The argument put forward to support the contention is that section 297 is the only section which authorises the Commissioners to cut off the water supply and that the section provides that the water can only be cut off on account of the non-payment of the water-rate. There is some force in this contention; but the point is not a fair one to raise, as these persons have been allowed to have the connection on the understanding that they would abide by the rules made under section 290 if it were found these rules were *intra vires*.

The same argument, however, applies as has already been applied to the proper construction of section 295. Section 295 applies to things *in statu quo* and section 290 with future necessity.

The water has, we understand, not been cut off although notice may have been given to cut it off under rule 24 (*e*) made under section 290. It cannot be said that this rule conflicts or is inconsistent with section 297.

Rule 24 (*e*) is, we consider, *intra* and not *ultra vires*. It seems to us to be a reasonable provision.

In the view we have taken, it is needless to discuss the cases which were cited before us, the general principles enunciated in which were not disputed. The Court has received the assistance of having both points of view thoroughly argued. We think it only right to add that we ought not to interfere with rules and conditions authority for which has been expressly provided for as in this case, unless they are clearly in conflict with some legal principle.

The result is, that the decree of the lower Appellate Court cannot be successfully assailed and the present appeal must be dismissed with costs.

Our judgment also governs Second Appeal No. 1168 of 1918 (Chittagong) which is also dismissed with costs.

Appeal dismissed.

BAI MONGHIBAI *v.* BAI RAMBHALAXMI.

BOMBAY HIGH COURT.

TESTAMENTARY SUIT No. 9 OF 1920.

September 2, 1920.

Present:—Mr. Justice Marten.

BAI MONGHIBAI—PETITIONER

versus

BAI RAMBHALAXMI—OPPONENT.

Testamentary jurisdiction—Consent terms not falling within jurisdiction—Decree, form of—Practice—Procedure.

Where in a testamentary suit the parties agree on certain terms, some of which do not fall within the testamentary jurisdiction of the Court, the proper procedure is to put all the terms in a schedule and to carry them out in the body of the order so far as the Court has jurisdiction. Those terms which do not fall within the testamentary jurisdiction of the Court can rest on agreement and, if necessary, they can be enforced in a suit on the Original Side. [p. 345, col. 1.]

Mr. *P. B. Vachha*, for the Petitioner.

Mr. *R. G. Munsiff*, for the Opponent.

JUDGMENT.—In this testamentary suit the parties have agreed on certain terms, and, as frequently happens in testamentary suits, some of the terms are such as possibly do not fall strictly within the testamentary jurisdiction. Some undoubtedly do; but it is possible that, as regards some of the others, they could more strictly be carried out in the exerise of the original jurisdiction of this Court. The difference between these two jurisdictions corresponds very much to what would be the difference in England between the Probate jurisdiction and the Chancery jurisdiction.

Quite recently in this Court in the case of *Samuel, In re* (1) a similar point arose; but there the terms Counsel agreed on were even more of what I may call a Chancery nature. In effect, the parties there wanted certain directions given to the administrator as to how the estate should be dealt with and how it was to be divided between certain beneficiaries. When the order in that latter case came before the Registrar, he very properly drew my attention to the standing direction of Sir Lawrence Jenkins given on the 22nd August 1901. It is contained in a letter written by the then Registrar to the Attorneys in a particular case; and it says as follows:—

"With reference to your precipe to draw up the consent decree in the above suit passed on the 14th instant, I beg to inform you that I cannot draw up the decree as specified in the terms save and except as mentioned in clauses 6 and 7 thereof. The Honourable the Chief Justice is of opinion that the Court exercising testamentary and intestate jurisdiction can deal with the questions of grant of Probate and Letters of Administration only and nothing more; and I have been directed to see that the consent decrees providing for more than that should not be drawn up."

Now, I think I have been taking testamentary matters now for a considerable time, I suppose some two years, and this particular direction was not previously brought to my attention, although of course from practice in England I was quite familiar with the distinction drawn between the jurisdiction of the Probate Court and the jurisdiction of the Chancery Court. The note I have made in dealing with this standing direction is as follows:—

"The Testamentary Registrar is quite right in drawing attention to this direction of Sir Lawrence Jenkins, but it must not be pushed too far. The English Probate Court's jurisdiction is also confined to Probate and Administration and it has not even got the Indian jurisdiction given by section 90 of the Probate and Administration Act. Yet, it is a matter of common occurrence for Probate suits in England to be settled on terms that embody distribution or administration of the estate in a particular way and which are by no means confined to the mere question whether Probate or Letters of Administration shall issue and if so to whom. If such terms are arrived at they must be all shown in the decree either expressly or by reference. Otherwise, the decree is misleading. It may be that the English Probate Court cannot itself carry out all the terms, *e. g.*, an application to the Chancery Division under the Settled Land Acts or in Lunacy may be necessary to effectuate the terms. But that does not prevent the terms being set out. In the present case I think I have jurisdiction to order the sale asked for in paragraph 4 and to direct the payment to the Accountant-General asked for by paragraph 7. The issue was as to the person to be appointed administrator and these terms are really safeguards attached to her

(1) Testamentary Suit No. 3 of 1920 (unreported.)

appointment. I was not compelled to appoint the widow (see Succession Act, section 202 and sections 225 and 224).

"Paragraphs 5, 6 and 7 are, however, more appropriate to an administration suit, and a decree could not be made here for administration *simpliciter*. That would be for the ordinary jurisdiction on the Original Side.

"I think the best plan is to put the terms in a schedule and for the body of the order to carry them out so far as we have jurisdiction. The doubtful paragraphs 5 to 7 can rest on agreement and, if necessary, they can be enforced in a suit on the Original Side. The liberty to apply to the Probate Court is added as possibly it may be useful. I have accordingly settled the minutes on these lines."

Accordingly, in that case I settled the minutes as there stated, and eventually passed a decree accordingly.

I propose to follow that direction in the present case. The consent terms will be embodied in a schedule, and the body of the order will give directions, so far as I properly can, sitting as a Judge of the Probate Court. I think those directions which I may properly give will be that the bonds when purchased in the name of the Accountant-General are to be held by the Accountant-General subject to the direction given in the consent terms, and that he is to remit the interest as directed in paragraph 3 and may vary the investment as directed in paragraph 4. I think paragraph 5 may be carried out by a formal admission in the body of the decree. As to paragraph 6, I do not see any objection to giving directions as to what is to be done with these securities on the death of the defendant nor to the consent contained in paragraph 7.

I accordingly direct the decree to be on the lines I have indicated.

The minutes to be shown to me, and I will certify the consent terms to be for the benefit of the minors.

I have stated all this because Counsel agree with me in thinking that it is convenient for the members of the Bar practising in this Court, and also for the Attorneys, to know definitely what I consider the practice of this Court ought to be on the points I have mentioned.

Order accordingly.

COURT OF THE BOARD OF REVENUE, MADRAS.

February 10, 1920.

Present :—Mr Couchman, 2nd Member.

In re SECTION 205 OF THE MADRAS ESTATES LAND ACT, 1908.

Madras Estates Land Act (I of 1908), ss. 3 (13), 205 —Revision—Order by District Collector—Jurisdiction of Board of Revenue to revise.

The Board of Revenue has no power to revise the order of a District Collector acting in revision under section 205, Madras Estates Land Act, as the section gives concurrent jurisdiction to the District Collector and the Board of Revenue over orders made by a Revenue Officer.

The expression 'Revenue Officer' in section 205 of the Act does not include a District Collector.

Petition for revision against the order of the District Collector, Ganjam.

JUDGMENT.—This is a revision petition against the order of the District Collector of Ganjam rejecting an application for revision under section 205 of the Madras Estates Land Act in respect of the order of the Deputy Collector of 23rd October 1919 under section 74 of the Act.

A preliminary objection has been raised that the Board of Revenue has no power of revising the orders of the District Collector passed in revision under section 205 of the Act. The objection has been raised on previous occasions before this Court but has been disallowed. Section 205 says that the Board of Revenue or the District Collector may call for the record of any proceedings before a Revenue Officer from whose decision no appeal lies in the circumstances stated.

Section 3 (13) says that "'Revenue Officer' means a Collector and includes any person appointed by the Local Government...to exercise any of the functions of a Revenue Officer under this Act."

Throughout the Act, the word "District Collector" is used whenever it is intended to convey the meaning of the "Chief Local Officer in charge of the Revenue Administration of the District." The term "Revenue Officer" seems to exclude a District Collector. Section 205 gives concurrent jurisdiction to the District Collector and the Board of Revenue over the Revenue Officer. Had it been the intention of the Act that the Board of Revenue should also have power to revise the orders of the District Collector passed in revision the section would have

made this clearer than it is now. I, therefore, consider that the Board of Revenue has no power to revise the order of a District Collector acting in revision under section 205 and dismiss the petition with costs.

M. C. P.

Petition dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2407 OF 1919.

November 18, 1920.

Present:—Mr. Justice Broadway.

MURAD BIBI—PLAINTIFF—APPELLANT

versus

RAHIM BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Succession—Heirs, whether take as tenants-in-common—Right of one heir when becomes barred—Suit for share of inheritance—Limitation Act (IX of 1908), Sch. I, Art. 144.

The heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred unless and until the other heirs set up an adverse right to the knowledge of that heir. [p. 347, cols. 1 & 2.]

Khadersa Hajee Bappu v. *Puthen Veettil Ayissa Ummah*, 6 Ind. Cas. 50; 34 M. 511; 8 M. L. T. 4; 20 M. L. J. 288; (1910) M. W. N. 447 and *Marian Beeviammal* v. *Kadir Meera Sahib Taragan*, 29 Ind. Cas. 275, followed.

Nasiruddin Shah v. *Musammat Lal Bibi*, 89 P. R. 1888, distinguished.

Second appeal from the decree of the District Judge, Multan, dated the 12th August 1919, reversing that of the Munsif, 2nd Class, Multan, dated the 2nd December 1918.

Mr. *Muhammad Shah Nawaz*, for the Appellant.

Mr. *Abdul Rashid*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was instituted by *Musammat* Murad Bibi in the following circumstances. One Abdul Hakim, who died on the 31st March 1902, left him surviving two sons, Rahim Bakhsh and Faiz Muhammad, and two daughters, *Musammat* Allah Wasai and *Masammat* Murad Bibi. On the 5th September 1915, Faiz Muhammad instituted a suit against his brother Rahim Bakhsh claiming to be entitled to one half of the property left by Abdul Hakim basing his claim on the allegation that the family followed custom. Rahim Bakhsh contested the claim and pleaded that the family followed Muhammadan Law and that Faiz Muhammad was only entitled to one-third. On his behalf it was admitted that the sisters were entitled to one-sixth each. On the 30th June 1916 *Musammat* Murad Bibi applied to be made a party to the suit between the brothers on the ground that she was entitled to one sixth of her father's estate. This application was opposed by Rahim Bakhsh who on the 8th July 1916 asserted that *Musammat* Murad Bibi had given up her inheritance and that he (Rahim Bakhsh) had paid her marriage expenses. The result was that *Musammat* Murad Bibi's application was dismissed, and on the 12th February 1917 a decree was passed in Faiz Muhammad's favour for one-third of the property. This was in accordance with an award given by certain arbitrators and in this award the sister's shares were distinctly given as one-sixth. *Musammat* Murad Bibi was directed to take separate action and in accordance with the direction she filed the present suit on the 8th August 1918. In this she claimed partition and possession of her one sixth share. Rahim Bakhsh, Faiz Muhammad and *Musammat* Allah Wasai were made defendants. The two latter confessed judgment. Rahim Bakhsh, however, contested the suit, alleging that *Musammat* Murad Bibi was only entitled to one-seventh and that she was not entitled to any portion of the estate as by custom daughters take their inheritance in the form of ornaments and clothes, etc., on their marriage, and that *Musammat* Murad Bibi had in accordance with this custom received Rs. 300, worth of such articles when she was married. He further pleaded that *Musammat* Murad Bibi had not been in possession of any portion of the estate. The Trial Court held that Rahim Bakhsh had failed to prove that he had given *Musammat* Murad Bibi ornaments, etc., of the value of Rs. 300, in lieu of her inheritance on her marriage and that she was entitled to a one-sixth share of her father's estate. It also, held that on her marriage *Musammat* Murad Bibi had lived with her husband for about six months and that after that she had been continuously living in the house in suit. She was accordingly granted a decree as prayed against Rahim Bakhsh,

Rahim Bakhsh appealed and the District Judge dismissed *Musammat* Murad Bibi's suit, holding that it was barred by limitation. He held that *Musammat* Murad Bibi was entitled to a one-sixth share on the death of her father, but that succession had opened out in 1902 when time began to run and the suit, which was brought in 1918, was barred by time. On the question of possession he came to the conclusion that *Musammat* Murad Bibi could not be held to have been continuously in possession up till 1916 merely because, after living for some time with her husband, she returned and continuously lived in the house in dispute.

Musammat Murad Bibi's suit having thus been dismissed as time-barred she has preferred this appeal through Mr. Shah Nawaz and I have heard Mr. Abdul Rashid on behalf of the respondent Rahim Bakhsh. The only point for determination is, whether the suit was barred by time. Mr. Rashid referred me to *Nasiruddin Shah* v. *Musammat Lal Bibi* (1), *Patcha* v. *Mohidin* (2) and *Kasmi* v. *Ayishamma* (3), and *Abdul Kader* v. *Aishamma* (4). The Madras cases can be eliminated from consideration inasmuch as the view taken in them has been dissented from in subsequent cases of the same Court: *Vide Khadersa Hajee Bappu* v. *Puthen Veetthil Ayissa Ummah* (5) and *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (6). In *Nasiruddin Shah* v. *Musammat Lal Bibi* (1) it was held that in that case there was no joint family and that the sons did not succeed on behalf of any one, each sharer becoming entitled to a share on the death of certain person. In *Khadersa Hajee Bappu* v. *Puthen Veettill Ayissa Ummah* (5) and *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (6) it was held that the heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred, unless and until the other heirs set up an adverse right to the knowledge of that heir. Against this, Mr. Rashid has been unable to refer me to any authority. Assuming that, in the case of Muhammadans governed by Muhammadan Law, the heirs succeed as tenants-in-common and possession of one can be regarded as possession of all, limitation will only commence to run when the right of any particular tenant-in-common is specifically denied by the other or others. In the present case, as it has been pointed out above, in 1915 Rahim Bakhsh definitely pleaded in the suit brought against him by Faiz Muhammad that the parties were governed by Muhammadan Law and that his sisters were entitled to a one sixth share. That case was decided on the basis of Muhammadan Law and the right to succeed on the part of sisters was definitely acknowledged. On the 8th July 1916, however, Rahim Bakhsh definitely alleged that *Musammat* Murad Bibi had surrendered her right in the estate by receiving from him certain moneys or articles of jewelry, etc., of the value of Rs. 300, on her marriage. This surrender has been found not proved and it would seem, therefore, that so far as Rahim Bakhsh was concerned it was not till the 8th July 1916 that *Musammat* Murad Bibi's rights were definitely denied. Even assuming that time began to run from the 5th September 1915, when Faiz Muhammad instituted his suit against Rahim Bakhsh, the present claim will be in time.

In these circumstances, I accept the appeal with costs and setting aside the order of the learned District Judge restore the decree of the learned Munsif.

Appeal accepted.

(1) 89 P. R. 1888.
(2) 15 M. 57; 1 M. L. J. 757*n*; 5 Ind. Dec. (N. S.) 389.
(3) 15 M. 60; 1 M. L. J. 754; 5 Ind. Dec. (N. S.) 391.
(4) 16 M. 61 (F. B.); 2 M. L. J. 200; 5 Ind. Dec. (N. S.) 750.
(5) 6 Ind. Cas. 50; 34 M. 511; 8 M. L. T. 4; 20 M. L. J. 288; (1910) M. W. N. 447.
(6) 29 Ind. Cas. 275.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 281 OF 1919.
February 10, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

DALUCHAND BALARAM MARWADI—PLAINTIFF—APPELLANT

versus

APPI KHEMA SASTE—DEFENDANT—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O.* II, *r.* 2

DALUCHAND BALARAM v. APPI KHEMA SASTE.

—*Dekkhan Agriculturists' Relief Act* (*XVII of* 1879), *ss.* 12, 13—*Mortgages, simultaneous—Suit on one mortgage—Account taken only in respect of one mortgage—Subsequent suit on another mortgage, whether maintainable.*

When a Court takes an account as provided by section 13 of the Dekkhan Agriculturists' Relief Act, it does not start the account with the particular bond or mortgage-deed, or whatever it may be which is pleaded as the basis of the suit. The account is taken of the transactions between the parties to the suit, and if those transactions began at an earlier date than a particular bond, whether a money-bond or a mortgage bond, and if the transactions led up to that particular bond then the account is taken from the earliest of the preceding transactions and is continued right up to the date of the suit. [p. 349, col. 1.]

Defendant had had several transactions with the plaintiff. A balance was made up and, in order to secure payment of the balance, the defendant executed three mortgages in favour of the plaintiff. The latter brought a suit on one of the mortgages and obtained a decree. The account taken in the suit was limited to the particular mortgage which was sued upon. Subsequently, the plaintiff sued on the second mortgage :

Held, that the suit was barred by Order II, rule 2 of the Civil Procedure Code read with sections 12 and 13 of the Dekkhan Agriculturists' Relief Act. [p. 349, col. 1.]

Second appeal from the decision of the District Judge, Poona, in Appeal No. 49 of 1918, confirming the decree passed by the Subordinate Judge at Baramati, in Civil Suit No. 263 of 1916.

Mr. *V. B. Virkar*, for the Appellant.

JUDGMENT.

MACLEOD, C. J.—The plaintiff took three mortgage-bonds on the 6th July 1900 for Rs. 99 each over the same property from the 1st defendant, the consideration being the balance of Rs. 274 due on the previous account, and Rs. 23 paid in cash. He sued on one of the bonds in 1911 and obtained a decree thereon. He did mention in his plaint that he held two other mortgages over the property, and that he would take separate steps on them. The property was sold in execution of the decree on the one bond, but was not sold subject to the other mortgage charges. It was sold free of any incumbrances, and realised more than the amount due on the bond in that suit. The plaintiff has now filed this suit on the remaining two mortgage-bonds. He cannot ask for sale of the mortgaged property. That has already been sold free of the mortgages in the previous suit. But he does ask for a decree for the amount due on the remaining two mortgage-bonds, which he contends will be effective as regards the balance of the sale-proceeds of the mortgaged property.

Both Courts have dismissed his suit on the ground that it was barred by Order II, rule 2 of the Civil Procedure Code, and sections 12 and 13 of the Dekkhan Agriculturists' Relief Act. The case of *Dhondo Ramchandra Kulkarni* v. *Bhikoji Gopal* (1) was referred to. There a person holding two different mortgages on the same property from the same person sued on the second mortgage without impleading the first mortgage, and obtained a decree. He then sued on the first mortgage, and it was held that the second suit was barred by reason of the decree in the first suit on the subsequent mortgage as *res judicata* under section 11, Explanation IV, of the Civil Procedure Code. Mr. Justice Hayward in his judgment expressed an opinion that "if it had been found, as a matter of fact, that the transactions were transactions 'out of which the suit had arisen', then they would have constituted the same cause of action, and the subsequent suit would have been barred under Order II, rule 2, by reason of the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act."

Now, there can be no doubt that these three mortgages were really part of the same transaction, whereby the plaintiff got security for the balance due on the old account together with the fresh cash advance, and when the first suit was filed, the Court was bound to inquire into the history and merits of the case, from the commencement of the transactions between the parties and the persons (if any) through whom they claimed, out of which this suit had arisen. The Court which decreed the first suit, having notice of the two mortgages executed at the same time as the suit mortgage, should have inquired into the history of those mortgages. However, it did not do so. But it is quite clear that this is exactly the case to which Mr. Justice Hayward referred in his remarks which I have just quoted, which in that case may have been *obiter*. One can imagine that it might easily lead to fraud, and also to evasion of the objects of the Dekkhan

(1) 27 Ind. Cas. 1005; 17 Bom. L. R. 144 at p. 152; 39 B. 138.

Agriculturists' Relief Act, if a party in the position of the plaintiff in this suit could sue on one mortgage, leaving aside other mortgages of the same date which together with the first mortgage really made up one transaction. He could thus avoid an account being taken of the whole transaction between the parties, and then at a future time file a suit on the remaining causes of action, which, as a matter of fact, really made up one entire cause of action. I think, then, that the plaintiffs having omitted to sue on these two mortgage-bonds when he sued on the first mortgage-bond, cannot now ask the Court to pass a decree on those two mortgage bonds, so as to be able to execute that decree against the balance of the sale-proceeds of the property, which was sold in execution of the first decree. He is barred, in my opinion, under Order II, rule 2 of the Civil Procedure Code, coupled with the provisions of sections 12 and 13 of the Dekkhan Agriculturists' Relief Act. The appeal, therefore, I think must be dismissed.

HEATON, J.—It is well understood now, and for many years has been, that when a Court takes an account as provided by section 13 of the Dekkhan Agriculturists' Relief Act, it does not start the account with the particular bond or mortgage-deed or whatever it may be, which is pleaded as the basis of the suit. The account is taken of the transactions between the parties to the suit, and if those transactions began at an earlier date than a particular bond, whether a money-bond or a mortgage-bond, and if the transactions led up to that particular bond, then the account is taken from the earliest of the preceding transactions and is continued right up to the date of the suit. That is now, too, well understood to need further comment. We have in this case an instance of conscious or unconscious evasion of that principle of the Dekkhan Agriculturists' Relief Act.

The plaintiff was a mortgagee who had had before these mortgages other transactions with the defendant. A balance was made up apparently, or, at any rate, it was asserted that there was a balance remaining payable by the defendant to the plaintiff. The plaintiff made a small further advance, and to secure the total debt took three separate mortgage-bonds from the same mortgagor, in each case relating to the same property. He brought a suit on one of the mortgage-bonds and obtained a decree. When that suit was brought, of course, accounts had to be taken under section 13 of the Dekkhan Agriculturists' Relief Act, and ought to have been taken in the way I have described. The account ought to have gone back to the earlier transaction and ought to have arrived at the balance due when the three mortgage-deeds were made, and have proceeded to embrace all the three mortgages. The account, however, did nothing of the kind. It was limited to the one mortgage deed on which the plaintiff then sued.

In so permitting the account to be taken, the plaintiff was in grievous error. For there is another matter which is perfectly well understood, and has been for years, and which has repeatedly been pointed out, it is that the Court often finds itself powerless to take an account as contemplated by section 13 without the conscientious assistance of the creditor: so it is the duty of the creditor to furnish the Court with what he asserts to be a true statement of the account and where a creditor does, as this creditor did, in that earlier mortgage-suit deliberately refrain from presenting a complete account, and limits the account he presents to one transaction, when it ought to have embraced all, he is putting at naught the intention of the provisions of the Dekkhan Agriculturists' Relief Act.

Applying, then, the words of rule 2, Order II, of the Civil Procedure Code to that particular condition of affairs which arises under the Dekkhan Agriculturists' Relief Act we find that, when a plaintiff brings a suit, he is usually bound to sue for the total debt due under all his transactions with the debtor. There may be exceptions, but that is a general rule where the Dekkhan Agriculturists' Relief Act applies. There certainly was no need to make any exception in this case. Here, therefore, we have circumstances which supply one of the simplest instances of the application of rule 2, Order II to the state of affairs contemplated by the Dekkhan Agriculturists' Relief Act. The suit should have

included the whole of the claim. It did not do so. It included only a part of the claim, and a decree was obtained on that basis, and the only thing consistently with the law which we can do, is to take it that the plaintiff relinquished the rest of his claim. That being taken, this suit must of necessity be dismissed, and I think the appeal should be dismissed.

Appeal dismissed.

MADRAS HIGH COURT.
FULL BENCH.
SECOND CIVIL APPEAL No. 2051 OF 1918.
September 10, 1920.
Present:—Sir John Wallis, KT., Chief Justice, Justice Sir William Ayling, KT., and Mr. Justice Krishna.
RAMA SAHU (DEAD) AND OTHERS—DEFENDANT No. 2 AND HIS LEGAL REPRESENTATIVES—APPELLANTS
versus
GOWRO RATHO—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 4, 107—Registration Act (XVI of 1908), ss. 17, 49—Lease, unregistered for less than a year, admissibility of, to prove character of possession.

An unregistered deed of lease for less than a year is admissible in evidence to prove the character of the possession of the occupier of the demised premises. [p. 355, col. 1.]

The provisions of section 107 of the Transfer of Property Act which says that a written instrument in order to have the effect of a lease for less than a year must be registered cannot be taken to have been inserted in section 17 of the Registration Act. Such a lease is not a document required by section 17 of the Registration Act to be registered and section 49 of the Act can have no application to it. [p. 354, col. 2; 355, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ganjam, at Berhampore, in Appeal Suit No. 71 of 1918 (Appeal Suit No. 275 of 1917, Ganjam District Court), preferred against the decree of the Court of the District Munsif, Aska, in Original Suit No. 400 of 1916.

This second appeal coming on for hearing on the 30th and 1st day of September and October respectively of 1919, upon perusing the grounds of appeal the judgments and the decrees of the lower Appellate Court and the Court of the First Instance and the material papers in the suit, and upon hearing the arguments of Mr. *O. S. Venkatachariar*, for the Appellant and of Mr. *B. Jagannadha Doss*, for the Respondent, and the case having stood over for consideration till the 8th October 1919, the Court (Spencer and Krishnan, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J.—The question raised in second appeal is whether Exhibit B, which is an unregistered lease for six months of a house at a rent of eight annas a month, was admissible in evidence to prove that defendants Nos. 1 to 3 occupied the house as fourth defendant's tenants.

To be effective as a lease of immoveable property this document required registration under section 107 of the Transfer of Property Act; although being a lease for a period less than one year it was not compulsorily registrable under section 17 (*d*) of the Indian Registration Act (Act XVI of 1908).

Section 107 of the Transfer of Property Act provides that leases of immoveable property from year to year or for any term exceeding one year must be made only by a registered instrument, and that all other leases may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession.

No place is provided by this section for written but unregistered leases even for periods of less than one year, whether accompanied by delivery of possession or not. Similarly, section 54 of this Act makes no provision for written but unregistered sale deeds of immoveable property even in cases where the value is less than rupees one hundred. In fact, a lessee or a purchaser in possession who can prove an oral agreement is better off than one who holds an unregistered instrument when his title is in question.

Section 4 provides that section 107 and the material portions of section 54 are to be read as supplemental to the Indian Registration Act. Does this signify that section 107 is to be understood as supplementing partiecular sections of the Registration Act? If, for instance, all instruments

referred to in section 107 are to be added to the list of instruments compulsorily registrable under section 17 of the Registration Act, the effect will be to enlarge clause (*d*) of that section by including leases of immoveable property for terms of less than one year. In that case the Legislature would have to be accused of a very clumsy device for avoiding an alteration in the wording of the section which of itself does not provide for all leases of immoveable property without exception being registered. Again, if section 107 is to be read as supplementing particular sections of the Registration Act, it may equally well be taken as supplementing section 18 and thereby making the registration of leases for more than a year optional. Thus, there would be a contradiction in terms between section 17 and section 18.

In my opinion, it was only intended that section 107 of the Transfer of Property Act should be taken as a whole and read as supplemental to the Registration Act as a whole.

In *Kaki Subbanadri* v. *Muthu Rangayya* (1) there are words which imply that the learned Judges who decided that case accepted the argument that section 107 of the Transfer of Property Act was to be read as supplemental to section 17 of the Registration Act (Act XVI of 1908). In *Muthukaruppan* v. *Muthu Samban* (2) there are similar observations as to the effect of section 4 to those met in *Kaki Subbanadri* v. *Muthu Rangayya* (1), but with due respect I cannot appreciate them. The learned Judges in the former case avoided the difficulty which that argument led to, by saying that an undertaking to occupy certain premises was not an instrument referred to in section 107 of the Transfer of Property Act. For that matter, unregistered leases are not specifically mentioned in section 107, except in the proviso which relates to exemption by the Local Government of unregistered leases for a term of less than one year. In this Presidency there has been no such exemption by notification of Government. The result is that, by the amendment of this Act by Act VI of 1904, all leases except agricultural leases, which fall under section 117, must be registered. Otherwise, they do not have the effect of passing the right to enjoy the property. But section 49 of the Registration Act deals only with documents required by section 17 to be registered when it declares that such documents shall not be received in evidence of any transaction affecting immoveable property until they have been registered. As I have endeavoured to show, the document which has been exhibited in this case as Exhibit B is not a document falling under section 17. That is a sufficient reason for supporting the Subordinate Judge's reference to Exhibit B as a piece of evidence in the case, and, as there are no other points of law, for dismissing the appeal with costs. I only wish to add my regret that the sections of these two Acts which deal with short leases have been left in a state of obscurity which renders the value of unregistered documents a matter of considerable ambiguity. I cannot believe that if it was the intention of the Legislature to make unregistered leases for periods of less than one year of no practical value, they would have limited the compulsory registration of leases under section 17 (*d*) of the Registration Act to leases for a term exceeding one year. When Act III of 1877 was superseded in 1908 by Act XVI of that year, sections 17 and 49 remained practically unaltered. Nor can I believe that it was intended that a tenant who receives a letter from a house owner living say, in Madras allowing him to occupy his house say in Ootacamund for six months on a fixed rent should be in a worse position after he commences his occupation than one who has only got verbal permission for such occupation.

I, therefore, think that this appeal should be dismissed with costs, but as there has admittedly been considerable difference of opinion in the view taken by several Benches of this Court as to the effect of sections 4, 54 and 107 of the Transfer of Property Act read with section 49 of the Registration Act, I agree to refer the question as to the admissibility of Exhibit B as evidence of the tenancy of defendants Nos. 1 to 3, to a Full Bench.

KRISHNAN, J.—The question for decision in this second appeal is, as stated by my

(1) 4 Ind. Cas. 1039; 32 M. 532; 6 M. L. T. 175.
(2) 25 Ind. Cas. 772; 38 M. 1158; 27 M. L. J. 497; 16 M. L. T. 344; (1915) M. W. N. 768; 1 L. W. 754.

learned brother, whether Exhibit B is admissible in evidence to prove that defendants Nos. 1 to 3 occupied the suit house during the period mentioned in it as tenants of the 4th defendant and not in their own right.

Exhibit B is an unregistered *muchilika*, or written undertaking, executed by the 1st defendant in favour of the fourth by which he agreed to occupy the suit house as the latter's tenant for six months at a rent of eight annas a month. That a lease can be made by such a document when accepted by the lessor, even though it is not one signed by the lessor, was settled by the Full Bench in *Ajam Sahib* v. *Meenatchi Devastanam* (3) overruling the opinion to contrary expressed in *Turof Sahib* v. *Esuf Sahib* (4) and *Kaki Subbanadri* v. *Muthu Rangayya* (1).

The argument of the appellant against the admissibility of the document in evidence may be briefly stated as follows: Exhibit B is an instrument falling under the second clause of section 107, Transfer of Property Act; by virtue of section 4 clause (2) of the same Act section 107 should be read as supplemental to section 17 (*d*) of the Registration Act (Act XVI of 1908) and section 49 (*c*) of the same Act, therefore, makes it inadmissible in evidence in proof of any transaction affecting the property as it is unregistered. It cannot, therefore, be used to prove the tenancy of the defendants Nos. 1 to 3.

On the points that arise on the above contention there seems to be some difference of judicial opinion in this High Court. In *Muthukaruppan* v. *Muthu Samban* (2) it was held by a Bench of this Court that in the analogous case of a sale for less than Rs. 100 dealt with by section 54, clause (3) of the Transfer of Property Act, the unregistered instrument evidencing it was not admissible in evidence even for the purpose of showing the nature of the occupier's possession, see page 1161*. The subsequent discussion shows that the learned Judges were basing their view on section 49 (*c*) of the Registration Act though they do not expressly refer to it. This view involves the position that the effect of section 4, clause (2) of the Transfer of Property Act is to make sections 54, clauses 2 and 3, 59, 107 and 123 parts of section 17 of the Registration Act; otherwise section 49 which in terms refers only to documents mentioned in section 17 will not apply. The rulings in *Vairananda Nadar* v. *Miyakan Rowther* (5) and *Kaki Subbanadri* v. *Muthu Rangayya* (1) (which has not been dissented from on this point) and the observation of the learned Chief Justice in the Full Bench case *Ajam Sahib* v. *Meenatchi Devastanam* (3) are in favour of the view that the effect of section 4 is to make section 107 and other sections referred to in it integral parts of section 17.

On the other hand, Sadasiva Aiyer and Napier, JJ., have dissented from the view expressed in *Muthukaruppan* v. *Muthu Samban* (2) in their judgments reported in *Kathari Narasimha Raju* v. *Bhupati Raju* (6) Napier, J., in particular observes: "I am, however, unable to agree with it [that is, the view expressed in *Muthukaruppan* v. *Muthu Samban* (2)]. The document is not compulsorily registrable under section 17 of the Registration Act and, therefore, we have not to consider whether the proposed use to prove the agreement would not be permissible, because it would affect immoveable property within the meaning of section 49 of the Registration Act. I am unable to accept the construction put on section 54 in the above case that it requires all sale-deeds, if in writing, to be registered. In my opinion, it only requires that, if the sale deed is to be relied on to establish the transfer, it must be registered. There being no law requiring the document to be registered, I see no reason why it should not be proved and used as required by the Evidence Act section 91" and it was admitted in evidence to prove an oral sale. On the above reasoning, it will be equally correct to hold that an unregistered lease-deed which is not relied on for the purpose of proving the creation of a lease by its own force or for the enforcement of the terms of it is not required to be registered by section 107, Transfer

(3) 8 Ind. Cas. 668; 35 M. 95 at p. 99; (1910) M. W. N. 766; 8 M. L. T. 437; 21 M. L. J. 202.

(4) 30 M. 322; 17 M. L. J. 395; 2 M. L. T. 270.

(5) 21 M. 109; 7 Ind. Dec. (N. S.) 433.

(6) 31 Ind. Cas. 52; 29 M. L. J. 721; 18 M. L. T. 371; 2 L. W. 964; (1915) M. W. N. 819.

*Page of 38 M.—*Ed.*

of Property Act and is admissible in evidence for the collateral purpose of proving either an oral lease or for explaining the nature of the possession of the person in occupation.

Again, in *Poomalai Udayan* v. *Karuppa Servai* (7) another Bench took the same view. The learned Judges held that, under section 54 (3), Transfer of Property Act, an unregistered instrument of sale, where the property sold was less than Rs. 100 in value, was admissible in evidence to prove the antecedent oral contract to sell and, if coupled with delivery of possession, was sufficient to transfer title. The learned Judges point out that section 49 of the Registration Act deals only with documents required by section 17 to be registered

My learned brother also takes the view that section 49 (*c*) cannot be applied to Exhibit B.

In view of this conflict of judicial opinion, I think it is desirable to have the question settled by a Full Bench. I would, therefore, refer to a Full Bench the following question:—

"Is Exhibit B admissible in evidence to prove that defendents Nos. 1 to 3 were in occupation of the plaint house as 4th defendant's tenants during the period covered by it ?"

This second appeal came on for hearing in pursuance of the above Order of Reference to a Full Bench.

Mr. *S. Ramanuja Iyengar* for Mr. *C. S. Venkatachari*, for the Appellants —My submission is that Exhibit B, the unregistered lease-deed for 6 months, is not admissible in evidence, since it is not registered. Section 107 of the Transfer of Property Act is very definite. It says that "leases of immoveable property from year to year or for any term exceeding one year must be made only by a registered instrument, and that all other leases may be made either by a registered instrument, or by oral agreement accompanied by delivery of possession." Although the instrument in question is not compulsorily registrable under section 17 (*d*) of the Indian Registration Act, nevertheless, if there is writing with respect to such a lease it must be registered. My contention is that section 4 of the Transfer of Property Act makes section 17, etc., as supplemental to the Registration Act. Since optional registration was abolished, the intention of the Legislature is clearly to read section 107 as supplemental to section 17 (*d*) of the Registration Act and not as supplemental to section 18 of the same Act. *Kaki Subbanadri* v. *Muthu Rangayya* (1) is in my favour It is there clearly laid down that section 107 of the Transfer of Property Act should be read as supplemental to section 17 of the Registration Act. *Muthukaruppan* v. *Muthu Samban* (2) also is in my favour. There it was held, which was a case of a sale, that it came under section 54 of the Transfer of Property Act, that such a document cannot be used in evidence even for proving the character of possession. I also refer to *Vairananda Nadar* v. *Mivakan Rowther* (5) and the observations of the learned Chief Justice in *Ajam Sahib* v. *Meenatchi Devastanam* (3) which are in my favour. The latest Privy Council case in *Varada Pillai* v. *Jeevarathnammal* (8) does not touch the present position. So my submission is that, since section 107 should be read into section 17 clause (*d*) of the Registration Act. Exhibit B comes within the mischief of section 49 of the same Act. Beaman, J.'s opinion in *Dawal Piranshah* v. *Dharma Rajaram* (9) also is in my favour.

Mr. B. *Jagannadha Dass*, for the Respondent: —Since *Muthukaruppan* v. *Muthu Samban* (2), decisions are uniform and are in my favour dissenting from the view in it. In *Kathari Narasimha Raju* v. *Bhupati Raju* (6) this Court has taken the view that, since such a document is not compulsorily registrable, it does not come within section 49 of the Registration Act and so dissented from *Muthukaruppan* v *Muthu Samban* (2). In *Muthukaruppan* v. *Muthu Samban* (2) there is no discussion of the point, but they practically assumed that section 107 of the Transfer of Property Act must be inserted into it. Also in *Poomalai Udayan* v. *Karuppa Servai* (7) there is decision of this Court which is in my favour. The

(7) 34 Ind. Cas. 921; (1916) 2 M. W. N. 136.

(8) 53 Ind. Cas 901; 46 I. A. 285; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J 313; 18 A. L. J. 274; 43 M. 244; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

(9) 41 Ind. Cas. 273; 41 B. 550; 19 Bom. L. R. 622.

view of Macleod, J., in *Dawal Piranshah* v. *Dharma Ra aram* (9) supports my contention: Further, I rely on the latest Privy Council judgment in *Varada Pillai* v. *Jeevarathnammal* (8) where it is held that such a document can be used in evidence to prove the nature of possession. Any other view would lead to anomalous results, as pointed out by Spencer, J., in the Order of Reference. So I submit that Exhibit B. can be used in evidence to prove the character of possession.

OPINION.

The question raised in the order of Reference in this case is whether leases for less than a year which require registration to make them operative by virtue of section 107 of the Transfer of Property Act must be considered, by virtue of section 4 of that Act, which provides that that and other sections shall be read as supplemental to the Indian Registration Act, to be documents "required by section 17 of the Registration Act to be registered," so as to bring them within the operation of section 49 of the Registration Act, which provides that "no document required by section 17 to be registered shall affect any immoveable property.....or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power unless it has been registered." The question what precise effect is to be given to the provisions of section 4 of the Transfer of Property Act as to section 107 and the other sections specified being read as supplemental to the Registration Act is a very nice question upon which considerable difference of opinion has prevailed in this Court and elsewhere. The earliest case in this Court is the case of *Vairananda Nadar* v. *Miyakan Rowther* (5). That case, in our opinion, is not an authority for the proposition that this and other sections are to be considered as read *into* section 17. What the learned Judges say is that they are to be read *with* section 17, and in that case they held that the provisions of section 107 of the Transfer of Property Act that a lease for more than a year must be registered must take full effect and could not be read as subject to the proviso in section 17 enabling the Local Government to grant exemption in cases where the term of the lease does not exceed five years and the annual rent reserved does not exceed fifty rupees. That case was, however, treated in *Kaki Subbanadri* v. *Muthu Rangayya* (1) as an authority for the proposition that the provisions of section 107 were to be treated as inserted in section 17 of the Registration Act. There are *dicta* to the same effect in the judgments of Sir Arnold White, C. J., and of Krishnaswami Aiyar, J., in the Full Bench decision in *Ajam Sahib* v. *Meenatchi Devastanam* (3); but the question there was whether a registered rental agreement executed by tenants could be held to be a registered lease granted by the landlord and the question here in no way arose in that case. This particular question was really not considered at all in *Muthukaruppan* v. *Muthu Samban* (2), but it was apparently assumed that section 107 must be taken to be inserted in section 17.

From that time the current of authority in this Court has set the other way. We have a decision of Sadasiva Aiyar, J., and Napier, J., in *Kathari Narasimha Raju* v. *Bhupati Raju* (6), and the decision of Phillips and Bakewell, JJ., in *Poomalai Udayan* v. *Karuppa Servai* (7), and the referring judgment of Spencer, J., in the present case.

Turning to the other Courts we have the two respective views of section 4 forcibly presented by Mr. Justice Beaman on the one side and by Mr. Justice Macleod, as he then was, on the other in *Dawal Piranshah* v. *Dharma Rajaram* (9). As we have said, the point is a nice one and either view is a possible view, but after carefully considering the question we are inclined to agree with the view of Mr. Justice Macleod for the reasons stated by him rather than with the view taken by Mr. Justice Beaman. All that section 4 says is, that section 107 and other sections are to be read "as supplemental to" the Registration Act. 'Supplemental' has been defined as meaning "added to". We think that if the Legislature intended that these provisions should be treated for all purposes as inserted in particular sections of the Registration Act it was for the Legislature to say so. We are not prepared, as a matter of construction, to say that the provisions of section 107 which says that a written

instrument, in order to have the effect of a lease for less than a year, must be registered must be taken to have been inserted in section 17; if not, such a lease is not a document required by section 17 to be registered and section 49 can have no application to the case. Spencer, J., in his referring order has pointed out that the anomalous results follow from the other view. That, however, is not the ground of our decision. We are not satisfied that the Legislature has sufficiently indicated its intention that these sections should be considered as inserted in section 17. Our answer must, therefore, be that the document is admissible. The question, however, loses much of its importance if, as has been contended before us, the Privy Council in *Varada Pillai* v. *Jevarathnammal* (8), are to be understood as ruling that document which are compulsorily registrable under section 17 and so governed by section 49 of the Registration Act may, nevertheless, be admissible in evidence to prove the character of the possession.

M. C. P.

Order accordingly.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1721 AND 1919 OF 1918.

June 3, 1920.

Present :—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher KT.

SAMSUL NEHAR BIBI—DEFENDANT No. 2—APPELLANT

versus

Moulvi MOHIUD-DIN-AHMAD—PLAINTIFF AND OTHERS—RESPONDENTS.

Muhammadan Law—Gift, essential, ingredients of—Possession, delivery of, whether necessary.

Under the Muhammadan Law, a registered deed of gift is invalid if it is not perfected by possession, as that law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee. Where he is neither himself in possession nor in possession through another, his possession is neither actual nor constructive, and he cannot convey an enforceable title. [p. 357, col. 1.]

Appeals against the decrees of the Subordinate Judge, Assam Valley Districts, dated the 4th of June 1918, modifying that of the Munsif, Dhubri, dated the 13th of August 1917.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Choudhury* (with him Babu *Indu Bhusan Roy*), for the Appellant in Second Appeal No. 1721 of 1918.—Under the Muhammadan Law a donor cannot make a valid gift of property of which he is not in possession; see Mulla's Muhammadan Law, Second Edition, page 113. See also *Ismal* v. *Ramji Sambhaji* (1) and *Rahim Bakhsh* v. *Muhammad Hasan* (2). The gift must be completed by delivery of possession. The case in *Mahomed Buksh Khan* v. *Hosseini Bibi* (3) relied on by the Court below is clearly distinguishable. There, as a matter of fact, possession was taken by the donee without any judicial decree and it was, therefore, ruled that the gift was not vitiated by the fact that the donor had no actual possession. The view of the lower Appellate Court that the gift was really a gift of an actionable claim is wholly erroneous. The donor did not transfer an actionable claim. What he intended to transfer was the right, title and interest in immoveable property which was not in his possession but which was in the adverse possession of the first defendant. This he could not do under the Muhammadan Law.

Babu *Bimal Chandra Das Gupta*, for the Appellant in Second Appeal No. 1919 of 1918.—I adopt the argument of Babu Sarat Chandra Roy Chaudhuri.

Babu *Jotindra Mohan Chaudhuri*, for the Respondents.—The whole question is one of intention. At the date of the gift the adverse possession of the first defendant was not complete and, therefore, the donor was in constructive possession. If the donor was in constructive possession, he was in a position to deliver constructive possession to the donee. This is all that the Muhammadan Law requires. Moreover, the gift can be validated by subsequent delivery of possession.

(1) 23 B. 682; 1 Bom. L. R. 177: 12 Ind. Dec. (N. S.) 456.

(2) 11 A. 1; A. W. N. (1888) 23; 13 Ind. Jur. 152; 6 Ind. Dec. (N. S.) 429.

(3) 15 C. 684 (P. C.); 15 I. A. 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175; 7 Ind. Dec. (N. S.) 104).

SAMSUL NEHAR BIBI *v.* MOHIUD-DIN AHMAD.

Babu *Sarat Chandra Roy Chaudhry* was not called upon to reply.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—These are two appeals by the two defendants in a suit for recovery of joint possession of land and for partition after such recovery.

The title of the plaintiff is based upon a gift from the true owner, dated the 7th September 1915. It has been found that, at the time when the gift was made, the owner was not in possession as he had been dispossessed by the first defendant who held adversely to him. The question for consideration is, whether, in these circumstances, the plaintiff acquired a good title under the Muhammadan Law.

The Subordinate Judge has held that as the proprietor could transfer only an actionable claim, the gift of that actionable claim was valid because possession of the claim in question could not actually be transferred; in other words, that under such a gift the plaintiff has become entitled to recover the property in the same way as the original owner might have done. In our opinion, this conclusion is based upon an erroneous view of the Muhammadan Law on the subject.

The rule of the Muhammadan Law on the subject of gifts of property out of possession is well-settled. Where the subject of gift being some kind of incorporeal property or an actionable claim, is not susceptible of physical possession, the gift may be completed by any appropriate method of transferring all the control that the subject-matter admits of. But the ownership of tangible property, of which the donor claims to be entitled to the actual present possession, cannot be transferred by way of gift, unless and until the donor obtains and delivers possession, or enables the donee to obtain possession. The decision of the Subordinate Judge is initiated by an assumption which is fundamentally erroneous, namely, that what was transferred was an actionable claim. What the proprietor intended to transfer was his right, title and interest in an immoveable property which was the subject-matter of a dispute. The ownership of this tangible property could be transferred, provided the owner was in actual present possession at the time when the gift was made. As he was not in such possession, he had to obtain and deliver possession; in other words, he should have instituted a suit, recovered the property from the adverse possession, and thereafter made a gift in favour of the donee. This is clear from a precedent which is to be found in Macnaghten's Muhammadan Law, page 201, case VI. The question there put was as follows: A person executed a deed of gift in favour of his nephew, conferring upon him the proprietary right to certain lands, of which he (the donor) was not in possession, but to recover which he had brought an action, then pending, against his wife. By the same deed he made over to him certain other landed property of which he was possessed. About a month after executing the deed, the donor died, and the donee in virtue of the gift, lays claim to the litigated property, was there a valid gift? The answer was in these terms: "The gift of a thing not in the possession of the donor during his lifetime is null and void, and the deed containing such gift is of no effect because in cases of gift seizin is a condition. Gift is rendered valid by tender, acceptance and seizin, but in gift, seizin is necessary and absolutely indispensable to the establishment of proprietary right. According to the Hidaya—Gifts are rendered valid by tender, acceptance and seizin. The Prophet has said, a gift is not valid without seizin. So also, if the thing given be pawned to or usurped by a stranger." That is exactly the case now before us so also in *shurti vigaya*:—"A gift is perfected by complete seizin. As the gift, therefore, is null, the claim of the donee is inadmissible, and the deed is invalid, as far as regards the lands of which the donor was never possessed. But, with respect to the other lands conveyed at the same time, the donee is entitled to them, if the donor put him into possession. If, however, the donor died, without conferring possession, the claim of the donee to them also is inadmissible." This precedent was followed by Mr. Justice Mahmood in the case of *Rahim Bakhsh* v. *Muhammad Hasan* (2).

Reliance was placed in the Court below upon the decision of the Judicial Committee in the case of *Mahomed Buksh Khan* v. *Hosseini Bibi* (3). That case, however, is clearly distinguishable and is, in fact, based

upon the case in Macnaghten's Muhammadan Law, at page 207. In the case before the Judicial Committee the mother had, within sixteen days after her daughter's death, executed and registered a deed of gift, transferring her share of the inheritance to that daughter's infant children and authorising them to take possession by their father as guardian (which could be done, and apparently was done, without any judicial decree) and it was held that the gift was not vitiated by the fact of the donor herself not having had actual possession of the share at the date of execution.

Reference was also made to the decision in *Ismal* v. *Ramji Sambhaji* (1) which is an authority for the proposition that, under the Muhammadan Law, a registered deed of gift is not valid if it is never perfected by possession. The Muhammadan Law requires that the donor should be in actual or at least constructive possession and that he should give actual or at least constructive possession to the donee. This case is of no assistance to the respondent. In the case before us the donor was not in actual possession nor could he be said to be in constructive possession, as the first defendant who was in actual possession held adversely to him, in other words, he was neither himself in possession nor in possession through another, his possession was neither actual nor constructive. In our opinion, it is plain that the gift was not perfected by delivery of possession, and the plaintiff has not enforceable title.

The result is, that these appeals are allowed and the suit is dismissed with costs in all the Courts.

FLETCHER, J.—I agree.

Appeals allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 711 OF 1919.

July 1, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

GABU NAROBA RAJPUT—PLAINTIFF—APPELLANT

versus

ZIPRU RAMSING RAJPUT—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 89—Joint family—Partition—Property, portion of, left joint—Account, suit for—Limitation.

Where on partition of joint family property a portion of the family property is left joint in the hands of one member, it continues to belong to all the members as tenants-in-common and the member in whose possession it is left is an agent of the other members. Therefore, a suit by the other members for an account of such property and for recovery of their shares is governed by Article 89 and not by Article 62 of Schedule I to the Limitation Act and limitation would begin to run from the date when an account is demanded and refused or if no demand is made, when the agency is terminated. [p. 358, cols. 1 & 2.]

Second appeal from the decision of the Assistant Judge, Khandesh, in Appeal No. 150 of 1918, confirming the decree passed by the Subordinate Judge at Shirpur, in Civil Suit No. 46 of 1917.

Mr. *D. R. Patwardhan*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued for an account and for recovery of his one third share of the proceeds of certain securities, alleging that the plaintiff, Ramsing, father of the defendant, and Ravjee were three brothers living jointly, that they divided in June 1898 the immoveable estate, but that they kept joint certain cash securities as they were all in the name of Ramsing who was the elder brother and manager of the joint estate; that at the time of partition it was orally agreed that Ramsing should realize the securities and divide the proceeds among the three brothers, that Ramsing did not divide the proceeds nor give any account, that Ramsing died on 6th January 1914, that after Ramsing's death the plaintiff asked the defendant for an account but he refused to give it.

The suit has been dismissed in both Courts. The learned Judges held that the claim was barred by limitation, it being

governed by Article 62 of the Indian Limitation Act. Exhibit 62 is a document which evidences the arrangement made by the brothers with regard to these securities. It was written therein that the three brothers had joint and equal ownership over them, and that these securities had to be recovered. Therefore, it must follow that the securities, meaning thereby, the debts due to the family by outsiders, remained joint family property, or at the least they remained family property undivided after the separation, in which case the members of the family would be with regard to those securities tenants-in-common. It cannot be, therefore, in my opinion, that when Ramsing collected these debts on behalf of himself and his brothers the money so got in would be considered as money had and received for his brothers so that time would begin to run in his favour at once. I should prefer to think that the money remained as owned by the three brothers as tenants-in-common and that time would not begin to run against the other brothers until a demand was made and refused or Ramsing showed his intention to hold the fund which he had collected against his brothers. However that may be, in any case, he must be considered as an agent for his brothers. and in that case Article 89 would apply and time would not begin to run until the account was demanded and refused, or if no demand was made, when the agency was terminated.

The lower Court has relied on the decision in *Banoo Tewary* v. *Doona Tewary* (1). That was a very similar case to this. The learned Judges applied Article 62 of the Indian Limitation Act, although they said that the defendant was acting on behalf of his co-sharers as their agent in realising their share in these monies. With all due respect, it seems difficult to see why Article 62 was applied, and not Article 89. In a case of this description, the other sharers would not be expected to know when the debts were recovered by the member of the family entrusted with their recovery, and it would seem to be very inequitable to hold that time was running against them from the time the monies were received, when they could not tell on what dates they had been received, and could not be aware that the managing member was intending to hold those monies against them. In my opinion, therefore, the decision of the lower Appellate Court was wrong, and there should be a decree in favour of the plaintiff for an inquiry into the amount of debts recovered by Ramsing. The appellant will be entitled to his costs up to date.

FAWCETT, J.— I agree that Article 62 of the Indian Limitation Act is not applicable on the facts of this case. It is true that that Article has been held applicable to a case where the members of a joint family became divided, and one of the members received debts due to the family prior to the division. Besides the case of *Banoo Tewary* v. *Doona Tewary* (1), referred to in the learned Chief Justice's judgment, there is that of *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (2). But in this latter case, at page 198 of the report, it is explained that Article 62 is properly applicable because the debts there were not recovered or realised by the defendants or any of the other brothers, *as representatives of the family or on behalf of the other members as well.* This distinguishes that case from the present one, for Ramsing's action in paying Ravji Rs. 600 in satisfaction of his share and tendering an equal amount to the plaintiff shows that Ramsing was collecting these debts on behalf of himself and the other two brothers. I can see no valid reason why Article 89 should not apply to a case like the present and in support of this I may cite *Raja Setrucherla Ramabhadra* v. *Raja Setrucherla Virbhadra Suryanarayana* (3) in which the Privy Council held that an elder brother was in the circumstances of the case liable to account on the footing of an ordinary agent. There is nothing, therefore, which renders it inappropriate to hold that Ramsing was an agent of the other brothers within the meaning of Article 89 of the Indian Limitation Act.

Decree reversed.

(1) 24 C. 309; 12 Ind. Dec. (N. S.) 873.

(2) 1 Ind. Cas. 408; 32 M. 191 at p. 194; 5 M. L. T. 49; 19 M. L. J. 94.

(3) 22 M. 470; 1 Bom. L. R. 388; 3 C. W. N. 533; 26 I. A. 167; 7 Sar. P. C. J. 510; 8 Ind. Dec. (N. S.) 32.

RAM LAL *v.* BHOLA NATH.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 93 OF 1919.
May 15, 1920.
Present :—Mr. Justice Ryves and
Mr. Justice Gokul Prasad.
RAM LAL AND ANOTHER—PLAINTIFFS
—PETITIONERS
versus
BHOLA NATH AND ANOTHER—DEFENDANTS
—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 20—Place of suing—Goods ordered by value payable parcel post—Cause of action, where arises.

A. at Kasganj, in the U. P. ordered certain goods of a firm in Delhi : the goods were sent by value payable parcel post ; on taking delivery *A.* found that the parcel did not contain the goods he had ordered ; he accordingly instituted a suit at Kasganj against the firm for damages. The Court returned the plaint on the ground that the cause of action arose at Delhi and it had no jurisdiction to entertain the suit :

Held, that the suit had been correctly filed at Kasganj ; that although the contract was entered into at Delhi it was not completed till delivery was made and the goods paid for at Kasganj ; that until actual delivery and payment was made at Kasganj the goods remained the property of the firm at Delhi, and that the Kasganj Court had jurisdiction to entertain the suit. [p. 361, col. 2.]

Civil revision against the order of the Judge, Small Cause Court, Kasganj, dated the 30th April 1919.

Mr. *G. Agarwala*, for the Petitioners.

The Hon'ble Dr. *T. B. Kapru* and Mr. *S. K. Varma*, for the Opposite Parties.

JUDGMENT.—The plaintiffs brought this suit in the Court of Small Causes at Kasganj to recover damages from the defendants, residents of Delhi, for an alleged breach of contract. The defence to the suit for the purposes of this application was that the Court at Kasganj had no jurisdiction to try it, as no part of the cause of action accrued in Kasganj. The Court held that it had no jurisdiction and ordered the plaint to be returned to the plaintiffs for presentation to the proper Court. The plaintiffs come here in revision.

The admitted facts relevant to this part of the case are as follows :—The plaintiffs are shop-keepers at Kasganj and the defendants are merchants in Delhi dealing in dyes among other things. There had been previous dealings between the parties but these need not now be considered. On the 6th of November 1918, the plaintiffs wrote a letter, which is on the record from Kasganj, asking the defendants to send them four boxes of a particular dye. Nothing was said in the letter as to how the goods were to be sent. In the plaint, however, it is stated in paragraph 6, that the goods were to be sent by value payable parcel post, and there is no doubt that this was understood by both the parties. The goods were sent by value payable parcel post and the plaintiffs took delivery at Kasganj after paying their price *plus* commission and other charges. On opening the parcel, the plaintiffs alleged that the boxes contained clay and not the dyes they had ordered.

Having recited these facts, the Court, instead of pausing to find what was the actual contract, discussed a number of rulings to discover what was the law. It is difficult to see how the Court could derive any help from a perusal of text-books or reported decisions at that stage. It had first to decide what were the facts. The result has been that the Court has discussed many rulings which are quite irrelevant and has distinguished and refused to follow the only ruling which seems to us to be really in point. It has also relied on two other rulings, one of which refers to a suit of a totally different nature and both of which are inapplicable to what, in our opinion, are the facts of this case. Fortunately, we are able to find from the pleadings and the letter what the contract actually was, otherwise we should have had to send the case back for a finding, as we have had to do to-day in another somewhat similar case. Clearly, the defendants contracted to send four boxes of the dye ordered to Kasganj and the goods were to be delivered to the plaintiffs at Kasganj on payment by the plaintiffs of their price. On this finding we have no hesitation in holding that a part, at least, of the cause of action, accrued at Kasganj. Section 20 of the Code of Civil Procedure, clause (*c*), lays down that, "every suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises." In order to discover what was meant by the words "cause of action, wholly or in part arises" it is instructive to turn to section 17 of the old Civil Procedure Code, Act XIV

of 1882. In Explanation III to section 17 it is enacted that: "In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely:—

(*i*) the place where the contract was made;

(*ii*) the place where the contract was to be performed or performance thereof completed;

(*iii*) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable."

On our finding, the contract was made in Delhi; the place where the performance of the contract was completed by delivery of the goods, was at Kasganj. and the place where in performance of the contract the money was impliedly, if not indeed expressly, payable was also Kasganj. The goods were delivered in Kasganj and they were paid for in Kasganj.

This is enough to conclude the matter but we think that, for the guidance of the Court below, especially as the point of view taken by that Court has been elaborately argued by Dr. Tej Bahadur, we should express our opinion upon it.

Before doing so, we should point out that the argument for the defendants is only relevant, if we were left in doubt as to the precise terms of the cantract and had to infer them from the conduct of the parties. If, for instance, the value payable parcel system had not been contemplated and used for the delivery and payment of the goods and the goods had been sent by the ordinary post. The argument for the defendants is that the contract was concluded at Delhi and that once delivery was made by the defendants to the post office in Delhi, the defendants had done all that they had contracted to do, because the post office was the agent of the plaintiffs and delivery to the plaintiffs' agent was equivalent in law to delivery to the plaintiffs, especially as the plaintiffs themselves had asked the defendants to send the goods by value payable parcel post. As a matter of fact, as we have said above, there was no suggestion in the letter itself that the value payable parcel system was to be used though it may be inferred, and, in fact, is admitted that both the parties intended its use and did use it. The fallacy in this argument seems to lie in the fact that, when the goods were given to the post office at Delhi for despatch to Kasganj, they did not become the property of the plaintiffs and were not intended to become their property. They remained the defendants' property unless and until the plaintiffs paid their price to the post office in Kasganj, and to this extent, at least, namely, for the purpose of receiving their price and then delivering the goods at Kasganj, the post office was the agent of the defendants, or at least the common agent of both parties.

Reliance has been placed on some English rulings, which, however, do not seem to us of much help. They relate to another question, the time when and the place where a contract is completed by negotiations which have passed through the post. It may be conceded that the contract was concluded at Delhi but we think that by that contract the defendants agreed to deliver the goods at Kasganj and receive payment there and that these were essential parts of the contract. The case of *Thanawala* v. *Shaheada Basudeo Singh* (1) has been strongly relied on, but the facts there were quite different. Mr. Chamier, as he then was, after quoting the terms of Explanation III to section 17 of the old Civil Procedure Code goes on to say: "It is quite clear from the terms on which the applicant does business as stated in the catalogue sent by him to the respondent that the contract was to be performed in Bombay. The respondent had to pay for the packing and for the freight and it was the duty of the applicant to deliver the goods to the Railway Authorities at Bombay for despatch to Rae Bareli. It is also clear that the price and the cost of packing and the freight were to be paid in Bombay by the respondent, therefore, the only question is whether the contract was made in Rae Bareli or in Bombay."

After discussing the correspondence between the parties in that case he went on to say: "I hold, therefore, that it was the respondent who offered to buy the applicant's goods and it was the applicant who accepted the offer. The acceptance was made and the contract completed in Bombay and, therefore, the Munsif of Rae Bareli has no jurisdiction to try this case."

The next case relied on was *Salig Ram* v. *Chaha Mal* (2). That case, it seems to us,

(1) 1 Ind. Cas. 825; 12 C. C. 17.
(2) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.

has been misunderstood. In the first place, it was not a suit between two principals for damages for breach of a contract but was one for compensation under section 212 of the Indian Contract Act in respect of the direct consequences of the defendant's negligence and misconduct as alleged. The defendant there was the agent of the plaintiff and it was his duty to purchase grain at Karachi, to place the goods on the rails at Karachi, and to post the railway receipt to the plaintiffs' address. As pointed out in the judgment in that case, (and reported at the bottom of page 52*) the learned Judges say: "It is quite clear that under section 17 (*a*), read with Explanation III of Act XIV of 1882, the present suit would not have been within the jurisdiction of the Hathras Court. The contract was made at Karachi, where the plaintiffs' offer was accepted. The performance of the contract had to be completed at Karachi and the money due was payable at Karachi. The defendant contracted to act as the plaintiffs' agent at Karachi for the purpose of purchasing and despatching the goods and to do certain acts there also. His negligence or misconduct, if any, occurred there." The one case out of the many discussed by the Court which seems really in point has been distinguished for reasons which do not appeal to us, that is the case of *Suraj Bhan* v. *Punjab Cotton Press Co. Ltd.* (3). In that case the goods were sent from Lahore to Delhi but they were addressed to the consignors. The railway receipt was forwarded to a banking firm and was made over to the consignees on payment. The lower Court ditinguishes this case because the goods were despatched in the names of the consignors. It seems to us, however, that this is a distinction without a difference. In both the cases, the goods remained the property of the consignors unless and until their price was paid. In both the cases, the price had to be paid at the place of destination, and in both the cases the person who received the price was the agent of the consignors and the goods only passed to the consignees when the consignors' agent having received their price handed over the goods or their equivalent, the railway receipt, to the consignees. After all, Dr. Tej Bahadur's argument amounted to this :—The post office throughout was the agent for the plaintiffs, and that it being conceded that the contract was made at Delhi, the Court at Delhi alone had jurisdiction; but in our opinion the system adopted by the parties was deliberately the value payable parcel system and we think, as we have said, that the real contract, which was concluded at Delhi, was that the price of the goods would be paid by the plaintiffs at Kasganj and that the defendants agreed that the post office should deliver the goods to the plaintiffs at Kasganj and receive payment for them there.

The result is, in our opinion, that the Court below was wrong in returning the plaint. We accordingly set aside that order and direct that Court to receive the plaint and restore it to its original number and proceed with the case according to law. The costs of this application will abide the result.

Order set aside.

(3) 18 Ind. Cas. 130; 45 P. L. R. 1913; 40 P. W. R. 1913.

*Page of 34 A.—*Ed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1055 OF 1918.

February 10, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

BAI PARVATI—DEFENDANT—APPELLANT

versus

MANSUKH JETHA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 33—Restitution of conjugal rights, decree for—Execution by detention in prison, order disallowing—Court, duty of.

Ordinarily, a Court passing a decree for restitution of conjugal rights against a wife ought to exercise the discretion conferred upon it by rule 33 of Order XXI of the Civil Procedure Code and direct that the decree shall not be executed by the detention of the wife in prison. It is no ground for refusing to exercise this discretion that the wife has already been in jail under the sentence of a Criminal Court and that it would be no violence to her feelings to be sent to jail if she disobeys the decree for restitution of conjugal rights. [p. 362, col. 2.]

BAI PARVATI v. MANSUKH JETHA.

Second appeal from the decision of the Assistant Judge, A. P., at Ahmedabad, in Appeal No. 522 of 1917, reversing the decree passed by the Joint Subordinate Judge at Ahmedabad, in Civil Suit No. 235 of 1917.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *M. H. Mehta* for Mr. *M. H. Vakil*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is a suit brought by the plaintiff, the husband, for restitution of conjugal rights against his wife, the first defendant. The suit was dismissed by the Trial Court. In appeal the plaintiff got a decree. The first defendant was ordered to go and live with her husband. Order XXI, rule 33, gives the Court discretion to order that such a decree shall not be executed by detention in prison. The learned Appellate Judge has considered that rule, but considered that as the wife had already suffered rigorous imprisonment for three years on a criminal charge, and was quite accustomed to that life, it would not be any violence to her feelings to be asked to go to jail for wilful disobedience of the Court's order.

Now, it may be admitted that the Court has power to give a husband a decree for restitution of conjugal rights, and no doubt the Court has power to order the wife, if she does not obey the decree, to go to jail. But the Code especially provides that the Court may order that the decree shall not be executed by detention in prison. Generally, the tendency of modern legislation is against sending women to jail in civil matters. Section 56 of the Code provides that they shall not be arrested or detained in a civil prison in execution of a decree for payment of money, and, except in very serious questions of contempt of Court, I doubt whether a Court would ever order a woman to be sent to jail merely for refusing to obey a decree of an ordinary nature. It may be said that decrees for restitution of conjugal rights are of a particular nature; that the law recognises that the husband is entitled to have his wife living with him, and that the only way to enforce obedience to such an order would be ordering the detention of the wife in prison if she refused to comply with the decree. But the days are past when a wife was considered as a mere slave or chattel of the husband. In my opinion, a decree for the restitution of conjugal rights which can be enforced by imprisonment, is a relic from the barbarous and middle ages. It is recognised, and has been recognised for many years in England, that a decree for restitution of conjugal rights is merely a preliminary step to enable a wife to get a divorce when she would not otherwise be able to do so, since the refusal of the husband to obey a decree for restitution of conjugal rights is considered as desertion, and desertion equivalent to cruelty, and, therefore, such desertion, coupled with adultery, will be sufficient to enable a wife to get a decree for divorce. That is the only use to which proceedings for restitution of conjugal rights are now put in England. In this country they may be used by the husband as a means for preventing the wife from claiming maintenance, since, if the Court passes an order against a wife to go and live with her husband, and she refuses to do so, then she is debarred herself from making any claim to maintenance. For a wife is only entitled to separate maintenance if she has some good reason for living apart from her husband. In my opinion, it is a sufficient consequence for the refusal to obey a decree for restitution if she has to maintain herself, and cannot make any claim against her husband for maintenance. In any event, in this case the reasons given by the learned Judge for refusing to exercise his discretion in favour of the defendant cannot be supported. I should, therefore, amend the decree of the lower Appellate Court by directing, under Order XXI, rule 33, that the decree shall not be executed by detention in prison. The appellant will have the costs of the appeal.

HEATON, J.—A decree in this case for restitution of conjugal rights is no doubt justified by the circumstances which have come to light in the course of the case. But when the Appellate Judge came to consider whether he should or should not make a direction such as is contemplated by Order XXI, rule 33, of the Civil Procedure Code, that is, a direction that the decree shall not be executed by detention in prison, he decided that he would not make any such direction. For that decision he gave what is to me an astonishing reason: he thought that because

the wife had already suffered rigorous imprisonment for three years, and was quite accustomed to that life, it would not do any violence to her feelings to require her to go to jail for wilful disobedience of the Court's orders. It would be interesting to ascertain in how many cases of persons who had once been sent to jail, it would not do violence to their feelings to be required to go to jail a second time. I imagine the number would be singularly few.

Then the Judge gave another reason. He said the decree would be a nullity, and that if he were to give such a direction the object of taking and giving it would be frustrated. That is not so either. The decree for restitution of conjugal rights, accompanied by a direction that the decree shall not be executed by imprisonment, is not a nullity. It is a declaration that the marital obligation of living with her husband rests on the wife, and it protects the husband against any proceedings for maintenance which the wife may institute under section 488 of the Criminal Procedure Code. Such a decree, therefore, does serve a really useful purpose. In this case I feel not the slightest hesitation in saying that the direction that the decree shall not be executed by imprisonment ought to be added, for, though it is perfectly true that the wife certainly ought not to be able to secure separate maintenance, it is equally true that it would be ludicrous to send her to jail for refusing to live with her husband whom she at one time apparently, had attempted to murder. I, therefore, agree with the order proposed.

Decree amended.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1655 OF 1918.

January 26, 1920.

Present :— Mr. Justice Sadasiva Aiyer and Mr. Justice Spencer.

DUGGEMPUDI NAGAMMA—

PLAINTIFF—APPELLANT

versus

TIRUMALA REDDI VENKATA REDDI AND OTHERS—DEFENDANTS—RESPONDENTS.

Promissory note executed for existing liability—Cause of action—Plaint, alternative claim in—Promissory note not returned to defendants—Procedure.

It is open to the holder of a promissory note executed for an existing liability when suing to recover the amount due, to include in his plaint both claims in the alternative. If he sues on one such cause of action and the right to sue thereon is not free from doubt, the Court should direct him to amend his plaint, so as to convert it into a suit based on both causes of action, or treat it as amended and then decide the suit finally. [p. 364, col. 1.]

Where in such a suit the promissory note is not returned to the defendant, he is entitled to be indemnified against future liability thereunder. [p. 364, col. 1.]

Second appeal against the decree of the Court of the Temporary Subdordinate Judge, Guntur, in Appeal Suit No. 101 of 1917, (Appeal Suit No. 34 of 1916 on the file of the District Court, Guntur), preferred against the decree of the Court of the Principal District Munsif, Guntur, in Original Suit No. 307 of 1914.

FACTS appear from the judgment.

Mr. *V. Lakshminarayana*, for the Appellant.—The lower Appellate Court erred in its view of the law that it could not inquire into the claim based on the original cause of action. Every plaint on a promissory note comprises both claims, that on the note and also on the original liability. The Court could award relief on either cause of action. The Privy Council decision in *Saminathan Chetty* v. *Palaniappa Chetty* (1), lays down nothing to the contrary. It only states that the causes of action are different, not that the plaint cannot include both causes of action in the alternative. The District Court should have gone into the question whether anything was paid to plaintiff in excess of Rs. 300.

Mr. *N. V. L. Narasimha Rao*, for the Respondents.—*Saminathan Chetty* v. *Palaniappa Chetty* (1) decides that the two causes of action are distinct. When a pro-note is executed for an existing liability, the original cause of action becomes merged in the pro-note.

JUDGMENT.

SADASIVA AIYAR, J.—*Saminathan Chetty* v. *Palaniappa Chetty* (1) quoted for the respondents only shows that the claim on a

(1) 26 Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617; 17 New Law Reports 56; (1914) A. C. 618; 83 L. J. P. C. 131; 110 L. T. 913.

promissory note, given for an existing liability is based on a different cause of action from that on the said existing liability. It does not decide that a plaint cannot include both such claims in the alternative. If a plaintiff sues on one of such causes of action and the right to sue thereon is not free from doubt, it is always open to the Court (and in my opinion, it is desirable to do so to put an end to litigation as far as possible) to direct the plaintiff to amend the plaint, so as to convert it into a suit based on both causes of action, or treat it as so amended, and then to decide the suit once for all.

The Court of first instance in this case held that no note was ever executed and hence it decreed the claim of the plaintiff based on the original cause of action alone.

The lower Appellate Court held that a promissory note was executed for the debt and hence the plaintiff's suit based solely on the original cause of action ought to be dismissed. It refused to go into the question whether more than Rupees 300 has been paid towards the plaintiff's claim whether based on the original cause of action or on the promissory note.

I think that this is an unsatisfactory mode of disposing of a litigation like this. I would, therefore, treat the suit as based on both claims in the alternative (the plaint being treated as amended accordingly) and direct the suit to be disposed of on the merits after dealing with the 6th issue. [The payment of Rs. 300 found by the District Munsif not having been disputed by the plaintiff, the question to be decided under that issue has become restricted to what further amounts (if any) have been paid.]

As pointed out in *Chokkalingam Chetty* v. *Annamalai Chetty* (2), if the defendant is anxious that, in case the promissory note is not returned to him, he might become liable to third persons who might become holders in due course of the negotiable instrument, the Courts could obtain proper security from the plaintiff, before awarding the amount (if any) found due to the plaintiff. The plaintiff in this case has expressed her willingness through her Counsel to give a proper indemnity bond, if so directed, for the amount (if any) which may be decreed to her.

(2) 34 Ind. Cas. 417.

The decree of the lower Appellate Court dismissing the suit is set aside and the case is remanded to that Court for disposal in the light of the above observations. All costs will be provided for in the fresh decree to be passed in that Court.

SPENCER, J.—I agree.

M. C. P.

Appeal allowed.
Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 37 OF 1918.
February 27, 1920.

Present:—Pandit Kanhaiya Lal, A. J. C.

LACHHMI NARAYAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GANGA BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Riparian owners rights of, nature and extent of.

The right of a riparian owner does not depend on the ownership of the soil of the stream. It belongs to the proprietor of the adjoining land as a natural incident to the right of the soil belonging to him and he is entitled to the benefit of it, as he is to all other natural advantages belonging to the land, of which he is the owner .It is not based on prescription or a presumed grant, but rests on the natural advantages arising from the situation. The stream may be permanent or intermittent; but so long as it has a natural origin and flows in a known or defined channel, the right of a riparian owner to use its water, when it flows alongside his land, continues unaffected. In addition to the right to take the water when the water flows adjoining his land, a person may also have an easement to go across the land of another, when the water recedes: but such a user can only be claimed by virtue of prescription or custom. [p. 365, col. 2.]

Appeal from the decree of the Subordinate Judge, Hardoi, dated the 3rd November 1917, modifying that of the Munsif, Sandila (Hardoi), dated the 14th August 1916.

Mr. *A. P. Sen*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—The plaintiffs are the owners of a hamlet called Patti, forming part of Tejipur, and the defendants Nos. 1

to 41 are the owners of Tejipur proper, which stands to the east of it. The river Kalyani flows over plots Nos. 207 and 246 *khasra* which appertain to the former. On the eastern bank of the river Kalyani, adjoining plot No. 246 *khasra*, lies the land appertaining to the village Tejipur proper.

The river Kalyani is a natural stream, flowing in a defined channel for the greater part of the year and forms one of the tributaries of the Ganges. The proprietors of thelvillage Tejipur proper claim on behalf of their tenants a right to irrigate their land from the Kalyani river as riparian owners. The allegation of the plaintiffs was that, in December 1914, the defendants wrongfully irrigated 60 *bighas* of their land from the water of the said river without any right. They claimed a declaration that they were the owners of the land, bearing Nos. 207 and 246 *khasra*, and of the water of the river Kalyani flowing thereon and sought to recover Rs. 120 on account of damages from the defendants for the water they had used.

The Courts below found that the defendants were justified in using the water of the stream for irrigating their fields. They further found that in December 1914 the water of the river had not receded so far from the boundary line of the village Tejipur proper as to render the proprietors of that village liable for trespass and that, in any case, no damage had resulted from the use to the plaintiffs.

So far as plot No. 207 *khasra* is concerned, it is clear that the defendants could not have taken water from the river flowing over that portion, without trespassing on the intervening land, belonging to the plaintiffs. The village of the defendants adjoins the river so far as it flows over portions of plot No 246 *khasra*, and while the defendants have a right as riparian owners to take water from the river where it flows adjoining their village, they have no right to take water from other portions which do not flow adjoining their land. In *Lyon* v. *Fishmongers' Company* (1) it was held that riparian owners had the same natural riparian rights in public navigable and tidal rivers as in the stream flowing on private land. Since the facts of nature constitute the foundation of their right, the law recognises and follows the course of nature in every part of the stream. The right does not depend on the ownership of the soil of the stream. It belongs to the proprietor of the adjoining land as a natural incident to the right of the soil belonging to him and he is entitled to the benefit of it as he is to all other natural advantages belonging to the land of which he is the owner. It is not based on prescription or a presumed grant, but rests, as section 7, clause (*b*) of the Indian Easements Act (V of 1882) shows, on the natural advantages arising from the situation. "The natural stream, existing by the bounty of the Providence for the benefit of the land through which it flows, is", says Gale, "an incident annexed, by operation of law, to the land itself." (Gale on Easements, 7th Edition, page 215*). The stream may be permanent or intermittent; but, so long as it has a natural origin and flows in a known or defined channel, the right of a riparian owner to use its water, when it flows alongside his land, continues unaffected. This is clear from the explanation appended to Illustration J of section 7 of the Indian Easements Act (V of 1882), which recognizes the right of a riparian owner to use the water of a natural stream though it may be intermittent.

In addition to the right to take the water when the water flows adjoining his land, a person may also have an easement to go across the land of another, when the water recedes; but such a user can only be claimed by virtue of prescription or custom. No custom was proved in this case and the question of prescription was not gone into, because no trespass was proved. The proprietary right of the plaintiffs to the soil of the bed of the river was not questioned.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) (1876) 1 App. Cas. 662; 46 L. J. Ch. 68; 35 L. T. 569; 25 W. R. 165.

*See 8th Edn. page 240—*Ed.*

IZZAT HUSAIN KHAN v. RAM CHANDER.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 810 OF 1918.
January 5, 1920.
Present:—Mr. Justice Tudball and
Mr. Justice Rafique.
IZZAT HUSAIN KHAN—
DEFENDANT—APPELLANT
versus
RAM CHANDER AND OTHERS—
PLAINTIFFS AND DEFENDANT—RESPONDENTS.

Pre-emption—Custom relating to 20-biswa mahal, *whether applicable to* haqiat mutafarriqa.

Where a custom of pre-emption relates only to lands which constitute the 20-*biswa mahal*, there can be no pre-emption in respect of the *haqiat mutafarriqa*, and the mere fact that the latter may at one time have formed part of the 20-*biswa mahal* would make no difference.

Second appeal against the decree of the Subordinate Judge, Farrukhabad, at Fatehgarh, dated the 14th March 1918.

FACTS.—Defendant No. 1 sold his *haqiats* in three items of properties (Fatehpur Katri, Bhojpur and Bardabagat) for Rs. 1,500 under a sale deed, dated 23rd June 1915 specifying the price of each item separately. Plaintiff claimed pre-emption in respect of Fatehpur and Bhojpur properties. The vendee pleaded want of custom on the ground that the Bhojpur property was formerly a grove and, later on, was converted into *haqiat mutafarriqa* and entered as such in revenue papers and so the *dastur dehi* was not applicable to it. The Court of first instance held that Bhojpur plot being *haqiat mutafarriqa* no right of pre-emption for or on account of such a plot could arise if it was not liable for Government revenue, and a holder of land not liable for revenue could not, for the purposes of the land, be regarded as a co-sharer and, consequently, the custom did not apply to the plot in dispute. It also found that at the time the *dastur dehi* was prepared this plot was a grove not assessed to rent.

The plaintiff appealed and the lower Appellate Court decreed the appeal holding that the custom of pre-emption applied equally to the Bhojpur plot also.

Dr. *S. M. Sulaiman*, for the Appellant.
Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—This appeal must succeed. It relates only to the property situate in

GOBA NATHU BAROLA v. SAKHARAM TEJU PATIL.

mauza Bhojpur, a piece of *haqiat mutafarriqa*." The Court of first instance held that the custom in the village was one pertaining to the *khalsa* lands which constitute the 20 *biswa mahal*. It, therefore, held that there was no proof of any custom in reference to the "*haqiat mutafarriqa*." It accordingly dismissed the claim so far as it related to the property now in dispute in this appeal. The lower Appellate Court was of opinion that, because this land had once formed part of the 20-*biswa mahal*, the custom ought to be deemed to apply to it as well. With this we find it impossible to agree. The plaintiff came into Court proving a custom among the co-sharers of the 20 *biswa mahal* in respect to their shares in that *mahal*. There is no evidence of the existence of a custom among the co-sharers of the "*haqiat mutafarriqa*." The custom is not attached to the land. It is true that the land in dispute may once have been a part of the 20 *biswa mahal*, but circumstances have altered and it no longer is part and parcel of that *mahal*. The result is that it is no longer within the custom as set out in the *wajib-ul-arz*, and the claim was rightly dismissed by the Court of first instance. We, therefore, allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellant will have his costs in this Court and in the lower Appellate Court.

Appeal allowed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 95 OF 1919.
February 10, 1920.
Present:—Sir Norman Macleod, KT.,
Chief Justice, and Mr. Justice Heaton.
GOBA NATHU BAROLA—PLAINTIFF—
APPELLANT
versus
SAKHARAM TEJU PATIL—DEFENDANT
—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Decree-holder auction-purchaser, suit by, against judgment-debtor and stranger to recover possession of property purchased, whether barred.

GOBA NATHU BAROLA v. SAKHARAM TEJU PATIL.

Where a decree-holder auction-purchaser in trying to obtain possession of the property purchased by him is resisted not only by the judgment-debtor but also by a stranger who claims to have an interest in the property, his proper remedy is to bring a separate suit for possession both as against the judgment-debtor and as against the stranger. Section 47 of the Civil Procedure Code is not a bar to the maintenance of such a suit.

Appeal from the decision of the District Judge, Khandesh, in Appeal No. 403 of 1917, reversing the decree passed by, and remanding the suit to, the Joint Subordinate Judge at Jalgaon, in Civil Suit No. 832 of 1916.

Mr. *P. B. Shingne*, for the Appellant.

JUDGMENT.

MACLEOD, C. J.—The plaintiff in execution of his decree purchased the suit property with leave of the Court. Not being able to get possession after his purchase, he brought this suit against the 1st defendant, his judgment debtor, and the 2nd defendant, who claimed to have an interest in the property, but who did not fill the position of a judgment-debtor with regard to the plaintiff. The Trial Court dismissed the suit as against both defendants on the ground that the plaintiff was the representative of the decree-holder, and the suit was barred under section 47 of the Civil Procedure Code.

In appeal, the decree of the Trial Court dismissing the suit as against the 1st defendant was upheld, but the decree as against the 2nd defendant was set aside and the suit was remanded for trial.

The plaintiff has appealed against that part of the decree which dismissed his suit against the 1st defendant. The 1st defendant has not appeared, and we have not had the advantage of hearing what he might say on the question before us. No doubt, in the case of *Sadashiv* v. *Narayan Vithal* (1) it was held by a Bench of this Court that a decree-holder by becoming a purchaser at a Court sale did not cease to be a party to the suit within the meaning of section 47 of the Civil Procedure Code, and that, therefore, proceedings for delivery of possession of the property purchased by the decree-holder were proceedings in execution of the decree, and fell wihin the scope of section 47 of the Civil Procedure Code. Now, in this case if defendant No. 2 had not been a party to the suit, the facts of the case would have brought the suit within that decision. Here we have another party claiming title to the property purchased who was not a party to the original suit, and that, I think, distinguishes this case from *Sadashiv* v. *Narayan Vithal* (1). If the judgment of the lower Appellate Court were to stand, it would follow that the plaintiff would have to proceed in execution proceedings against the 1st defendant, and file a suit against the 2nd defendant. The execution proceedings against the 1st defendant might result in his having to file another suit against the 1st defendant, if the matters in dispute between him and the 1st defendant could not be decided except by means of a suit. That would be a very unfortunate result. For myself I feel inclined to doubt the decision in *Sadashiv* v. *Narayan Vithal* (1). I would prefer to follow the decision of the Full Bench of the Allahabad High Court in *Bhagwati* v. *Banwari Lal* (2). However that may be, in this case, I think, I can come to the conclusion that, although the plaintiff remains a party to the suit as against the 1st defendant, yet the 2nd defendant not being a party to the suit, the plaintiff's proper remedy in order to get possession of the property purchased at the Court-sale would be by filing a suit against both the 1st and 2nd defendants. By purchasing the property the plainitff no doubt does not cease to be a party to the suit. But he fills quite a different capacity as auction-purchaser. It appears to me that it would be more correct to say that as auction purchaser he acquires a different set of rights which entitle him to come to the Court for protection by filing a suit, instead of proceeding in execution. I would, therefore, reverse the decree of the lower Appellate Court dismissing the suit against the 1st defendant, and direct that the suit against both the defendants should be remanded for trial and adjudication on the merits. The appellant must have his costs of the appeal.

HEATON, J.—I concur. Whether the decision in *Sadashiv* v. *Narayan Vithal* (1) is correct or

(1) 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 661.

(2) 1 Ind. Cas. 416; 31 A. 82 (F. B.); 5 M. L. T. 185; 6 A. L. J. 71.

not (and I think it may need reconsideration), yet the case, as presented by the plaintiff here, is certainly not one which can be summarily dismissed on the ground that the suit will not lie. Whatever the true facts may be, the plaintiff is seeking to recover possession from two persons, defendant No. 1 and defendant No. 2, and the relief he asks for against defendant No. 2 he could not obtain by proceedings in execution. Therefore, he is driven to bring a suit, and, as my Lord the Chief Justice has pointed out, it would really be a legal absurdity to compel him for one matter which ought to be disposed of as one case, to take separate proceedings: first, proceedings in execution against defendant No. 1; and then a suit against defendant No. 2. However involved our law of procedure may be, I feel quite certain that it was never intended to produce results of that kind.

Decree reversed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 259-B OF 1919.
July 28, 1920.

Present:—Mr. Kotwal, A. J. C.

Musammat RAIJI—PLAINTIFF—APPELLANT
versus
SHRIRAM—DEFENDANT—RESPONDENT.

Hindu Law—Widow, alienation by, nature of—Possession of transferee, whether wrongful.

A transfer by a Hindu widow is voidable, and until the reversioner signifies his intention to avoid it, the transferee cannot be deemed to be in wrongful possession of the property alienated.

Appeal against the decree by the District Judge, Amraoti, in Civil Appeal No. 5 of 1919, dated 24th March 1919.

Mr. *G. R. Pradhan*, for the Appellant.
Mr. *M. V. Joshi*, for the Respondent.

JUDGMENT.—The defendant is a transferee of a field from a widow. The plaintiff is a reversioner who obtained a decree for possession after the widow's death against the defendant in Civil Suit No. 187 of 1917, and now sues for mesne profits for three years, two of them being years prior to the date of the above suit. The lower Courts have dismissed the claim for these two years. The plaintiff appeals.

The lower Courts' decrees are quite proper. The transfer to the defendant by the widow was only voidable: *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1), and until the plaintiff had signified her intention to avoid it the defendant could not be deemed to be in wrongful possession. The transfer was not repudiated before the 14th May 1917, the date of the institution of Suit No. 187 of 1917, and no mesne profits can be claimed for any period prior to that date. Reliance is placed on *Raghoba Arelay* v. *Ragho* (2), and it is urged that the plaintiff should be given, if not mesne profits, at any rate, some amount as compensation for the defendant's use of the land for those two years, but that was a case in respect of tenancy land and the defendant was deemed to hold under the implied agreement to pay for the use of the land.

The appeal fails and is dismissed with costs.

Appeal dismissed

(1) 34 C. 329 (P. C.); 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom L. R 602; 2 M. L. J. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I A. 87 (P. C.).
(2) 14 C. P. L. R. 129.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 424 OF 1920.
August 20, 1920.
Present :—Mr. Justice Gokul Prasad.
SHEO BALAK—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *ss.* 439, 476—*Penal Code* (*Act XLV of* 1860), *s.* 182—*Complaint not enquired into—Order calling upon complainant to show cause why he should not be prosecuted, legality of—Revision—High Court, power of interference of.*

Accused presented a complaint to the District Magistrate who, without giving him an opportunity of having his complaint inquired into, and without any inquiry into the complaint, called upon the accused to show cause why he should not be prosecuted under section 182 of the Penal Code:

Held, (1) that the order of the District Magistrate was illegal and improper, as a complainant can be made to suffer the consequences of his action only when his complaint, after full and open inquiry, is found to be false ; [p. 370, col. 1.]

(2) that the High Court had power to revise the order, although no final order directing the prosecution of the accused had been passed. [p. 370, col. 1.]

Criminal revision against the order of the Sub Divisional Magistrate, Banda, dated the 17th June 1920.

Mr. *Ram Nama Prasad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The circumstances under which this application arises are rather lengthy and of a peculiar nature. It appears that one Sukhnandan, who was the *lambardar* of a village, paid up the Government revenue due from *Musammat* Dularia, one of the co-sharers. The accused is said to be her *sarbarahkar* or manager. Sukhanandan applied under section 184 of the Land Revenue Act and got an *ex parte* order for the attachment of the property of the applicant. The applicant who had got information of this order applied on the 18th of March 1920 to the Naib-Tahsildar that the order of attachment was bad, inasmuch as he had nothing to do with *Musammat* Dularia. The Naib Tahsildar forwarded the application to the Deputy Collector for orders. On the 25th of March 1920 the Deputy Collector asked the Tahsildar for a report and stayed proceedings. This order reached the Tahsildar on the 27th of March 1920. He informed the Naib-Tahsildar, the *wasilbaqinawis* and the *qurqamin* who are said to have received this order on the 28th of March 1920. Notwithstanding this, the *qurqamin* proceeded to attach the house of Sheo Balak saying that the house belonged to *Musammat* Dularia. The applicant, therefore, put in an application before the Deputy Collector who asked the Tahsildar to enquire into the matter and report whether the applicant was the *sirbarahkar* of *Musammat* Dularia. The Tahsildar made enquiries and came to the conclusion that the accused was not the *sarbarahkar* of *Musammat* Dularia and that the attached house did not belong to her. On the 12th of May 1920 the Deputy Collector directed the attachment to be removed and it was so removed. On the 31st of May 1920 the applicant, Sheo Balak, made a complaint to the District Magistrate against the Naib-Tahsildar and the *qurqamin* alleging that they had a grudge against him, and acted most improperly in attaching his house and ill-treating and insulting the ladies of his house, and that notice should be taken of this conduct of theirs. The District Magistrate, who seems to be a new man, passed an order to the following effect :—"Sub-Divisional Magistrate, please take the statement of this man on oath and, if possible, institute a suit against him under section 182, Indian Penal Code." This order was passed on the same day on which the application was put in without even examining the complainant in support of his application. The accused applied through his Pleader for a copy of this order which was refused. On the 16th of June 1920 the Sub-Divisional Magistrate took the statement of the complainant on oath and, without deciding his complaint or hearing his witnesses or any other evidence, issued a notice to the applicant on the 17th of June 1920 to show cause on the 30th June 1920 why a case under section 182 of the Indian Penal Code should not be started against him. The applicant applied for a copy of the full order dated the 17th of June 1920 passed by the Sub Divisional Magistrate but this copy was also refused. The applicant comes here in revision. A preliminary objection was taken by Mr. Malcomson, the learned Government Advocate, that no revision lies inasmuch as the applicant has been called upon to show cause and no order has been passed for his prosecution yet. I cannot accede to this argument. It

has been held in the case of *Ohadha* v. *Emperor* (1) that an order like this can be revised and I am in full agreement with that decision. I, therefore, repel the preliminary objection.

The above statement of facts will show clearly that the whole case has been very badly managed. The applicant has not been given a chance of having his complaint enquired into and the order of the District Magistrate, practically directing his prosecution without any enquiry into the complaint, was most improper and was not justified by law. Moreover, in a case like this, where serious allegations are made against responsible officers like the Naib-Tahsildar, his subordinate, and the *qurqamin* it is both in the interests of the public and the Government that the complaint should immediately and thoroughly be enquired into, and if it is found to be true the persons complained against should be removed from the service or otherwise dealt with. It is only when the complaint has been, after full and open enquiry, found to be false, that the complainant should be made to suffer the consequences of his action. It is only if proceedings are taken promptly in this way that the people can have confidence in the administration of justice. The whole action of the District Magistrate has been most ill-advised. I, therefore, allow this application in revision, set aside the order of the Court below directing the accused to show cause why he should not be prosecuted under section 182 of the Indian Penal Code, and direct the Magistrate to proceed to a determination of the complaint of the accused according to law.

Application allowed.

(1) 36 Ind. Cas. 878; 14 A. L. J. 851; 18 Cr. L. J. 66.

PATNA HIGH COURT.

CRIMINAL REVISION No. 460 OF 1920.

October 16, 1920.

Present :—Mr. Justice Jwala Prasad.

RUPA SINGH AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 350—Case withdrawn from file of Magistrate—Magistrate, whether ceases to exercise jurisdiction—De novo *trial—Accused, failure of, to demand new trial, effect of.*

A Magistrate ceases to exercise jurisdiction within the meaning of section 350 of the Criminal Procedure Code when a case is withdrawn from his file, and where, in such a case, the accused, on the case being sent to another Magistrate, fail to ask for a new trial the latter Magistrate is competent to record the remaining evidence and pronounce judgment. [p. 371, col. 2.]

Mr. *J. N. Maitra*, for the Petitioners.

JUDGMENT.—The petitioners have been convicted of theft under section 379, Indian Penal Code, for having removed a lot of bamboos stacked in front of the house of the complainant. The conviction is assailed on the following grounds:—

That the bamboos removed originally belonged to the clump of bamboos standing on the petitioners' land, Plot No. 131. The complainant's bamboo clumps stand on Plots Nos. 74 and 76, which are contiguous to Plot No. 131.

No doubt, according to the measurement of the *Amin*, there were some clumps on the border land extended to the petitioners' Plot No. 131. The number of bamboo clumps in dispute is very large and all of them cannot possibly belong to the clump on the ridge extending to the petitioners' Plot No. 131. The petitioners' plot has been found to be a cultivated one. The Magistrate has definitely held that the complainant peacefully cut and removed the bamboo clumps, from his Plots Nos. 74 and 75 and that it is possible that some of the bamboos may have been taken out of the extended clump on the petitioners' land. The petitioners did not object to it at the time of the cutting. In fact, there was no dispute between them about it. Subsequently, a friction arose between the parties, a few days previous to the present occurrence, on account of the cattle of the brother of the accused having trespassed on the *khadhar* land of the com-

plainant, and, consequently, the petitioners removed forcibly in a body the bamboos stacked at the house of the complainant.

The Court below has said that there is no actual evidence of the bamboo clumps belonging to the petitioners, but, as observed above, it may be possible that some of the bamboos may have been cut from the extended clump. There was, in the circumstances, no *bona fide* dispute and, as a matter of fact, no justification for removing the bamboos, whether some of them belonged to the complainant's land or not, when they were lying duly cut and stored and were in the possession of the complainant at his house. The removal of the bamboos from the possession of the complainant certainly constituted an offence under section 379, Indian Penal Code. There is, therefore, no force in this contention of the learned Vakil for the petitioners.

The petitioners have, however, relied more upon the legal ground than upon the facts of the case. That ground is that conviction of the petitioners upon the evidence, partly by the Magistrate who convicted them, and partly by another Magistrate, is not legal. Reference has been made to section 350 of the Code of Criminal Procedure and to the ruling, *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (1). The circumstances under which this happened, are as follows:—

The case was pending in the file of Maulvi Safdar Hussain, Second Class Magistrate. He recorded some evidence. Upon the petition of the complainant, the case was withdrawn from his file under section 528 and was made over to the present Magistrate, Mr. S. C. Sarkar, who concluded the trial and convicted the accused. The petitioners did not press for a *de novo* trial. The charge was framed upon the evidence recorded by Mr. Safdar Hussain and the prosecution witnesses were further cross-examined after the charge. The accused then entered upon their defence and examined several witnesses. It is said that Maulvi Safdar Hussain was in the District and, therefore, did not cease to exercise jurisdiction in the case and, hence, section 350 had no application and that Mr. Sarkar should have held a *de novo* trial, unless the accused expressly waived their right to have the witnesses re-summoned. In this, no doubt, the learned Vakil is supported by the case of *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (1). That case, however, has gone far beyond the words "may demand" in proviso (*a*) to section 350. It has been held in a number of cases that a Magistrate ceases to exercise jurisdiction when a case is withdrawn from his file, as in the present case: *vide Palaniandy Gounden* v. *Emperor* (2), *Mohesh Chandra Saha* v. *Emperor* (3), *Emperor* v. *Nanhua* (4) and *Barachi* v. *Emperor* (5). Therefore, section 350 does apply to the present case. Under proviso (*a*) to that section, the accused person "may demand that the witnesses or any of them be re-summoned and re-heard." The Calcutta High Court, in a later case *Brindaban Chander Das* v. *Ishaquddin Chowdhury* (6), laid down that the accused should ask for a trial *de novo*. The accused in this case did not ask for it, and, upon a true construction, scope and the meaning of the section, I am clearly of opinion that the trial is not vitiated. This contention must also fail.

It is then said that the conviction of the petitioners under section 352, Indian Penal Code, as well as under section 379 is wrong. I do not appreciate it. The two sections contemplate distinct offences, the former of theft and the latter of assault. There is also no reason for any grievance upon this point, for the Magistrate has not passed separate sentences under each of the sections and the sentence of Rs. 25 each under any of the sections is not severe.

Then remains the contention that the accused were not examined under section 342 of the Code of Criminal Procedure. The accused were examined. They also filed written statements and were not at all prejudiced. The circumstances of the case

(1) 12 C. W. N. 140 at p. 143; 6 Cr. L. J. 434.

(2) 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146.

(3) 35 C. 457; 12 C. W. N. 416; 7 Cr. L. J. 220; 7 C. L. J. 488.

(4) 23 Ind. Cas. 722; 36 A. 315; 12 A. L. J. 467; 15 Cr. L. J. 354.

(5) 35 Ind. Cas. 961; U. B. R. (1916) II, 108; 10 Bur. L. T. 73; 17 Cr. L. J. 401.

(6) 4 Ind. Cas. 67; 13 C. W. N. 550; 10 Cr. L. J 492.

distinguish it from the ruling *Raghu Bhumij* v. *Emperor* (7).

The petition is rejected.

Rule discharged.

(7) 58 Ind. Cas. 49; 1 P. L. T. 241; 5 P. L. J. 430; 21 Cr. L. J. 705.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 68 OF 1920.
April 17, 1920.
Present:—Mr. Justice Walsh.
MOHAN SINGH—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 408—Criminal breach of trust—Criminal Procedure Code (Act V of 1898), s. 222 (2)—Charge, contents of—Prosecution, duty of.

In a trial for criminal breach of trust in respect of money, although under section 222 (2) of the Criminal Procedure Code the accused may be charged in respect of the gross sum received by him, without specifying any particular item of any particular date in respect of the constituent parts of the gross sum, nevertheless, the prosecution must decide what amount they are prepared to prove the accused lawfully received and lawfully expended and what total sum, and how that total sum is made up, he has either unlawfully expended or failed to account for in such a way as to leave no doubt that he has been engaged in criminal misappropriation. And, in order to convict, there must be a definite finding of a certain definite sum traced to the accused, and clearly shown to have been wilfully and unlawfully appropriated to his own use. [p. 372, col. 2; p. 373, col. 1; p. 374, cols. 1 & 2.]

Criminal appeal against the order of the Additional Sessions Judge, Moradabad, dated the 24th of November 1919.

Mr. *A. S. Osborne*, for the Appellant.

Mr. *Lalit Mohan Banerji*, Government Pleader, for the Crown.

JUDGMENT.—The learned Judge in this case had the acquiescence of all three assessors and one cannot help feeling that, probably, in recording a conviction, he was not far wrong in the sense that by a sort of rough justice he has arrived at a right determination. But nothing is more dangerous in criminal law than the system of convicting a person on some vague general notion when the real charge has not been established. In this case I have grave doubts whether the form of the charge in which it was sent to Sessions was one which the learned Sessions Judge ever ought to have entertained. Undoubtedly, section 222 (2) of the Code of Criminal Procedure enables a man to be charged for criminal breach of trust in respect of a gross sum received by him between certain dates without specifying any particular item of any particular date in respect of the constituent parts of the gross sum, but I think that that is meant for a case where he is charged with embezzling the gross sum. The authority referred to during the argument in this case on behalf of the, *Emperor* v. *Ibrahim Khan* (1), certainly bears out that view. In that case the accused was charged with having committed a criminal breach of trust in respect of a gross sum of Rs. 208-12 fees which he had received on 18 different occasions from persons in respect of grazing cattle. It was no part of his duty to expend any part of that sum. It was his duty to pay it into the Treasury. He did not do so but appropriated it to his own use. That was a gross sum within the meaning of section 222 (2), as was decided by the learned Judges in that case. But that is not the case here, and section 222 must be construed and controlled in the light of the governing provision which requires such particulars to be given as are reasonably sufficient to give the accused notice of what he has got to meet. Sub-clause (2) is merely a particular illustration which the Legislature has enacted so as to make the case free from doubt which might otherwise have risen. But the cases must be very rare in which, where a trader appoints a general agent or manager of a sub-branch, with general authority to sell goods, collect money, purchase goods, pay labour dues and general expenses, it is sufficient to fling into the charge an alleged balance or net profit which the agent is supposed to have earned and say that, in respect of that net profit, he is guilty of misappropriation of every rupee which he cannot produce or explain. One difficulty in that procedure is, as it seems to me, that it offends against the principle that the onus is on the prosecution and they have no right to throw the onus upon the accused

(1) 7 Ind. Cas 186; 33 A. 36; 7 A. L. J. 897; 11 Cr. L. J. 442.

in respect of the charge. They must make up their mind what amount they are prepared to prove he has lawfully received and lawfully expended and what total sum, and how that total sum is made up, he has either unlawfully expended or failed to account for in such a way as to leave no doubt that he has been engaged in criminal misappropriation.

In this case I think, having regard to the fact that the law in this country does not permit an accused person to give evidence on oath and, therefore, puts considerable obstacles in the way both of the prosecution and of an accused person in a case of this character, the power to examine the accused at the trial with a view to enable him to give an explanation ought to be carefully exercised. Reading the examination of the accused in this case and the somewhat rough and ready method by which the learned Judge arrived at his final conclusion, the learned Judge seems to me to have gone dangerously near filling up the gaps in the prosecution evidence by the answers extracted from the accused in his examination.

It is to be feared that the provisions of section 342, Criminal Procedure Code, are sometimes either misunderstood or used for a purpose for which they were never intended.

Although transactions which involve civil liabilities may amount to criminal offences and often they do, so that the dividing line between the two in a discussion of the case is almost indistinguishable. On the other hand, I have always set my face most strongly against permitting an employer of labour when he entrusts a sub-agent or manager with large powers without any very clearly defined rules as to how those powers should be carried out, how his books should be kept and his accounts from time to time made up, and when he finds that those powers have been abused and there is a failure to render a satisfactory account resorting to the criminal law, not for the purpose of punishing an offender or in the public interest but as a means of putting the screw on to extract money from the agent. In this case the principal agent who was sent by the prosecuting company to investigate the affair admits that he extracted from the accused a promise to pay, and I am surprised that the learned Judge should, in a case of this kind, have awarded any portion of the fine as what he calls "compensation" to the prosecuting company I should, in any event, have quashed that part of the sentence. I regard it as a mistake and one calculated to encourage rather than otherwise, employers and masters using the criminal law for an indirect purpose of their own.

There is no getting over the fact that the prosecution themselves made the initial mistake of failing to support the charge with any account whatever representing what they put forward as the true account showing how much had been embezzled, and the learned Judge has merely come to the conclusion that on a rough calculation the accused has probably misappropriated something like Rs. 450, if not more. That will not do. There must be a definite finding of a certain definite sum traced to the accused and clearly shown to have been wilfully and unlawfully appropriated to his own use. The prosecution made a feeble attempt to discharge this duty in respect of three items. They proved that one Allah Bakhsh had taken a receipt for Rs. 480 and one Majid had taken a receipt of Rs. 163 for grass sold, but, inasmuch as both these items were entered by the accussd in his accounts, the charge as to his having failed to account for these receipts obviously breaks down and it becomes a question whether he had properly expended the difference between what he had in his possession and what he had included in the sums which in fact he received. They went so far as to call one independent witness, named Ishri Prasad, who proved that he had paid the accused Rs. 250. Inasmuch as the accused had never denied the fact and had entered it in his own handwriting in his accounts, the object for which this witness was called is not apparent. It did happen that, in the course of the case, one sum, namely, of Rs. 400, alleged to have been paid to one Binda Mal Bania and vouched for by him on the 1st of May 1919 was put forward by the accused as accounting for part of the money which was not forthcoming, and a receipt is on the file purporting to be a receipt by Binda Mal Bania dated the 1st of May 1919 for that sum which might have been paid in instalments or even in a lump sum on that date. It is true that in

order to establish a right to have witnesses summoned the defence ought to provide a list before the Magistrate but in a case of this kind the neglect to exercise that right ought not to be judged too harshly, having regard to the somewhat roving nature of the charge, but, inasmuch as the learned Judge had the receipt before him and the Legislature had provided by section 540 of the Code of Criminal Procedure an admirable weapon in the hands of the Court for satisfying itself upon any essential matter left in doubt, and inasmuch as the accused in this case himself invited the Court to summon this witness, I am unable to understand why the Sessions Judge did not call for the Bania and examine him under that section. However, he chose not to do so and I am, therefore, the less able to understand how he could possibly commit himself to the finding, which is one of the few definite findings of fact which I can discover in the judgment, that this receipt is a clear forgery.

On all these grounds the conviction and the sentences must be set aside, and the fine, if recovered, and to the extent to which it has been recovered by either payment or distress or execution, must be refunded to the accused person, and any goods seized from him or his family in execution of the fine must be restored and the Court must take steps to direct that that be done without any delay whatever. On the other hand, I think I must re-commit the accused to the Sessions on one definite charge, at any rate, namely, the alleged uttering of the forged receipt alleged to have been given by Binda Mal on the 1st of May 1919 which I have initialled M. S. I., or, alternatively, under section 235, of having embezzled that sum of Rs. 400. Of course, if the receipt is really a forgery and the money was never paid the accused must have dishonestly applied the money to his own use. I direct the Sessions Judge also to frame any charges which he may find upon the evidence (I have been unable to find any other upon the evidence on the record) of embezzlement of any specific sums such as those I have mentioned, namely, Rs. 480 paid to accused by Allah Bakhsh, Rs. 163 paid by Majid and Rs. 250 paid by Ishri Prasad, and decide the question with regard to those sums of money whether they have been received at any time by the accused and the receipt wilfully concealed from his master and the amounts or any part thereof wilfully applied to his own use.

The accused must not be released from custody. He must be detained in custody as a prisoner waiting trial until the re hearing of this case in the Sessions Court. I send the case for re-trial by the Sessions Judge of Moradabad.

Re-trial ordered.

PATNA HIGH COURT.

CRIMINAL REVISION No. 462 OF 1920.

October 16, 1910.

Present:—Mr. Justice Jwala Prasad.

LACHMI SINGH AND OTHERS—2ND PARTY—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 145—Possession, dispute as to, absence of—Proceedings appropriate—Security to keep the peace—Proceedings against several persons—Overt acts, proof of.

Where one party is clearly in possession of property and another party wants to take forcible possession of it, there is no dispute as to possession of the property within the meaning of section 145 of the Criminal Procedure Code, and the appropriate course is to initiate proceedings under section 107 of the Code. [p. 375, col. 1.]

An order under section 107, Criminal Procedure Code, can only be passed when there is a finding that the persons sought to be bound down are guilty of wrongful acts committed or sought to be committed by them. This can only be proved by overt acts against each individual. [p. 375, col. 2.]

When wrongful overt acts are committed or threatened to be committed jointly by a number of persons, the act is really committed severally and jointly by each of them, and all of them would be liable to the penalty of section 107 of the Code. [p. 375, col. 2; p. 376, col. 1.]

Mr. *G. C. Pal*, for the Petitioners.

The Governmet Pleader and Mr. *Sivanandan Ray*, for the Crown.

JUDGMENT.—The petitioners are agnates of one Ram Charitar Singh, who died seven years ago in a state of separation from the second party. His property was succeeded by his widow *Musammat* Ramjhari Kuer. On her death, in February 1920, the property devolved upon her daughter, *Musammat* Indermani Kuer.

LACHMI SINGH v. EMPEROR.

The present proceeding under section 107 of the Code of Criminal Procedure was instituted on the 16th March 1920 on a Police report to the effect that Lachmi Singh and others of the second party were interfering with the possession of *Musammat* Indermani Kuer over the property of her father, Ram Charitar Singh, inherited by her and that a breach of the peace was imminent. There was a notice under section 144 of the Code issued against the second party on the 3rd March 1920.

The second party challenged the proceedings instituted against them on the ground that Ram Charitar Singh died as a member of joint family and that the property after his death devolved upon them by survivorship, and that his widow and daughter did not succeed and had no right to succeed and were not in possession of the property. They went so far as to suggest that Ram Charitar Singh had a posthumous son born to him a few months after his death, with a view to defeat the right of the first party to the property in question. This has been found to be false by the Court below and need not be adverted to any more. The petitioners further claimed that the proceeding should be under section 145 of the Code, and not under section 107 inasmuch as the dispute was with regard to the possession of land.

Both the parties adduced evidence, oral and documentary. Admittedly, the name of the widow was recorded in the Collectorate Register D., soon after the death of her husband, Ram Charitar Singh. This shows not only separation of Ram Charitar Singh for the petitioners, but also the possession of his widow over the property in question.

The application for the registration of her name was unopposed and was even verified by one of the petitioners. The receipts filed by the *Musammat* lead to the same conclusion, namely, her possession over the property and the separation of Ram Charitar Singh from the petitioners.

The evidence in the case is overwhelming and conclusive to establish the possession of the first party. There could, therefore, be no possible dispute as to possession of the property in question so as to justify a proceeding under section 145, instead of section 107.

The following passage in the judgment of the lower Court has been made the foundation of the strenuous argument of Mr. Pal that the petitioners could not be bound down under section 107 of the Code:—

"It is true, no doubt, that there are no very definite allegations against each particular appellant, but they all belong to the party which wants to get Ram Charitar's property by violence and no reason is alleged why some should be falsely implicated."

Reference on the same point is made to the remarks of the Trial Court in the last paragraph of its judgment to the effect that it is not necessary for the purpose of this case to prove definite specific acts against each individual of the second party, showing that each, severally, is likely to commit a breach of the peace, inasmuch as their interest, as *goitias* of Ram Charitar Singh and as claimants to the disputed property are amalgamated, and it would be sufficient to prove that, as a whole, or as a party, they are likely to break the peace. I must, at the outset, observe that as an abstract proposition the Trial Court has overstated it and does not accord either with the evidence summarised by it in the preceding paragraph or the conclusion drawn by it. I think that the Trial Court does not really mean what it says and the order passed cannot be set aside upon the mis-statement of law, when the facts found really lead to the conclusion that the petitioners were determined to dispossess the first party or to interfere with her possession by wrongful means and acts. I stick to the view taken by me in the case of *Ghasi Ram* v. *Emperor* (1). That view was expressed upon a consideration of the authorities on the subject, notably *Ajodhya Prasad Singh* v. *Emperor* (2), and a true interpretation of section 107 of the Code. An order under that section can only be passed when there is a finding that the persons sought to be bound down are guilty of wrongful acts committed or sought to be committed by them. This can only be proved by overt acts against each individual. When wrongful overt acts are committed or threatened to be committed jointly

(1) 49 Ind. Cas. 642 at p. 645; (1919) Pat. 98; 20 Cr. L. J. 194.
(2) 35 C. 939; 12 C. W. N. 932; 8 Cr. L. J. 207.

by a number of persons, the act is really committed severally and jointly by each and all of them, and all of them would be liable to the penalty of section 107. True, that overt acts committed by some of a body of persons cannot be a justification for binding all of them, howsoever interested they may be in the commission of the act or in the result intended to be achieved thereby. The learned District Magistrate is apparently of this view, when, in the passage quoted above, he says that there is no reason why some should be falsely implicated. On this point may also be referred the decision reported in *Gouri Dutt* v. *Gobind Singh* (3). It is to be judged on the facts and circumstances of each case whether there is evidence of overt acts having been committed by the accused persons severally or jointly. The aforesaid remarks made by the Courts below led me to suspect of there being no sufficient evidence of overt acts committed by the accused persons. The Trial Court has summarised this evidence. Three witnesses testify that the second party went to turn out the *Musammat* by force. They obstructed her maid, threatened Gopi Singh, her agent and *karpardaz*, on the public road and they stopped her water supply. The evidence imputes the acts to all the accused persons. It has not been elicited in cross examination that any of the accused persons did not commit the acts imputed to them, and the only interpretation of the evidence could be that all these persons by their various acts detailed above wanted to dispossess the *Musammat* wrongfully from the land in dispute. If the accused wanted to show that some of the accused did not take part in those acts, it was their duty to clear it up and when the word "accused" was used in the evidence, it referred to all the accused as having committed the aforesaid wrongful acts. To support this, there is the specific case of house trespass committed by four of the petitioners, Nos. 2, 9, 10 and 11, and assault on the *Musammat's* labourers. The facts of the present case as well as the finding of the Courts below take it out of the purview of the decisions quoted above.

There is, therefore, to my mind clear evidence of wrongful acts committed by all the accused persons. This fully answers the contention of the learned Vakil and disables me to differ from the view taken by the Courts below that the petitioners are determined to oust the *Musammat* from her land by unlawful means.

I, therefore, decline to interfere with the order passed in this case. The petition is rejected.

Rule discharged.

(3) 53 Ind. Cas. 829; 1 P. L. T. 44; 20 Cr. L. J. 829.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPEAL No. 180 OF 1920.

September 20, 1920.

Present:—Mr. Justice Gokul Prasad.

ABDUL RAB—APPLICANT

versus

AZMAT ALI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526 (8)—Transfer of case—Adjournment, Court when bound to grant—Ground for transfer—Magistrate showing haste in recording accused's statements.

Under section 526 (8) of the Criminal Procedure Code a Court is only bound to give such an adjournment as will afford reasonable time for an application for transfer being made and an order obtained thereon before the accused is called on for his defence. But where, before he is called on for his defence, he has ample time to make such an application and does not do so, the legality of the proceedings of the Magistrate cannot be questioned. [p. 377, cols. 1 & 2.]

The fact that a Magistrate exhibits haste in recording the statement of an accused person before all the evidence for the prosecution is concluded, is sufficient to create an apprehension in the mind of the accused that he will not have a fair trial and to entitle him to a transfer of the case to some other Magistrate. [p. 379, col. 1.]

Criminal Miscellaneous Application for transfer of the case under section 526, Criminal Procedure Code.

Mr. *S. N. Mukerji*, for the Applicant.

Mr. *Ram Numa Prasad*, for the Opposite Party.

The Government Aadvocate, for the Crown.

JUDGMENT.—This is an application for the transfer of a case under section 500 of the Indian Penal Code from the Court of Pandit Shee Charan Lal, Magistrate of the

First Class of Allahabad, in which one Azmat Ali is the complainant and Abdul Rab and others are accused. It appears that, on the day fixed for hearing of this case and before any witnesses were examined, the applicant put in an application for adjournment under section 526 of the Code of Criminal Procedure, clause (8), on the ground that he intended to make an application for transfer to the High Court. This application was summarily rejected. The Deputy Magistrate examined four of the prosecution witnesses and took down the statement of the accused. This was on the 23rd of July 1920. After this the Deputy Magistrate adjourned the case for the 27th of July and permitted the complainant to put in a fresh list of witnesses and for the summoning of certain records. On the same day the applicant applied for a copy of the application for adjournment with the order passed thereon and also for copies of the statements of the prosecution witnesses. The order passed thereon was that *only* copies of the statements of the prosecution witnesses should be allowed. On the 27th of July the statements of the other three accused were taken. The applicant on the 30th of July 1920 applied to the District Magistrate for transfer and he stayed proceedings pending the disposal of the application. The District Magistrate, for reasons recorded by him, dismissed this application on the 12th of August. The applicant comes here in revision. It has been argued before me by Mr. Saila Nath Mukerji for the applicant that all proceedings in the case should have been stayed as soon as the application under section 526, clause (8) of the Code of Criminal Procedure was put in and subsequent proceedings were illegal, and reliance has been placed on certain rulings of the Calcutta High Court, *viz.*, *Wahed Molla* v. *Shaik Basaraddi* (1) and *Kishori Gir* v. *Ram Narayan Gir* (2). On the other hands the case of *Vaithinatha Iyer* v. *Kuppu Thevan* (3) takes the other view. No case of this Court has been put before me in which this point was decided. Having regard to the wording of clause (8) of section 526 of the Code of Criminal Procedure, I am of opinion that the Court is only bound to give such an adjournment as will afford a reasonable time for the application being made and an order being obtained thereon before the accused is called on for his defence. In the present case the accused had not been called on to enter into the defence and had ample time to move the higher Courts for transfer of the case to the Court of some other Magistrate so that the legality of the proceedings of the Magistrate is not open to question. I have now to decide on the facts and circumstances of the case whether this is a fit case in which the powers of transfer should be or could be properly exercised. The facts alleged by the accused on which he asked for a transfer are as follows:—Azmat Ali, complainant, is the nephew of one Abdul Hai and is in other ways related to him. In June 1919 Abdul Hai aforesaid and his son Manzur Ahmad were tried for the murder of the son of the accused-applicant Abdul Rab. They were both convicted in the Sessions trial and, later on, Abdul Hai alone was acquitted by the High Court on the ground that the case against him had not been proved beyond reasonable doubt. It will thus appear that Abdul Hai and the accused-applicant are on inimical terms with each other. This Abdul Hai was for a long time a *peshkar* in this very Court and is an active *pairokar* in the present case, that the accused being afraid of the influence of the said Abdul Hai *ex-peshkar* and Altaf Husain, the pesent *peshkar* of the Court of Pandit Sheo Charan Lal, wanted the transfer of the case from the Court of Pandit Sheo Charan Lal, the Deputy Magistrate, which resulted in the application and the order which I have already mentioned above. I have before me a counter-affidavit filed in reply to the affidavit put in by the accused (which I have detailed at length) and also the explanation of the Trying Magistrate. I do not think that the Deputy Magistrate would be in any way influenced in the decision of this case because of his *ex-peshkar* Abdul Hai or the present *peshkar* Altaf Husain, but the very explanation of the Deputy Magistrate to the effect that it was not brought to his notice that the application for copy put in on behalf of the applicant was for copy of the application for transfer with the order passed thereon goes to show that there is something underhand being done in his office to prejudice the case of the accused, or at least to hamper it. The ex-

(1) 11 C. W. N. 507; 5 Cr. L. J. 291.
(2) 8 C. W. N. 77; 1 Cr. L. J. 46.
(3) 17 Ind. Cas. 572; (1912) M. W. N. 1121; 13 Cr. L. J. 828.

planation of the Trying Magistrate that, when he passed the order, he did not know of what papers the copy was required, shows the necessity of particular care being taken in the proceedings connected with this case. Of course, I do not for a moment mean to suggest that the Trying Magistrate in this particular case refused the application for copy intentionally or that he has any prejudice against the accused, but I am not at all surprised that, having regard to the connection of Abdul Hai with the office of the Trying Magistrate, plus the refusal of the application for copy and the further fact that the Trying Magistrate, although he might have been justified in proceeding to examine one of the prosecution witnesses, *viz.*, Babu Gokul Narain Tandon who had come from Bara Banki (he does not name any other Government officer who had come from outstation), hurried in taking down the statements of the accused before all the evidence for the prosecution had been finished was enough to create an apprehension in the mind of the accused that he would not have a fair trial. Having regard to cumulative effect of all what I have stated above, I think the apprehension in the mind of the accused was justified. This being so, having regard to the law laid down in *Jafar Husain* v. *Emperor* (4) and *Farzand Ali* v. *Hanuman Prasad* (5), I think that this case should be transferred to the Court of some other Deputy Magistrate competent to try the same in this district. I order accordingly.

Case transferred.

(4) 26 Ind. Cas. 643; 12 A. L. J. 786; 16 Cr. L. J. 56.

(5) 19 A. 64; A. W. N. (1896) 177; 9 Ind. Dec. (N. S.) 41.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 625 AND 668 OF 1919.

(CRIMINAL REVISION PETITIONS NOS. 536 AND 572 OF 1919).

March 1, 1920.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Coutts-Trotter.

IN CR. R. C NO. 625 OF 1919

VELU MALAVARAYAN—COUNTER-PETITIONER NO. 6—PETITIONER

IN CR. R C. NO. 668 OF 1919.

C. MUTHUSAWMI PILLAY AND OTHERS—COUNTER PETITIONERS NOS. 1 TO 6—PETITIONERS

versus

T. M. C. KUPPUSAWMI PILLAI *alias* KUPPUSAWMI—PETITIONER—RESPONDENT IN BOTH.

Criminal Procedure Code (Act V of 1898), s. 145, scope of—Dispute embracing several items of property—Lumping items together, legality of—Possession, decision as to, in absence of parties, legality of—Preliminary order—Failure to record reasons, effect of.

Section 145 of the Criminal Procedure Code gives a Magistrate a special jurisdiction to decide a dispute as to actual possession of immoveable property, on his being satisfied that the dispute is likely to cause a breach of the peace, but a decision ought not to be arrived at arbitrarily, and should be a judicial decision arrived at after giving each of the disputants an opportunity of being heard. A decision arrived at in the absence of the parties, or either of them is illegal. [p. 381, col. 2.]

Where a dispute embraces several items of property, they may be lumped together in a single inquiry provided the disputants are the same for each item. Where, however, the disputants on one or both sides are different for different items of property, the disputants concerned in each item should be given an opportunity of being heard before a decision is arrived at on the question of actual possession, because in such a case the Magistrate would have no jurisdiction to decide the question of actual possession of a number of items after only hearing the parties who claimed possession of one or two of them. [p. 381, col. 2.]

The failure by a Magistrate to record his reasons for being satisfied that there is a danger of the breach of the peace, though a serious irregularity, does not affect his jurisdiction. [p. 382, col. 2; p. 383, col. 1.]

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders, dated the 26th September and 10th October 1919, of the Court of the Sub-Divisional, First Class Magistrate, Kumbakonam, in Miscellaneous Case No, 49 of 1919.

VELU MALAVARAYAN v. KUPPUSWAMI PILLAI.

FACTS appear from the judgment.

Messrs. *Nugent Grant*, *S. Ranganatha Aiyar*, *S. Muthiah Mudaliar*, *O. S. Govindaraja Mudaliar* and *Short Bewes & Co.* and Dr. *S. Swaminathan*, for the Petitioners.—The preliminary order of the Magistrate is in contravention of the provisions of section 145, Criminal Procedure Code. He has not stated his reasons for apprehending a breach of the peace. This requirement of law is peremptory and non-compliance vitiates the proceedings.

The District Magistrate having, on revision, held that there was no question of breach of the peace, the Sub-Divisional Magistrate's order is in contravention of the District Magistrate's order.

The Sub-Divisional Magistrate failed to exercise a jurisdiction vested in him by law when he passed the final order without hearing the parties. The Magistrate could not have had or considered all the materials for passing his order in the absence of the parties.

The dispute related to several items of properties situate in five different villages and the claimants are different, each setting up an independent title. This lumping together of all the items is illegal.

The change from section 144 to section 145 is not warranted by law. In any event, when the proceedings were altered, the necessary parties should have been brought on the record and heard.

Mr. *V. L. Ethiraj*, for the Public Prosecutor, for the Crown, and Mr. *T. Rangachariar*, for the Respondents.—The Magistrate's failure to record reasons for apprehending a breach of the peace is only an irregularity. It does not affect his jurisdiction. *Vide Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1). Moreover, the Magistrate acted on the Police report which sets out the reasons.

There is no clash between the order of the District Magistrate and that of the Sub-Divisional Magistrate. The former only directed the latter to continue his proceeding and the Sub Divisional Magistrate had discretion to alter the nature of the proceedings into one under section 145.

(1) 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 429; 23 M. L. J. 499; (1912) M. W. N. 1154; 13 Cr. L. J. 753.

As to the absence of parties, the finding is that they wilfully refused to receive the notices and the Magistrate acted on such materials as were before him.

As to the lumping of properties, all the claims in respect to them could be traced to a common origin and the Magistrate had jurisdiction to dispose of them all in one enquiry.

ORDER.

AYLING, J.—These revision petitions arise out of proceedings under section 145 of the Code of Criminal Procedure before the Sub-Divisional Magistrate of Kumbakonam (Miscellaneous Case No. 49 of 1919 on his file) regarding certain lands in five villages of Papanasam Taluk. These proceedings were initiated by an order of the Magistrate, dated 26th September 1919, which runs as follows:—

"Whereas I am satisfied that a breach of peace will take place unless action under section 145, Code of Criminal Procedure, is taken in respect of lands, etc., now in dispute, noted here below in the schedule, both parties will appear on 8th October 1919 at Kumbakonam and put in written statements of their respective claims as respects the facts of actual possession of the subject of dispute."

An attachment order under the last portion of clause 4 of section 145 followed; a schedule of the lands in dispute was appended; and also a list of the parties called on to appear and put in written statements. These were:—

Petitioner.—T. M. C. Kuppusawmi Pillai.

Counter-petitioners.—1. C. Muthusawmi Pillai, 2. Venkatachella Thinnapiriyan, 3. Murugayya Malavarayan, 4. Gopalasawmi Kurakondan, 5. Varada Nandiar, 6. Velu Malavarayan.

Criminal Revision Case No. 625 is based on a revision petition presented by 6th counter-petitioner, asking that this order may be set aside as without jurisdiction.

The Magistrate subsequently held an enquiry and on 10th October 1919, passed an order under clause (6) of section 145 in favour of petitioner, Kuppuswami Pillai. Against this order all the counter petitioners petitioned (Criminal Revision Case No. 668 of 1919); 5th counter-petitioner has since died.

It is necessary to set out briefly the history of the proceedings. The properties in

question appear to have belonged to a Vakil, named Kumaraswami Pillai, who died on the 13th March 1919. Petitioner and 1st counter-petitioner are his sons and he also left four daughters and a widow. After his death disputes arose as to his properties. Petitioner claimed to be entitled to hold all of them as managing member of an undivided family after the death of his father. His brother and sisters set up a Will and apparently also alleged partition. On 15th August 1919 petitioner Kuppusami Pillai petitioned the Sub-Divisional Magistrate to restrain the 6th counter-petitioner, whom he named, from interfering with his exclusive possession and management of the properties. A report on this was submitted by the Police on 26th August 1919 which will be referred to later; and, an 30th August 1919, the Magistrate passed an *ex parte* order under section 144 of the Code of Criminal Procedure prohibiting the counter-petitioners from interfering with the lands. This is stated only to be a temporary measure, pending an enquiry to be made on 15th September 1919. This *ex parte* order was cancelled by the District Magistrate on 22nd September 1919 on the ground that, as long as the whole dispute was *sub judice* with the Sub Divisional Magistrate, no breach of the peace was to be apprehended. The order concluded thus :— "The Sub Divisional Magistrate should conduct his enquiry and pass such orders as he deems fit."

The enquiry posted to 15th September 1919 had apparently been adjourned to 26th September 1919 ; and on the latter date, the Sub Divisional Magistrate took the matter up again but took action not under section 144, Criminal Procedure Code, but under section 145, passing the order set forth above.

Against this the 6th counter-petitioner presented a revision petition to this Court (Criminal Revision Case No. 625 of 1919) and obtained an order, dated 7th October 1919, staying further proceedings in the Magistrate's Court pending disposal of his petition. This stay order was unfortunately not communicated direct to the Sub Divisional Magistrate but only through the District Magistrate; and as a fact did not reach the Sub-Divisional Magistrate till 16th October 1919,

Meanwhile, on 8th October 1919, the Magistrate had taken up the enquiry as directed in his preliminary order. None of the counter-petitioners was present or represented The Magistrate, nevertheless, proceeded with the enquiry treating the 1st counter petitioner as *ex parte* and excluding the other counter petitioners from the proceedings. On his final order, of two days later, he thus explains his action:—

"2. The enquiry was taken up on 26th September after notice to the parties and both sides were represented by Vakils. After hearing their arguments, I decided to proceed under section 145, Code of Criminal Procedure, and passed orders accordingly at once on the same date and attached the properties in dispute and placed them in charge of the Sub-Magistrate, Valangiman. Notices attaching the properties and calling on the parties to put in written statements of their respective claims on [the 8th instant were issued the next day, and were personally served on the petitioner and on the 1st counter-petitioner on 28th September 1919. The endorsements on the other notices show that the other counter-petitioners except counter-petitioner No. 6 who could not be found refused to receive the notices without the order of the 1st counter-petitioner. The counter-petitioners Nos. 2 to 6 are merely servants of the 1st counter petitioner and the dispute about possession is only between the two brothers, the petitioner and the 1st counter-petitioner.

"The others are, therefore, excluded from these proceedings.

"3. On the 8th instant when the case was taken up none of the counter-petitioners was present or represented. The petitioner filed his written statement and his documents. As the absence of the 1st counter-petitioner was deliberate and wilful, I declared him *ex parte* and proceeded to take the evidence produced by the petitioner."

On the evidence adduced by the petitioner, the Magistrate found that the latter was in possession of all the schedule properties, declared him to be entitled to remain in possession until evicted in due course of law, and forbad any disturbance by "1st counter-petitioner or his men." The attachment was released and the properties were directed to be handed over to petitioner. This is

said to have been done on 14th October 1919.

Now, both the order of 26th September 1919 and the order of 10th October 1919 are orders with which we can only interfere on the ground of defect of jurisdiction : [*Vide Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1)], and, as regards the latter, we have to consider whether the Magistrate gave himself jurisdiction by his order of 26th September 1919, and also whether anything occurred subsequently to affect his jurisdiction to proceed in the matter.

Two preliminary grounds of attack on the order of 26th September 1919 may be disposed of in a few words. It is argued that the order is bad in law in that the Magistrate failed to record his reasons for being satisfied that there was danger of a breach of the peace ; and, in the second place, that it is in contravention of the order of the District Magistrate of 22nd September 1919 in that the latter held that there was no danger of a breach of the peace.

As regards the first, the Magistrate's failure to record his reasons, though a culpable irregularity does not affect his jurisdiction. [*Vide Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1)]. As to the second objection, the District Magistrate in his order merely held that there was no such danger of a breach of the peace as would justify an *ex parte* order and specifically directed the Sub-Divisional Magistrate to proceed with his enquiry and pass such orders as he deems fit. The Sub-Divisional Magistrate had perfect discretion to take action under section 145 instead of section 144 and was probably well advised to do so. There remains another ground of objection which really goes to the question of jurisdiction and calls for the most serious consideration. Briefly; it is this, that, as regards a considerable portion of the property affected by the order, the Magistrate has decided the dispute as to possession without having the disputants on both sides before him or giving them an opportunity of being heard.

The effect of section 145 is to give the Magistrate a special jurisdiction to decide a dispute as to actual possession of immoveable property, conditionally on his being satisfied that the dispute is likely to cause a breach of the peace. The decision must of course, be judicial, not arbitrary, and must be arrived at after giving each of the disputants an opportunity of being heard. Common sense and equity, to say nothing of the provisions of the latter part of clause (1) of section 145, alike indicate that this is the nature of the jurisdiction conferred. One such dispute may, of course, embrace several items of property and, provided the disputants are the same for each, there can be no possible objection to the lumping together of all the several items in a single enquiry. But, on the other hand, the disputants on one or both sides might be different for different items of the property covered by the dispute. Here, again, as long as the dispute regarding the various items was substantially the same, there would be no objection always provided that all the disputants (meaning those concerned in each item) were given an opportunity of being heard. But the Magistrate would in such a case have no jurisdiction to decide the question of actual possession of a number of items after only hearing the parties who claimed possession of one or two of them. Take a simple case. *A.* and *B.* are rival claimants to three adjoining fields, each claiming all the fields under a single title. *B.* transfers his title by sale to *X.*, *Y.*, *Z.*, each for a single field ; and a dispute arises between *A.* on the one hand and *X.*, *Y.* and *Z.* on the other, *A.* claiming actual possession of all three fields and *X.*, *Y.* and *Z.* actual possession each of one field. The Magistrate, provided he is satisfied that the dispute is likely to cause a breach of the peace, has jurisdiction to determine the fact of actual possession of all the three fields in a single enquiry giving *A.*, *X.*, *Y.* and *Z.* all an opportunity of being heard But he has no jurisdiction to determine the possession of the fields claimed by *Y.* and *Z.* in an enquiry held only as between *A.* and *X.* I am not here considering cases where the Magistrate is mistaken or misled as to the identity of parties ; what I say is that, as regards each item of property of which the Magistrate decides the possession, the jurisdiction vested in him presupposes that he shall have the two parties to the dispute arrayed before him against each other.

Now this is what he has not got in the

present case. The lands in dispute, over 70) acres in extent, are situated in 5 different villages. Petitioner on the one side claims possession and title to them all ; on the other side, the claimants are various and independent of each other although their title may be referred back to a common origin. Exactly what items each claims is impossible to say in the absence of the written statements required by the section but a reference to the Police report, dated 26th August 1919, on which the Magistrate took action, is sufficient for our purposes. The Sub-Inspector reports —

"First counter-petitioner when questioned by me stated that since the death of his father he has been in enjoyment of the lands which fell to his share, that his sisters likewise have been enjoying theirs, and that his brother, the petitioner, enjoys his." It is clear from this that 1st counter-petitioner makes no claim to title or possession of any but his own share of the family lands and that the Police report is correct in this respect is shown by the following passage in a petition subsequently filed by 1st counter-petitioner before the Additional Divisional Magistrate :—

"That this petitioner is only in possession of a portion of his father's lands in Amirthavalli, the portion being known as Chinnapanni, ever since the time when the village was being owned by the Nadar brothers of Poroyar. The hundred acres in the village bequeathed to the four sisters of the petitioner are in the possession of their lessees. In the village of Maruvathur the petitioner is only in possession of the lands allotted to him for his share, while in the village of Cheri Vadakkupattam the lands owned by the testator stood even during his lifetime only in the name of this petitioner who is now in possession thereof, the cultivation operations having far advanced." We must assume that the Magistrate acted on the Police report, the only record before him ; and on this he had jurisdiction either to limit his enquiry to the lands in dispute between petitioner and 1st counter-petitioner, or, if he thought the dispute endangering the public peace extended to the sisters' share, to include the lands of those shares in the enquiry calling on the parties concerned in the dispute as to those shares also to file written statements before him. The only person who was in any sense concerned in the dispute as to the sisters' shares and who was made a party to the enquiry was 6th counter-petitioner who is one of several lessees under the said sisters and whose own lease is said to cover only 2 Velis (14 acres). And even 6th counter-petitioner was, as already stated, subsequently excluded from the proceedings.

The Magistrate's action in including in his enquiry lands which, on the record before him, were not claimed by the single counter-petitioner who remained on record, and regarding which no claimant was on the record is, in my opinion, without jurisdiction.

The irregularity probably arose out of the fact that the nature of the proceedings was changed. The original petition filed by petitioner on 15th August 1919 requested orders under section 144 of the Code of Criminal Procedure prohibiting interference with the petitioner's possession.

The six persons named therein were the persons whose interference was apprehended: and naturally these were the persons against whom the order under section 144 of the Code of Criminal Procedure was directed. The change of proceedings to proceedings under section 145 necessitated a re-cast of the parties. Those concerned in the dispute, in the language of section 145, became the proper parties to be heard ; and these are not necessarily the same persons as those whose interference to the danger of the public peace was apprehended at the time of the previous order. In fact, counter-petitioners Nos. 2 to 5 who are stated to be merely agents and friends of 1st counter-petitioner may very probably have been rightly excluded from the enquiry under section 145 as having no concern in the dispute, although their regard for their employer or friend may have been such as to justify the apprehension that they would aid him in the interference prohibited by the order dated 30th August 1919.

This conclusion as to the Magistrate's failure of jurisdiction still leaves us in some doubt as to the proper extent of our interference. It is suggested that we should limit our interference to the order so far as it concerns the sisters' shares of the lands, leaving it to stand as regards

the share claimed by 1st counter-petitioner. After some consideration I am forced to the conclusion that we cannot split up the order in this way. Orders under section 145 should be specific and intelligible on their face; and here it is impossible to say, without further detailed enquiry, which of the items included in the schedule the order should stand good. Moreover, we cannot ignore the fact that any of the parties who has a right to be heard is entitled to show that no dispute likely to cause a breach of the peace existed, and it is conceivable that the whole proceedings might have to be vacated on this ground.

The only course appears to be to set aside the whole proceedings including the preliminary order, dated 26th September 1919, as without jurisdiction and this, in my opinion, should be done.

COUTTS TROTTER, J.—I agree.

M. C. P.

Proceedings set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 586 OF 1920.

September 3, 1920.

Present :—Mr. Justice Gokal Prasad.

EMPEROR—PROSECUTOR

versus

JHABDEY *alias* JHAO LAL—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 120 (1)—Accused bound over in security after sentence for another offence—Failure to furnish security—Imprisonment in default, when to commence.

Accused was convicted under section 147 of the Penal Code, but was released on bail pending the disposal of an appeal against his conviction. While on bail he was proceeded against under section 110 of the Criminal Procedure Code and was ordered to furnish security, or in default to undergo imprisonment. His appeal was dismissed, and the Magistrate directed that, as he was undergoing sentence in default of furnishing security, the sentence under section 147 would take effect after the expiry of the sentence under section 110 of the Criminal Procedure Code:

Held, that the order was illegal as it contravened the provisions of section 120 (1) of the Criminal Procedure Code, and that the period of detention on failure to furnish security could not commence before the sentence under section 147 of the Penal Code had been served out.

Criminal reference made by the District Magistrate, Mainpuri, through the Sessions Judge.

JUDGMENT.—This is a reference made by the Sessions Judge of Mainpuri in the case of Jhabdey *alias* Jhao Lal. He was convicted under section 147 of the Indian Penal Code, and was sentenced to rigorous imprisonment for two months on the 12th August 1919. He appealed against the conviction and was out on bail during the pendency of the appeal. While he was so out on bail, proceedings were taken against him under section 110, Criminal Procedure Code, and on the 27th October 1919 he was ordered to furnish a security to be of good behaviour for a period of one year. The required security was not furnished and he was ordered to be rigorously imprisoned for one year until and unless the security demanded were furnished sooner. Jhabdey appealed against both the orders aforesaid. His appeal in the section 147 case was dismissed on the 10th November 1919 and that against the order under section 110 was dismissed on the 14th November 1919. On the 10th December 1919 the Sub-Divisional Magistrate directed that as Jhabdey was at that time undergoing a sentence under section 110, Criminal Procedure Code, the remaining portion of his sentence under section 147 of the Indian Penal Code should take effect on the expiry of the sentence under section 110.

It appears that the sureties came forward on the 9th August 1920, and the present Sub-Divisional Magistrate, who has succeeded the Sub-Divisional Magistrate who convicted Jhabdey under section 147 of the Indian Penal Code and who had also passed the orders under section 110 of the Criminal Procedure Code, sent for Jhabdey from jail for the purpose of being released. He was then informed by the Jailor that the accused should not be released as he had to undergo two months' rigorous imprisonment as directed by the Court on previous occasion. The present District Magistrate of Mainpuri has reported the matter to this Court being of opinion that the order of the former Sub-Divisional Magistrate was,

under the circumstances, illegal as being in contravention of section 120, clause (1) of the Criminal Procedure Code. I think the learned District Magistrate is right. The words in section 120, clause (1)—" If any person in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made, sentenced to.....the period for which such security is required shall commence on the expiration of such sentence," are clear and the detention on failure to furnish security could not be deemed to have commenced before the sentence under section 147 of the Indian Penal Code has been served out. I, therefore, accept the reference and direct that Jhabdey do not surrender now. The bail-bond is cancelled.

Reference accepeted.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1157 OF 1920.

October 29, 1920.

Present :—Mr. Justice Wilberforce.

BODHA—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 190 (1) (c), 191, 537—Proceedings initiated on Magistrate's own motion—Failure to comply with provisions of s. 191, effect of—Trial, whether legal.

Where a Magistrate initiated proceedings on his own motion but did not comply with the provisions of section 191, Criminal Procedure Code, and did not inform the accused that he had the option of having his case tried by another Magistrate :

Held, that this omission was not a mere irregularity curable by the provisions of section 537, but was an absolute illegality which vitiated the whole trial.

Ghasi v. *Queen-Empress*, 13 P. R. 1898 Cr.; *Emperor* v. *Chedi*, 28 A. 212; A. W. N. (1905), 258; 2 A. L. J. 745; 2 Cr. L. J. 809, followed.

Case reported by the Sessions Judge, Ferozepore, with his No. 245-J of 13th August 1920.

FACTS.—The accused, Bodha, has been convicted in this case under section 7 of Act XVI of 1861 for driving without a license and has been sentenced to a fine of Rs. 50.

GROUNDS.—The proceedings were started on a report made by the Tahsildar and cognizance was taken presumably under section 190. (*c*) of the Criminal Procedure Code. But the accused was not informed that he had the option of having the case tried by another Magistrate (*vide* section 191, Criminal Procedure Code.) The Tahsildar's report does not state clearly that the accused was plying for hire. The accused states before me that he was not doing so. It is argued that the accused merely stated before the Magistrate that he was driving without a license and not that he was plying for hire. This may be a mere afterthought, but the fact remains that there is no evidence on the file to support this essential ingredient of the offence. Finally, the sentence of fine of Rs. 50 seems manifestly excessive. The Magistrate has not given any reasons for the severe sentence and, although notice was issued to the District Magistrate, no one has been instructed to appear in support of the Magistrate's order. I think the conviction is liable to be set aside on the two grounds stated above. If this view is not accepted, I would recommend that the sentence should be reduced to a fine of five rupees.

I forward the file for the orders of the Hon'ble Judges.

ORDER.—The petitioner in this case has been convicted of driving a cart for hire without a license and has been fined Rs. 50. The Magistrate himself initiated the proceedings on his motion but did not comply with the provisions of section 191. This is not a mere irregularity curable by the provisions of section 537. It is an absolute illegality and vitiates the whole trial [see *Ghasi* v. *Queen-Empress* (1) and *Emperor* v. *Chedi* (2)]. I, therefore, accept the petition and set aside the conviction, discharging the petitioner.

Conviction set aside.

(1) 13 P. R. 1898 Cr.
(2) 28 A. 212; A. W. N. (1905), 258; 2 A. L. J. 745; 2 Cr. L. J. 809.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEALS NOS. 100 TO 1 4 115, 116 AND 117 OF 1916.

July 23, 1918.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

S. K. NATHARSA ROWTHAR AND ANOTHER—APPELLANTS

versus

Sheik MUHAMMAD ROWTHAR AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 11, para. 2—"Decree", meaning of—Additional Court-fees, non-payment of—Penalty—Court, power of, to fix time for payment.

In applying section 11 of the Court Fees Act to a suit for partition and mesne profits, the term "decree" in that section should be taken to refer to the final, and not the interim decree in the suit. [p. 387, col. 2.]

Where in a suit for partition and mesne profits the Court decrees the claim and awards a specific sum on account of such profits, on the plaintiff paying the additional Court-fee, if any, due in respect of the profits, the Court has no power, under section 11, paragraph 2, of the Court Fees Act, to fix any time for payment and the only penalty which the plaintiff incurs in the event of his not paying the Court-fees is that he cannot execute the decree until he does pay the fee. [p. 388, cols. 1 & 2.]

Appeals against the orders of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suits Nos. 35, 39 to 45 of 1915, respectively, preferred against the orders and decrees of the Court of the District Munsif, Mannargudi, in Execution Petition Revision No. 72 of 1915, Miscellaneous Appeals Nos. 136, 147 and 100 of 1915, Execution Petition Revision No. 242 of 1915, Miscellaneous Appeals Nos. 100, 29 and 28 of 1915, respectively, (Original Suit No. 63 of 1901).

FACTS appear from the judgment.

Mr. *K. Srinivasa Aiyangar* (with him Messrs. *K. S. Jayarama Aiyar* and *S. Varadachariar*), for the Appellants.—The word 'suit' in the last paragraph of section 11 of the Court Fees Act means the entire suit. As a time was expressly fixed by Court for payment of the additional Court-fee and as it was not complied with, the whole suit was liable to be dismissed. *Fulchand* v. *Bai Ichha* (1) and *Kewal Kishen Singh* v. *Sookhari* (2) have been wrongly decided.

(1) 12 B. 98; 6 Ind. Dec. (N. S.) 551.
(2) 24 C. 173; 1 C. W. N. 243; 12 Ind. Dec. (N. S.) 781.

The final decree, Exhibit C, must be treated as a conditional decree and as it was not complied with it was inexecutable.

There was an express order of Court under clause (2) of section 11 of the Court Fees Act. The parties understood it as such and even the High Court's judgment proceeded on that basis. Plaintiff could not be permitted to say that there was no order under that clause.

Messrs. *G. S. Ramachandra Aiyar* and *A. V. Viswanatha Sastri*, for the Respondents.—The order of the lower Court was one passed under the first clause of section 11 of the Court Fees Act. Under that clause, until the additional Court-fee is paid the decree could not be executed. The order fixing a time for payment and imposing a penalty is *ultra vires*. The only penalty for not paying the Court-fee is that the decree is incapable of being executed.

In partition suits the 'decree' for purposes of the section should be understood to be the final decree. In that view, the order for payment falls under clause (1) of the section and the provision fixing a time is a nullity.

The order cannot fall under clause (2). Under that clause it is necessary that the Court should fix the precise amount to be paid. Here it has only indicated a method by which the amount could be ascertained and thrown on the plaintiff the burden of paying the correct amount at his risk.

The additional Court-fee having been paid, the suit should not be dismissed.

JUDGMENT.

KRISHNAN, J.—These civil miscellaneous second appeals arise from proceedings in Original Suit No. 93 of 1901 on the file of the District Munsif's Court, Mannargudi. To understand the circumstances in which they arise, and the contentions of the parties in them, it is necessary to state the facts at some length. Original Suit No. 93 of 1901 was for partition and delivery of plaintiff's share in certain immoveable properties with past and future mesne profits. A decree was passed directing that plaintiff do recover 63/96ths share in the plaint properties, with costs and past and and future mesne profits, the amount of which was left to be determined in execution. There was an appeal and a second appeal but, except that the plaintiff's share

was varied to 175/288, the decree of the first Court was confirmed. In 1910, after the new Code of Civil Procedure had come into force, plaintiff filed Execution Petition No. 228 of 1910 for the appointment of a Commissioner under Order XXVI, rule 13, and for the passing of a final decree after dividing the properties and ascertaining the mesne profits Accordingly, a Commissioner was appointed, but, as his report was objected to, the Court held an enquiry itself and passed a judgment deciding the objections raised. As to the mesne profits it stated that a fresh calculation would be made in the light of its remarks and that plaintiff would be entitled to the sum so found due; it did not itself fix the actual amount. It also stated that, "there would be a final decree drawn up on the petitioner paying the additional Court-fee, if any, due in respect of mesne profits allowed, within 15 days." This judgment was dated 22nd March 1911, but no Court fee was paid by the plaintiff within the 15 days as directed. Nevertheless, we find a final decree was drawn up, which is Exhibit C 2 in the case. It bears the date of the judgment but it seems to have been actually drawn up only in July 1911. The material part of it says, "this Court doth order and direct that the petitioner do pay additional Court-fee, namely, Rs. 227-8 0 on or before the 6th day of April 1911 and get possession of his share of the properties hereunder described as fixed by the Commissioner in their report hereto attached, and this Court doth further order and decree that the 1st defendant do pay petitioner Rs. 4,441-2 3 for mesne profits and also Rs. 376-12-0 for costs." In September 1911 plaintiff applied, by Exhibit G., for execution of this decree proposing that the Court might take the money due for Court-fee from the amount realised from the defendant. The Court rejected it saying, "the Court-fee should be paid before taking out execution." He again applied in October 1911, Exhibit H, paying the Court-fee on the past profits only, and contending that he was not bound to pay on the future profits. This was also dismissed, the Court holding that he was bound by the decree. He applied again for execution by Exhibit J. paying the whole Court-fee and, by Exhibit K., for extension of time to pay that fee. These were registered as Execution Petition No. 666 of 1911 and Execution Appeal No. 618 of 1911. Both were dismissed; the Court saying on the former, "as Execution Appeal No. 618 of 1916 is dismissed, suit in respect of mesne profits is dismissed. Fresh application for delivery to be put in." There was an appeal to the Subordinate Judge against these orders as well as one against the final decree. He reduced the mesne profits but granted time for payment of Court-fee and reserved the order on Execution Petition No. 666 of 1911 and remanded that petition for fresh disposal. In second appeal the High Court, the judgment of which is reported as *Natharsa Rowther* v. *Mahomed Rowther* (3), held that there was no legal and valid dismissal of the suit for mesne profits but the Appellate Court had no power to extend time and was wrong in reducing the mesne profits. The learned Judges restored the original decree as to the amount of profits but, at the same time, set aside the order of the Subordinate Judge on Execution Petition No. 666 of 1911, which had the effect of restoring the Munsif's order on it, though they had held that his reason was clearly bad, they also granted time for payment of the Court-fee on the amount the Subordinrte Judge had disallowed and they had allowed. It is difficult to see why Execution Petition No. 666 of 1911 was not ordered to be re-tried on the view expressed by their Lordships, and it is not clear under what power they purported to extend time themselves. However, it is not open to the parties now to dispute the correctness of those orders. Their Lordships had also remarked that the defendants would be entitled to move the District Munsif in a proper way to dismiss the suit for profits, and that plaintiff might move for review of the order fixing time and ask for its enlargement.

Parties have taken advantage of these remarks and have made the suggested applications. Plaintiff had already applied by Execution Petition No. 72 of 1915 for delivery of possession and had got delivery of all except Item No. 11. Plaintiff filed three petitions. In Miscellaneous Appeal No. 28 of 1915 he asked for review of the order on Execution Appeal No. 618 of 1911 and for excusing delay in

(3) 28 Ind. Cas. 890.

payment of Court-fee. In Miscellaneous Appeal No. 29 of 1915 he formally prayed that the Court fee already paid by him may be accepted; in Execution Petition No. 242 of 1915 he asked for delivery of Item No. 11. Defendants also filed three petitions, Miscellaneous Appeal No. 100 of 1915 asking that the whole suit might be dismissed for non-payment of Court fee in time; Miscellaneous Appeal No. 136 of 1915 for re delivery of the properties delivered under Execution Petition No. 72 of 1915, and Miscellaneous Appeal No. 147 of 1915 objecting to the delivery of Item No. 11. The lower Court dismissed the suit so far as it was for future mesne profits but refused to dismiss the rest of it. They also dismissed the application for review, but ordered delivery of Item No. 11. Thus, Miscellaneous Appeals Nos. 28, 29, 136 and 147 of 1915 were dismissed *in toto*; Miscellaneous Appeal No. 100 of 1915 was allowed and Execution Petition No. 242 of 1915 was allowed in full. It is against the order on these petitions that the civil miscellaneous second appeals before us have been filed

The main question for our consideration is, whether the suit was liable to be dismissed, and, if so, to what extent. Mr K. Srinivasa Aiyangar for the defendants has contended that the present case fell under the 2nd paragraph of section 1 of the Court Fees Act and as, admittedly, the additional fee was not paid in time, the whole suit should fail. He argued that the word "suit" in the last sentence meant the entire suit an that the rulings in *Fulchand* v. *Bai Ichha* (1) and in *Kewal Kis en Singh* v. *Sookhari* (2) were not correct. But, before we consider this point, we must be satisfied that the present case properly falls under the 2nd paragraph; for it is clear that the dismissal of the suit is not a penalty for default under the 1st paragraph. The 1st paragraph deals with a case where the profits are settled by the decree and the penalty under it for non-payment of the additional Court-fee is, that the decree should not be executed till it is paid; under that paragraph the Court has no power to fix any time for payment, any order to that effect being mere surplusage. See *Perianan Chetty* v. *Nagappa Mudaliar* (4). The 2nd paragraph deals only with a case where mesne profits are ascertained in execution of the decree, the two paragraphs being mutually exclusive. It will be seen from the statement of the facts in this case that, though the 1st decree directed the mesne profits to be ascertained in execution, they were actually ascertained only by the final decree, Exhibit C 2. Proceedings taken for the purpose of passing final decrees in partition suits have often been held to be proceedings in the suit and not in execution. The first decree in this case was only an *interim* decree. It seems to me that the word *decree* in section 11 should be taken to refer, in cases like the present, to the final decree, for that is the decree in the suit, the *interim* decree being in the nature of an order in suit. If I am right in this view, the present case will fall under the 1st paragraph of section 11 and not under the 2nd and the provision in Exhibit C-2 fixing the 6th of April 1911 as the last day for the payment of the additional Court-fee should be ignored.

Plaintiff has not incurred the penalty of the dismissal of his suit by non-payment in time, he simply cannot execute his decree till he pays the full fee. As he has already paid that fee into Court, there does not seem to be any valid objection now, under the Court Fees Act, to his executing his decree in full including the claim for future profits.

There is another difficulty pointed out by the plaintiff's Vakil in applying the 2nd clause of section 11. Even if we consider this to be a case where the profits were ascertained in execution, taking Exhibit C-2 as an order in execution, there can be no doubt that, as contended by him, the word as "ascertained" implies that the exact sum of money representing the profits has been fixed. It is not sufficient for the application of the section to show that a method had been indicated for the purpose of calculating those profits. In the absence of clear words to that effect in the section, I do not think the burden should be laid on the party of making a correct calculation and paying the correct Court-fee at the risk of having a suit dismissed if he makes a mistake. If the Court proposes to act under clause (2) it should ascertain the amount of profits in money and state the additional Court-fee payable and fix a

(4) 30 M. 32; 16 M. L. J. 548; 2 M. L. T. 23.

reasonable time for payment of it. In the present case the judgment of the District Munsif of the 22nd March 1911 did not ascertain the amount of profits but only ordered a calculation to be made for it in the light of the observations in it. It was the judgment that contained the order giving 15 days' time to plaintiffs to pay the additional fee. As it did not fix the amount of profits or the Court-fee payable, the order could not be treated as a proper one giving time under clause (2) of section 11. In fact, it is doubtful if the Court intended to pass an order under section 11 at all, as the payment within 15 days was merely made a condition for drawing up a final decree. No doubt, in Exhibit C-2 the amount of profits and the Court-fee are both stated. Can we treat the order in it to pay the Court-fee before the 6th day of April 1911 as a proper order under clause (2) section 11 ? It is pointed out that Exhibit C-2 was actually drawn up only in July 1911. The payment of the Court-fee by 6th April 1911, a date which had already expired, was thus an impossibility and, for that reason, the order cannot be treated as a proper one under the section. I must, therefore, hold that it is not shown that a proper order giving time was passed under section 11, clause (2) and, on this ground also, the application for dismissing the suit must be disallowed. If this view is correct, the Court should now pass a proper order under the 2nd clause, but it is not necessary to do so as the additional fee has, as stated above, been already paid.

It was also urged that the final decree should be looked upon as a conditional decree and as the conditional decree was not complied with, it could no longer be executed. As already pointed out, the fixing of the 6th April 1911 as the last date for payment of the additional fee was *ultra vires* and should be ignored. It may also be pointed out that the decree as drawn up is not, in its terms, a conditional decree at all. If, however, the payment of the additional fee is taken as a condition for execution, that condition has been complied with.

It was next urged that the course of the proceedings in this case showed that the parties understood the order fixing time in Exhibit C-2 to be one under section 11, clause 2, and that the High Court's judgment itself proceeded on that footing and that, therefore, plaintiff was precluded from urging that there was no order under that clause. There has, no doubt, been considerable confusion in this case as it seems to have been assumed that there was an order under clause (2). But no order having the force of *res judicata* on the question has been pointed out to us. The order passed by the Court on the first execution application, Exhibit G., would seem to show that the Court then considered the order to pay the additional Court fee as one under clause (1) of section 11. If the order of the District Munsif in Execution Petition No. 686 of 1911 saying that the suit in respect of mesne profits was dismissed had become final, plaintiff might have been concluded by it so far as the mesne profits were concerned, but the High Court held that there was no legal order for dismissal. The fact that the dismissal of that execution petition was not expressly set aside by the High Court cannot prevent us from holding that his suit for mesne profits cannot be dismissed. The question what effect the dismissal of Execution Petition No. 666 of 1911 will have on any future application for execution for mesne profits does not arise for decision now, as we have no execution petition for such profits before us for disposal.

I would, therefore, hold that Original Suit No. 63 of 1901 should not have been dismissed at all, not even to the extent of the claim for future mesne profits. Miscellaneous Appeal No. 100 of 1915 thus fails *in toto* and Miscellaneous Appeal No. 136 of 1915 also fails. No special argument was addressed to us regarding the delivery of Item No. 11 and so Miscellaneous Appeal No. 147 of 1915 must also fail, plaintiff's application Miscellaneous Appeal No. 28 of 1915 for review of the order on Execution Appeal No. 618 of 1911 and for excusing delay was rightly dismissed and has now become unnecessary. Miscellaneous Appeal No. 29 of 1915 must be formally allowed as it asks that Court-fee already paid may be accepted. Execution Petition No. 242 of 1915 was rightly allowed by the lower Courts.

In the result, Civil Miscellaneous Second Appeals Nos. 100, 101, 103 and 104 of 1916 must be dismissed with costs. Civil Miscellaneous Second Appeals Nos. 115 and 116 of 1916 must be allowed with costs here and in the Courts below. Civil Miscellaneous Second Appeal No. 117 of 1916 must be dismissed with costs.

SPENCER, J.—I entirely agree. I have only to add that I think that Courts should be very careful to avoid passing orders which are either impracticable or impossible for parties to comply with. If the District Munsif (Mr. Gopalan Nair) had not passed an order in Execution Petition No. 228 of 1910 to pay additional Court-fees upon a sum, which had not at that time been ascertained in rupees, annas and pies, and by a date which had already expired by the time the order was embodied in the form of a decree, this litigation might have been avoided, the parties would have been saved much unnecessary expense, and the time of other Courts would not have been taken up in disentangling the confusion which has resulted from his order.

M. C. P.

Order accordingly.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO. 384 OF 1919.
February 12, 1920.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.
THE SURAT CITY MUNICIPALITY—APPELLANT
versus
MANEKLAL ICHHARAM AND CO.—RESPONDENT.

Bombay District Municipal Act (III of 1901), s. 59 (b) (ii)—Vehicle kept outside, but used inside, district, whether liable to wheel-tax.

In order to be liable to wheel-tax under clause (*b*) (*ii*) of section 59 of the Bombay District Municipal Act, a vehicle must be both kept and used within the district. A vehicle kept outside, but used within, a district is not liable to wheel-tax under the section.

Appeal from the decision of the Assistant Judge at Surat, in Appeal No. 92 of 1918, reversing the decree passed by the First Class Subordinate Judge at Surat, in Civil Suit No. 255 of 1917.

Mr. *N. K. Mehta*, for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The defendant Municipality sought to levy a tax on the plaintiffs' vehicles on the ground that they were empowered to do so under section 59 (*b*) (*ii*) of the Bombay District Municipal Act. Their argument seems to have been that every cart kept outside the District was liable to be taxed if it happened to be used within the district; that is to say, that every cart kept outside for use in the district was liable to a tax. That by itself is putting a strained meaning on the words of the sub-section "kept for use within the district." But if sub section (*ii*) were in any way obscure, its meaning is made perfectly plain by sub section (*iii*) which refers to vehicles boats, or animals used for riding, draught or burden, which enter the district, but are kept outside. The Municipality are entitled to levy a toll on such vehicles and animals whether loaded or unloaded.

Then, we are told that the Municipality have made rules whereby they only levy a toll on loaded vehicles. But sub section (*iii*) especially says that such vehicles and animals which are used for riding, draught or burden and enter the district, are not liable to taxation under sub-section (*ii*). We are asked to read for the word "but," the word "if". If that were so, then it would mean that there were two classes of vehicles and animals kept outside, but used within the district, some of which would be liable to taxation under sub-section (*ii*), while the rest would not be liable. But there is no provision whatever in the section for distinguishing these two classes. In my opinion, therefore, the judgment of the lower Appellate Court was perfectly correct and, as long as the plaintiff kept his carts outside the district, he was only liable to pay toll when they entered the district, and he was only liable for toll under the Municipal rules if his carts were loaded. Therefore, the appeal is dismissed with costs.

HEATON, J.—I agree.

Appeal dismissed.

SUNDARA GOUNDAN *v.* ARUMUGA GOUNDAN.

MADRAS HIGH COURT.
CIVIL APPEAL No. 354 OF 1919.
March 31, 1920.
Present :—Justice Sir Abdur Rahim, KT., and Mr. Justice Moore.

SUNDARA GOUNDAN, MINOR, BY GUARDIAN AND MATERNAL UNCLE MUTHUSAMI GOUNDAN—DEFENDANT No. 2—APPELLANT

versus

K. ARUMUGA GOUNDAN AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1, 3 TO 6—RESPONDENTS.

Hindu Law—Debt—Son, liability of, for father's debt—Immoral purpose—Proof, necessary.

To enable the son of a Hindu to escape liability for payment of his father's debt on the ground that it was incurred for an immoral purpose, he must establish a direct connection between the debt and the immoral purpose. The mere fact that the father kept a concubine is not sufficient. It is sufficient, however, if the Court can draw an inference from the evidence as to the connection between the debt and the immoral purpose.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in Original Suit No. 145 of 1917.

FACTS appear from the judgment,

Mr. *C. V. Anantha Krishna Aiyar*, for the Appellant.—The son has discharged the onus when he specifically established that the father was keeping a woman for whom he incurred a lot of expenses, such as making jewels and furnishing her with capital to carry on the business of money-lending. A very exact degree of proof should not be required. It is always difficult to prove the specific application of the loan for an immoral purpose.

Mr. *T. M. Krishnaswami Aiyar*, for the Respondents.—The son cannot escape liability unless he establishes a direct connection between the debt and the immoral purpose. There is no proof that this particular loan was applied to meet the expenses of the concubine. See *Bhagbut Pershad Singh* v. *Girja Koer* (1), *Suraj Bansi Koer* v. *Sheo Pershad Singh* (2), *Dattatraya Vishnu* v. *Vishnu Narayan* (3), *Chintamanrav Mehendale* v. *Kashinath* (4), *Dhuipallia Buchayya* v. *Kuppa Venkatakrishnayya* (5). The evidence tending to show that the 1st defendant and his concubine incurred debts subsequent to the transaction in question is irrelevant.

JUDGMENT.—The onus of proving that the debts, to discharge which a mortgage was executed in favour of the plaintiff by the 1st defendant, the father of the 2nd defendant, were incurred for immoral or illegal purposes, is on the 2nd defendant. What has been established is that the 1st defendant was keeping a woman, before the debts in question were incurred, that is, prior to 1903 The woman herself, called Nagaratnam, has given evidence and she says that her expenses were paid by the 1st defendant, that he made jewels for her and gave her money to carry on money-lending. Some promissory notes (Exhibits I to IV) were adduced in evidence, they were executed jointly by the 1st defendant and Nagaratnam but they were all subsequent to 1906, in which year the last items of the debts (Exhibits C and V) were incurred. There is also evidence that Nagaratnam lent Rs. 1,000 on mortgage to one Venkatakrishnasami Naidu in 1910. That was long subsequent to the present transaction. Beyond this, there is no evidence to connect the incurring of the debts with any immoral purpose. On the other hand, the 1st defendant had a net income of about Rs. 1,000 a year and had three sons, a wife and a daughter to maintain. He married two of his daughters, though there is no evidence to show how the expenses of the marriage were met.

The evidence in this case only established that the 1st defendant was keeping a concubine and to that extent he must have incurred some additional expense. No direct connection, however, is established between these debts and any immoral or illegal purpose, and, according to the rulings, it is necessary for a son who seeks exemption from liability to establish that. The rulings of the Privy Council in *Suraj Bansi Koer* v. *Sheo Pershad Singh* (2), *Bhagbut Pershad Singh* v. *Girja Koer* (1), *Chintamanrav Mehendale* v. *Kashinath* (4) and *Dattatraya Vishnu* v. *Vishnu Narayan* (3) make this position clear. We have also a recent decision of this Court, in

(1) 15 C. 717 (P. C.); 15 I. A. 99; 12 Ind. Jur. 289; 5 Sar. P. C. J. 186; 7 Ind. Dec. (N. S.) 1062.
(2) 5 C. 148 (P. C.); 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705.
(3) 12 Ind. Cas. 949; 36 B. 68; 13 Bom. L. R. 1161.
(4) 14 B. 320; 7 Ind. Dec. (N. S.) 674.
(5) 58 Ind. Cas. 797; 36 M. L. J. 296.

SHIDRAMAPPA v. MAHOMED YUSAF.

Dhulipallia Buchayya v *Kuppa Venkatakrishnayya* (5), where this view of the law was adopted. It would no doubt be difficult in many cases to prove that a particular debt was incurred for some specific immoral or illegal purpose and it may be sufficient if the evidence is such that the Court would be in a position to infer that the debt incurred by the father must have been incurred for immoral purposes. That seems to be the principle underlying the decision in *Bhagbut Pershad Singh* v. *Girja Koer* (1). The facts of this case fall short of any such proof. The appeal must be dismissed with costs. Time for redemption is extended by six month.

C. M. C. P.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 921 OF 1918.

February 13, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

SHIDRAMAPPA MARIAPPA MANVI —PLAINTIFF—APPELLANT

versus

MAHOMED YUSAF IMAMDINSAB AND OTHERS—DEFENDANTS—RESPONDENTS.

Water, damage caused by flow of—Suit to recover damages, maintainability of—Rights of owners of land.

An owner of property is entitled to protect himself against water which he has not brought on his land himself. He is entitled to divert water which threatens to do damage to his land. Likewise, his neighbours have a right to protect themselves against water which threatens to do damage to their properties [p. 392, cols. 1 & 2.]

Where the plaintiff and the defendant have equal rights to protect their own properties by turning the water which threatens to flow over their lands in times of flood into a ditch, and in consequence of that the combined water which would otherwise have gone on to their respective lands causes damage to the banks of the ditch on either side, it is the business of both parties to protect themselves against damage which may result when there is an excess flow of water in the ditch, and neither party can, in such a case, have a cause of action against the other. [p. 392, col. 2.]

Second appeal from the decision of the Assistant Judge at Dharwar, in Appeal No. 175 of 1916, confirming the decree passed by the Second Class Subordinate Judge at Gadag, in Civil Suit No. 276 of 1915.

Mr. *H. B. Gumaste*, for the Appellant.

Mr. *V. R. Sirur*, for Respondent No. 1.

JUDGMENT.—The plaintiff alleged that a stream passed between his Survey Nos. 638 and 639 in Gadag and the defendants' lands to the south ; that a road passed to the east of the parties' lands ; that the water from the lands beyond that road belonging to the Acharyas of Annigeri and Sortur alone passed to the stream and none else ; that a portion of the rain water from the lands to the east of defendants' lands passed into the defendants' lands by certain passages shown in the sketch, Exhibit 62 ; that the defendants dug earth from the road and stopped the passages, with the result that the water in the stream was thereby increased and washed away the banks on the plaintiff's side and caused him damage.

The lower Court granted the plaintiff a decree directing the defendants to restore the plaintiff's land to the extent to which it had been washed away, as marked in Exhibit 63 in red pencil, and to plant *kalnars* or *devubalis* there to prevent further washing away of the plaintiff's land. The Court refused to grant an injunction against the defendants, but stated that if the plaintiff found that any other portion of his land was washed away, he might take steps in execution of this decree to ascertain what portion was washed away and to get it restored. There were various other directions in the order.

Both parties objected to the decree, but in first appeal the Assistant Judge confirmed the decree of the lower Court. Even now the plaintiff is not satisfied with what he has got, while the defendants have filed cross-objections, and maintain that the lower Court ought to have dismissed the plaintiff's suit.

The position, even now, after all the evidence has been taken, is not perfectly clear. But there is a ditch which runs between the lands of the plaintiff on the north and the lands of the defendants on the south. It does not seem to be a natural water-course, because it admittedly stops at the road on the east. It does not cross the road so as to drain the lands which are on the east. The lands slope

from the east to the west. It has been found that the rain water which falls on the land to the east, when there is a heavy fall of rain, flows down the slope, across the road, and over the lands of the respective parties. For very many years the plaintiff has diverted the water which would otherwise have flowed across his land into the ditch, and while only the water which would have flowed over the plaintiff's land went into the ditch, no damage was caused to the plaintiff's lands through the water flowing down the ditch. The defendants thought they would protect themselves in a like manner from the water which flowed over their lands from the lands of their eastern neighbours, and so they built *bandhs* on the road which prevented the water from the eastern lands, flowing over their lands, and turned that water into the ditch. Owing to the increase of water flowing down the ditch the banks of the ditch on the plaintiff's side were washed away. One should be able to see, therefore, from those facts what are the rights of the parties. It has not been proved to a certainty in whose ownership is the ditch. One plan makes out that the boundary of Survey Nos. 638 and 639 passes along the bed of the ditch. Another map makes it pass to the north of the ditch and it is not clear whether, as a matter of fact, any part of the ditch was included in the Survey numbers belonging to either the plaintiff or the defendants But the map which the learned Trial Judge relied upon most, Exhibit 63, shows that the ditch, if it belonged to either party, belonged to the defendants. Probably, it comes within section 37 of the Bombay Land Revenue Code, and, if so, it belongs to neither party. If that is so, both the plaintiff and the defendants had equal rights to protect themselves against water which threatened to come over their lands from the east

As laid down in the case of *Nield* v. *London and North Western Railway Company* (1), an owner of property is entitled to protect himself against water which he has not brought on his land himself. He is entitled to divert water which threatens to do damage to his land. Likewise, his neighbours have a right to protect themselves against water which threatens to do damage to their properties. In this case it seems to me that both the plaintiff and the defendants had equal rights to protect their own properties by turning the water which threatend to flow over their land in times of flood from the east, into this ditch. If, in consequence of that, the combined water, which would otherwise have gone on to the lands of the plaintiff and the lands of the defendants, caused damage to the banks of the ditch, then I would only say, it is the business of both parties to protect themselves against damage which may result when there is an excessive flow of water in the ditch.

In the case of *Nield* v. *London and North Western Railway Company* (1) the defendants, owners of a canal, being threatened by an overflow of flood water from a neighbouring river, and, fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiff's premises which were also situated on the banks of the canal above the premises of the defendants, and being penned back by the planks the water rose in the canal until it flooded the plaintiff's premises. In an action brought to recover damage for the injury so caused, it was held that the defendants were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural water-course, not to impede the flow of water down it.

Here, therefore, the defendants had not brought this water from the east. It came owing to the heavy rain-fall. They were entitled to protect themselves, just as the defendants in that case were entitled to protect themselves from an overflow of flood water from the neighbouring river. That seems to be a simple proposition of law which applies to this case, and, therefore, in my opinion, the judgments of both the lower Courts were wrong.

(1) (1875) 10 Ex. 4; 44 L. J. Ex. 15; 23 W. R 60.

The appeal is dismissed, and the cross-objections are allowed, and the suit dismissed with costs.

Appeal dismissed;
Cross-objections allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2862 OF 1916.
March 5, 1920.

Present:—Mr. Chevis, Acting Chief Justice, and Mr. Justice LeRossignol.

WASINDA RAM—PLAINTIFF—APPELLANT
versus
SITA RAM—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 115, applicability of, to minors—"Person", meaning of—Minor—Misrepresentation as to age—Minor, whether estopped from pleading infancy.

The word "person," as used in section 115 of the Evidence Act, should not be narrowed down so as to exclude an infant. [p. 395, col. 2.]

Where there have been no misrepresentations by a minor as to his age, or where the misrepresentations have not, as a matter of fact, misled the opposite party, there can be no estoppel and infancy can be successfully pleaded. On the other hand, where the opposite party has been misled by false representations, section 115 is applicable and the plea of minority cannot be heard. [p. 395, col. 2.]

Nelson v. *Stocker*, (1859) 4 De G. & J. 458; 28 L. J. Ch. 760; 5 Jur. (N. S.) 751; 7 W. R. 603; 124 R. R. 339; 45 E. R. 178; *Saral Chand Mitter* v. *Mohun Bibi*, 25 C. 371 at p. 395; 2 C. W. N. 18 and 201; 13 Ind. Dec (N. S.) 247, followed.

First appeal from the decree of the District Judge, Dera Ghazi Khan, dated the 30th June 1916.

Dr. *Gokal Chand Narang*, for the Appellant.

Babu *M. N. Mukerji*, for the Respondent.

JUDGMENT.

CHEVIS, ACTG. C. J.—In this case a preliminary objection was raised by Mr. Mukerji that the appeal was time-barred. Limitation expired during the Chief Court vacation in 1916; the appeal was lodged on the day the Court re-opened, but on insufficient stamp, it being pleaded that stamp was not procurable that day on account of the *Id*. The stamp was filed the next day. We disposed of the objection by allowing an extension under section 5 of the Limitation Act.

The plaintiff, Wasinda Ram, sues for Rs. 1,351, principal and interest due on a bond for Rs. 600, executed by the defendant Sita Ram on 4th February 1912. The defendant admitted execution but pleaded that he had not received full consideration, and that the rate of interest charged was penal. He also pleaded that he was not liable as he was a minor at the time of execution.

The issues were as follows:—

(1) Was defendant a minor on 4th February 1912?

(2) Did defendant represent to plaintiff that he was of age, and, if so, what is the effect?

(3) Was the bond not for full consideration?

(4) Is the rate of interest penal?

The lower Court decided issues Nos. 3 and 4 in plaintiff's favour, but dismissed the suit, holding that defendant and plaintiff both knew that defendant was a minor, and that defendant was, therefore, not liable. The plaintiff appeals to this Court.

As to issues Nos. 3 and 4, I should have no hesitation in agreeing with the lower Court. The defendant might have defended the lower Court's decision in part by arguing that the decision on these issues should have been in his favour, but nothing was said in arguments on his behalf with regard to these issues.

The lower Court's finding as to defendant's age is that he was born on 10th December 1891. The copy of entry in the birth register gives the name of the child as well as the father's name, so I consider there can be no doubt that this entry refers to the defendant. His age, then, would be about six weeks short of 20 years when his dealings with the plaintiff commenced, (*i.e.*, in *Assu* 1968) and about two months over 20 when the bond in suit was executed. A guardian had been appointed for him, but the guardian resigned, and on the 18th May 1910, (*i.e.*, about five months before the dealings with plaintiff commenced) the District Judge passed an order that, though the minor was 18 or 19 years of age and minority would continue till the age of 21, as the appointment of a fresh guardian was discretionary and as the minor did not wish a fresh guardian to be appointed, and was old enough by appearance to act for himself, no fresh guardian need be appointed. After that, Sita

Ram managed his own affairs, as he admits. (See page 5 of the paper-book). He brought a suit without a next friend in April 1911, (see his own evidence), *i.e*, before dealings with plaintiff began, and in every way seems to have acted as a man who had attained his majority would do. The plaint alleges that the dealings were entered into on defendant's assurance that he had become an adult and had got back his property from the District Judge on 18th May 1910. The witnesses go one step further and allege that the plaintiff said he was 21 or 21½. The District Judge has no faith in this evidence, saying, the witnesses come from plaintiff's village, and one is a former tenant of the defendant who was ejected from his tenancy. Seeing that the dealings took place in plaintiff's village it is only to be expected that the witnesses should belong to that village. As to one witness, *viz*., Amdu, P. W. No. 3, being a former tenant of the defendant, this is correct, but he says that he voluntarily gave up the land and was *not* ejected. The evidence of these witnesses may not be relied on implicitly with regard to the actual words used by the defendant, but I see no sufficient reason for disbelieving the gist of their evidence, which is that the defendant represented himself to be of full age. He obviously had been posing as a major, and I do not suppose for a moment that the plaintiff would have advanced him money at 1 per cent. interest if he had not believed him to be a major. Plaintiff's brother, Teja Ram, P. W. No. 6, says "Sewa Ram was guardian of defendant. He used to come with him. When he was removed defendant acted for himself." He also says, "He said he was over 21, otherwise plaintiff would not have advanced to him." I should say all this was perfectly correct, except that defendant may perhaps have posed as being over 21 without having necessarily said anything precise as to his age. If he posed as 21 that would be quite sufficient. I believe he did pose as being of full age, *i.e*., as being 21 years old, and I would hold that the money was advanced in consequence of the defendant misrepresenting that he was of full age. The learned District Judge lays stress on the fact that the defendant's age is put down as 20 in the stamp-vendor's endorsement on the stamped paper, but I do not think this matter of any consequence at all. In the first place, it is not shown that the plaintiff was present when the stamp was purchased in Dera Ghazi Khan or that the plaintiff ever read the endorsement, which is in Urdu, and it is alleged that the plaintiff cannot read Urdu, and, in the second place, even if the plaintiff read the endorsement there is no particular reason why he should bother about it, seeing that a stamp-vendor would probably enter the age merely by guessing it from the purchaser's appearance and without making enquiries from the purchaser.

Holding, then, as I would hold, that the defendant obtained the money by misrepresentations as to having attained his majority, I have next to consider whether the defendant is estopped from pleading minority, by reason of section 115 of the Evidence Act.

The first case I will notice is *Dhanmull* v. *Ram Chunder Ghose*(1). There the plaintiff sued for a money decree and for a mortgage decree. He had been induced by fraud on the part of the minor defendant to part with his money. It was held by the Full Bench that the plaintiff could not get any decree in the face of defendant's plea of infancy. But, as is noted at the foot of *Saral Chand Mitter* v. *Mohun Bibi* (2), the publication of this case was prohibited by two of the deciding Judges, and so this case was not published till six years after its decision.

In *Saral Chand Mitter* v. *Mohun Bibi* (2), the plaintiff had advanced money on a mortgage-deed, having been deceived as to the defendant's age. So the facts were similar to those of the above mentioned case. The Trial Judge, Jenkins, J., so far followed the 24 Calcutta [*Dhanmull* v. *Ram Chunder Ghose* (1)], ruling that he refused to give a personal money decree against the defendant, but he gave the plaintiff an ordinary mortgage-decree, holding that there was nothing in the earlier ruling to prevent his doing so, as in the earlier case it had, for some reason or other, been admitted on behalf of the plaintiff that a mortgage-decree could not be given. On appeal by the defendant, the Full Bench noted that all that was decided in the 24 Calcutta [*Dhanmull* v. *Ram Chunder Ghose* (1)], case was that no personal money decree could be passed

(1) 24 C. 265; 1 C. W. N. 270; 12 Ind. Dec. (N. S.) 844.

(2) 25 C. 371 at p 395; 2C. W. N. 18 and 201; 13 Ind. Dec. (N. S.) 247.

against the minor. That judgment was doubted, but as no money decree had been given by the Trial Judge it was unnecessary to refer the case to a Full Bench. There were no cross objections by the plaintiff claiming a money decree, so the decree of the Trial Judge was simply affirmed.

In *Dhurmo Dass Ghose* v. *Brahmo Dutt* (3), the plaintiff was the quondam minor, suing for cancellation of a mortgage effected by him during his minority. It was held that the misrepresentations as to his age had not misled the plaintiff and the claim was decreed. The defendant appealed, and the case came before a Full Bench, which upheld the decision, holding that there could be no estoppel in the case of a minor; see *Brohmo Dutt* v. *Dharmo Das Ghose* (4). [It may here be noted that a contrary view had been held in *Ganesh Lala* v. *Bapu* (5).] The case went on to the Privy Council, which held that it was unnecessary to decide the question whether the doctrine of estoppel was inapplicable in all cases of infants, but simply held that the doctrine could not apply to a case where the party dealing with the minor had not, as a matter of fact, been misled by his misrepresentations. Their Lordships lay down that a contract entered into with a minor is void, and not merely voidable, but do not decide the question whether the doctrine of estoppel is applicable to a case where the minor has actually misled the person he is dealing with.

In *Nelson* v. *Stocker* (6), the decision was in favour of the quondam minor, on the ground that the other party was not misled, but, as is pointed out in *Saral Chand Mitter* v. *Mohun Bibi* (2), there are passages in the judgment of Lord Justice Turner—Lord Justice Knight Bruce not differing—which make it clear that, if a false representation had been made and acted on, the person to whom it was made, not knowing it to be false, the liability of the quondam minor to return the money would have been undoubted. Lord Justice Turner says: "Infants are no more entitled than adults are to gain benefits to themselves by fraud.... The privilege of infancy is a legal privilege. On the one hand, it cannot be used by infants for the purposes of fraud. On the other hand, it cannot, I think, be allowed to be infringed upon by persons who, knowing of the infancy, must be taken also to know of the legal consequences which attach to it."

In *Balak Ram* v. *Dadu* (7), the quondam minor, though he had deceived the defendant, was allowed to recover the land sold during his infancy on re-payment of the sale-money. For my own part I doubt if he should have been given any relief at all; I would favour rather the Bombay view [*Ganesh Lala* v. *Bapu* (5)]. But we are not here dealing with the case of a minor seeking to recover property, so we need not, in my opinion, stop to consider whether or on what terms he should be allowed to do so; the ruling is based on the applicability of section 41 of the Specific Relief Act, with which we have nothing to do in the present case.

It seems to me clear that, where there have been no misrepresentations, or where the misrepresentations have not, as a matter of fact, misled the opposite party, there can be no estoppel and infancy can be successfully pleaded. On the other hand, where the opposite party has been misled by false representations. I am of opinion that section 115 is applicable and that the plea of minority cannot be heard. I fail to see why the word "person," as used in section 115 of the Evidence Act, should be narrowed down to exclude an infant. To do so, in my opinion, means to open the door to fraud. There is, I consider, a good deal of weight to be attached to the opinions quoted in *Nelson* v. *Stocker* (6) and in *Saral Chand Mitter* v. *Mohun Bibi* (2).

I would accept the appeal and decree this claim with costs in both Courts.

P. S.—I have omitted to note *Levene* v. *Brougham* (8), a case in which a money-decree was given against a minor who had obtained an advance of money by misrepresentations as to his age. I note, however, that stay of execution was granted with a view to appeal, and that I have not been able to ascertain

(3) 25 C. 616; 2 C. W. N. 330; 13 Ind Dec. (N. S.) 405.
(4) 26 C. 381; 3 C. W. N. 468; 13 Ind. Dec. (N. S.) 846.
(5) 21 B. 198; 11 Ind. Dec. (N. S.) 133.
(6) (1859) 4 De G. & J. 458; 28 L. J. Ch. 760; 5 Jur. (N. S.) 751; 7 W. R. 603; 124 R. R. 339; 45 E. R. 178.
(7) 7 Ind. Cas. 1000; 76 P. R. 1910; 98 P. L. R. 1910; 112 P. W. R. 1910.
(8) (1908) 24 T. L. R. 801.

the result of the appeal, if any appeal was lodged.

LE ROSSIGNOL, J.—I agree with what my learned colleague has written. In view of what the District Judge wrote in his order of 18th May 1910, we must take it that the defendant, knew that although, practically, that order rendered him *sui juris*, it declared him in so many words to be still subject to the disability of infancy, so that his conduct in suggesting the reverse to third persons was false and intentional. It is true that a contract made with an infant is no contract but is void *ab initio*, but that is not a matter of which Courts must take cognizance *suo motu*, and if section 115 of the Evidence Act prohibits the tender of the plea, (and I see no reason to suppose that it does not), then the plea may not be tendered.

It is unfortunate that we have no pronouncement by the Privy Council on the applicability of that section to minors, but the matter appears to be *res integra* and I read the word 'person' in its natural sense, including a minor.

In any case, if the quondam minor is not liable on the contract, he is liable in equity to make restitution and to pay damage for the loss entailed upon plaintiff by his fraud.

For these reasons, I concur in accepting the appeal and decreeing the claim with costs throughout.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 293 OF 1919.

February 26, 1920.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

ESUFALLI ALIBHAI—PLAINTIFF—APPELLANT

versus

ABDEALLI GULAM HUSSEIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Administration suit by one of several heirs, whether maintainable.

Although under the Muhammadan Law it is not necessary to take out Letters of Administration to the estate of a deceased person, yet any one who is interested in the estate is at liberty to bring a suit for administration thereof. Such a suit is maintainable even if the plaintiff knows definitely what the estate consists of, and the plaintiff is not, in such a case, bound to sue for partition.

Second appeal from the decision of the Assistant Judge, Surat, in Appeal No. 134 of 1917, confirming the decree passed by the First Class Subordinate Judge at Surat, in Civil Suit No. 304 of 1915.

Mr. *N. K. Mehta*, for the Appellant.

Mr. *G. N. Thakor*, for Respondents Nos. 1 and 2.

JUDGMENT.

MACLEOD, C. J.—The plaintiff filed this suit as the heir of his father Alibhai Tyabji and his mother Mariambu, wife of Alibhai Tyabji, for an account and administration of the estate of one Gulam Hussein. Gulam Hussein died in 1904 leaving as his heirs, according to Shia Muhammadan Law, his father and mother, who are each entitled to one sixth, and also his widow and his son and two daughters. The son is defendant No. 1 in the suit. The other defendants are descendants of the daughters.

The suit has been dismissed in both Courts on the ground that an administration suit in reference to Gulam Hussein's estate did not lie; that the only suit that could lie was for partition on payment of proper Court fees, and that the suit was not brought in time. I must confess, I cannot follow the reasoning of the learned Judges in the Courts below in support of those findings. I cannot myself see why an administration suit in this case cannot lie, considering that Gulam Hussein died in 1904; that his estate has never been distributed, and that his estate has never been administered. It is impossible for any one who could prove he was entitled to an interest in the estate to get that interest until the estate has been ascertained by proper administration. It is perfectly true that under the law there is no need, on the death of a Muhammadan, for Letters of Administration to be taken out to his estate, and the result, as I have often pointed out, is that frequently the heirs live in harmony after his death without distributing the estate. Some of them may die leaving their heirs, and it is only when disputes arise in the family that the trouble begins. The point is abundantly clear that

if there is an estate it can be administered and if a party who has an interest in that estate has asked the Court to administer that estate, even if he knows exactly what it consists of, he is entitled to come to Court and ask for a preliminary decree for the administration of that estate. He is not bound, even although he knows what the estate consists of, to file a suit for partition. He may do so or he may not. That is no reason why, if he wishes to file an administration suit to get the estate administered in the proper way, he should not do so. It does not follow that because *A.* dies leaving certain definite property that that property will be divided amongst all the heirs. He may have left debts and charges on the estate, and it is only when the estate has been administered, and the usual administration accounts have been taken that the interests of those entitled to share as heirs can be ascertained. The plaintiff in this case stands in the shoes of Alibhai and Mariambu, and he is entitled to come to Court and ask the Court to decide what was the estate of Gulam Hussein, and to decide what was the interest of Alibhai and Mariambu in that estate. It may be discovered, when the suit is heard on the merits, that Alibhai and Mariambu have no interest in Gulam Hussein's estate. But that has nothing to do with the preliminary point which has been decided against the plaintiff. In my opinion, the decree of the lower Appellate Court must be set aside, and I find that the suit as framed is perfectly correct, and that, therefore, the suit should proceed to be tried on the merits on the remaining issues which were framed in the Trial Court but not decided. The plaintiff will have the costs in this Court and in the lower Appellate Court. Costs in the Trial Court to be costs in the cause. Proper Court-fees must be paid as on an administration suit. I may add that no question of limitation arises.

HEATON, J.—I concur that the suit is not bad merely because the plaintiff sues for an account and administration of the estate of the deceased Gulam Hussein. From the circumstances which appear, such a suit is perfectly proper, and it may turn out to be an absolutely necessary thing for the plaintiff to sue for. Gulam Hussein died in 1904 leaving, amongst other heirs, his father and mother. They have since died, and their shares have passed to the plaintiff. He claims, therefore, that he is a sharer to the extent of one-third in the estate of Gulam Hussein, and I understand that what he claims is either to get one-third of the estate of Gulam Hussein as it was when he died, or else to get one-third of the estate as it was when the suit was brought. Which of the two he really sues for, and many other matters, can only be determined by going into the case on its merits. Unfortunately, instead of doing this, the lower Courts dealt with the matter on a preliminary issue, and I am afraid they were somewhat influenced by the fact that an administration suit is a very cheap suit to bring. The Court-fees on such a suit are small, whereas the Court-fees on a partition suit vary with the value of the property to be partitioned. But it does not in the least matter to a Judge whether a suit is a cheap suit or a dear suit. The plaintiff could bring his suit in any form which the law allows. Seeing that he wants an inquiry into what is the estate of Gulam Hussein, and also apparently wants an inquiry into what that estate was when Gulam Hussein died and what has become of it since; that is to say, seeing that he wants to trace the successive development of the estate from Gulam Hussein's death up to the present moment, it seems to me quite impossible to say that he is not entitled to bring an administration suit. Possibly, his claim may be successfully met in a variety of ways but it cannot be defeated on the bare ground that the suit is bad in form. I think, therefore, that this suit was wrongly dismissed on a preliminary point, and that we must set aside the decree of the lower Courts dismissing the suit, and remand it to be disposed of on its merits. The plaintiff will have the costs in this Court and in the lower Appellate Court. Costs in the Trial Court to be costs in the cause.

Decree set aside.

SOMASUNDARAM CHETTY v. UNNAMALAI AMMAL.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 90 OF 1919.

March 2, 1920.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

SOMASUNDARAM CHETTY—RESPONDENT No. 3—APPELLANT

versus

UNNAMALAI AMMAL AND OTHERS—PETITIONER AND PLAINTIFF—RESPODENTS NOS. 1 AND 2.

Hindu Law—Widow—Maintenance, decree for, charging family property—Decree, whether has precedence over other debts.

A decree for maintenance obtained by a Hindu widow which is charged against the family properties has precedence over other debts owing by the estate. [p. 399, col. 1.]

Appeal against the order, dated the 16th December 1918, of the District Court, South Arcot, in Execution Petition No. 66 of 1917, in Original Suit No 33 of 1914.

FACTS appear from the judgment.

Messrs. *S. Duraiswamy Aiyar* and *S. A. Raghunada Row*, for the Appellant.—The objection of Hindu co-parceners, to pay maintenance to female members is subservient to the obligation to pay debts. The creation of a charge will not affect the question. In any event, the maintenance charge was created when the attachment under the money-decree was pending. The charge is affected by the doctrine of *lis pendens*. See *Sham Lal* v. *Banna* (1), *Gur Dayal* v. *Kaunsila* (2) and *Krishna Patter* v. *Sinnaponnu* (3).

Mr. *S. T. Srinivasagopalachariar*, for the Respondents.—There is no distinction between various kinds of charges. A maintenance charge is as efficacious as any other charge. Even though a maintenance claim may not take a priority over a debt, yet where a charge has been created in the former case and none in the latter, the charge will have precedence over the obligation which has not ripened into a lien. In the cases cited for the appellant no charge was created in favour of the claimant for maintenance The rest of the judgment is *obiter*. In *Jayanti Subbiah* v. *Alamelu Mangamma* (4) and *Rangammal* v. *Echammal* (5) the prior claim of the maintenance charge-holder seems to be recognized.

JUDGMENT.—This matter arises in execution. A suit was brought in July 1913 against the father of a debtor who was undivided from his father for money borrowed. The son died in March 1913. An application for attachment before judgment was obtained on the 11th July 1913. There was a simple money-decree against the father executable against the assets of the son in his hands. On the 30th of July 1914, the widow of the son sued her father-in-law for maintenance and claimed that it should be charged against the family properties. The decree as prayed for was made on the 28th of November 1914. Meantime, the decree-holder under the money-decree brought the property to sale; he had notice of the charge created in favour of the daughter in-law. This lady has now applied to execute her decree for maintenance against the purchaser under the money-decree. It must be taken to have been found that the decree against the father-in-law was for a claim binding on the family. The first question which was argued was that, as the decree creating a charge was during the pendency of the attachment under the money-decree, the charge is affected by *lis pendens*. One answer to this contention is that section 64 of the Civil Procedure Code relates to voluntary transfers and not to charges created by a decree. However this may be, we have not materials to enable us to say that the sale and purchase were in pursuance of the attachment before judgment and that such an attachment was subsisting when the charge was created.

The more important question is, whether the charge is ineffective as against a creditor whose debts are binding on the family. In the first place, it seems undesirable to draw a distinction between the kinds of charges created under a decree. Whatever may have been the original obligation which was pursued in a Court of law, the moment that a Court declares that its decree is to be discharged by the creation of a charge on immoveable property it is as binding on all subsequent purchasers of the property at least as if there was a mortgage for a binding

(1) 4 A. 296; A. W. N. (1882) 42; 6 Ind. Jur. 504; 2 Ind. Dec. (N. S.) 905.

(2) 5 A. 367; A. W. N. (1883) 65; 3 Ind. Dec. (N. S.) 315.

(3) 25 Ind. Cas. 759; 16 M. L. T. 551.

(4) 27 M. 45.

(5) 22 M. 305; 9 M. L. J. 14; 8 Ind. Dec. (N. S.) 217.

debt created by the debtor on the property. In this view, the charge would take precedence over all claims which have not ripened into a lien on the property. Secondly, the proposition that a debt binding on a Hindu family takes precedence over a maintenance claim in all cases is not supported by any clear authority. It may be stated as a general proposition that, in the administration of a Hindu's estate, binding debts would take precedence over mere claims for maintenance or residence on the part of the female member of the family. But there is no clear authority for the proposition that a charge *bona fide* created for maintenance can be defeated by a creditor who has lent money for family purposes. *Sham Lal* v. *Banna* (1) and *Gur Dayal* v. *Kaunsila* (2) have been relied on before us. In neither of them was a charge created in favour of the maintenance claimant. The *obiter dictum* that, even if there is a charge, it would be subordinated to the claim of the creditor is not supported by any text of Hindu Law or by any decided cases. The observations in *Krishna Patter* v. *Sinnaponnu* (3) are of the same character. On the other hand, there are the observations of Bhashyam Aiyangar, J., in *Jayanti Subbiah* v. *Alamelu Mangamma* (4) which are to the effect that a creditor transferee can, under certain circumstances, be subjected to the obligation of paying maintenance. In *Rangammal* v. *Echammal* (5), Subramania Aiyar, J, pointed out that the moral obligation to maintain a daughter in-law would ripen into a legal obligation the moment that a decree is passed. It would be an *a fortiori* case where such a decree charges specific property. In our opinion, the rule of Hindu Law is limited in its application only so long as the two obligations—the one to pay a binding debt and the other to pay a maintenance—are both of them not made charges on the property. If either of them assumes that shape, then it would take precedence over the other. This is a principle underlying section 39 of the Transfer of Property Act and that principle is quite consistent with the rule of Hindu Law. In our opinion, therefore, the lower Court is right and this appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 218 OF 1919.

March 1, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

PANDURANG BALKRISHNA GOLVANKAR—PLAINTIFF—APPELLANT

versus

JAGYA BHAU SHAGAT—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of decree—Payment out of Court—Certification by decree-holder—Limitation—Payment disputed—Procedure.

There is no time fixed within which a decree-holder is bound to certify a payment made to him out of Court, such payment can be certified by the decree-holder at any time. [p. 400, col. 1.]

Where a judgment-debtor denies having made a payment which the decree-holder certifies, the Court should take evidence and come to a conclusion, one way or the other, whether the payment has actually been made or not. [p. 400, cols. 1 & 2.]

Second appeal from the decision of the Assistant Judge, Thana, in Appeal No. 12 of 1918, confirming the decree passed by the Subordinate Judge at Bassein, in Darkhast No. 172 of 1917.

Mr. *P. B. Shingne*, for the Appellant.

Messrs. *S. Y. Abhyankar* and *P. N. Shende* for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—A decree was passed in Civil Suit No. 84 of 1906 by which it was ordered that the defendant should give to the plaintiffs sweet paddy *khandis* 12½ in the lump (maunds 245 or Rs. 490 0 0 as its price at the rate of Rs. 2 per maund) by instalments commencing in 1 07. The decree further directed that, in case any two instalments were not paid, the whole decree should be executed at once. The decree-holder filed an application for execution on the 10th September 1917 alleging that the nine instalments from 1907 to 1915 had been paid to him regularly in January of each year as they fell due, and that as two instalments of 1916 and 1917 had not been paid, he asked that the whole decree should be executed. The judgment-debtor denied having made any payments at all, and, as none of the alleged payments of the nine instalments had been certified to and recorded by the Court, the question arose whether the Court executing the decree could take notice of the alleged payments.

PANDURANG BALKRISHNA v. JAGYA BHAU.

Both Courts have dismissed the plaintiff's application. In the first place, a question of limitation arises, whether there is any time fixed for an application to certify a payment made by a decree-holder, as is required by Order XXI, rule 2. That point arose in *Tukaram* v. *Babaji* (1). Under section 258 of the Civil Procedure Code of 1882, unless such a payment or adjustment had been certified as aforesaid, it would not be recognized as a payment or adjustment of the decree by any Court executing the decree. In Order XXI, rule 2, clause (3), the words are, "a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree."

Under the old Code this Court has decided that, as there was no time fixed within which the decree holder is bound to certify a payment made out of Court, such payment could be certified at any time: see *Tukaram* v. *Babaji* (1).

In *Eusuffeeman Sarkar* v. *Sanchia Lal Nahata* (2), it was held that a decree-holder who had received a certain sum of money by way of payment of interest can either apply to certify payment before execution, or may do so on his application for execution of the decree. In that case, on the 7th February 1906, the plaintiff obtained a decree, and, on the 18th May 1911, he applied for execution. At the time of the application he notified to the Court that he had received a certain sum on the 19th June 1908 from the judgment-debtor towards interest, and alleged that the execution was not barred by limitation. It was held that the notification to the Court of the receipt of the sum paid by the judgment-debtor was all that the decree-holder had to do in order to certify payment, and Order XXI, rule 2, of the Code of Civil Procedure did not stand in the way. Therefore, if there is no time required for certifying, then the application for execution in this case certifying the payments already made amounted to a certifying under Order XXI, rule 2, which the Court was bound to take notice of, and if the payments were disputed, as they appear to have been done in this case, then the Court should have taken evidence, and come to a conclusion, one way or the other, whether the payments had actually been made or not. In my opinion, therefore, the decision of the lower Appellate Court was wrong. The case must go back, and the *darkhast* must be sent back to to the Trial Court to be disposed of in accordance with law. The appellant will have his costs in this Court and the Court below. Costs in the first Court will be costs in the *darkhast*.

HEATON, J.—I agree. I only wish to add this. Rule 2 of Order XXI provides specifically a way in which a payment or adjustment can be certified. It provides how a *darkhast* has to be presented, and it provides that the *darkhast* must state any payment or adjustment made subsequently to the decree, and the *darkhast* has to be verified by the applicant. Therefore, the statements in the *darkhast* are certified. They include a statement of payments or adjustments made. Therefore, those payments or adjustments are certified. Moreover, they would be recorded by the Court in the regular course, because they would be entered in the register of *darkhast*. When we come to the case of the judgment-debtor, it is expressly provided that he may make an application to issue a notice. So we have the two methods provided by the Code, the method to be followed by the judgment-debtor and the method to be followed by the judgment-creditor; and in the case of the latter there is, as has already been held by this Court, no limit of time within which the adjustment has to be certified. I, therefore, agree that the decision of the lower Court was wrong on a preliminary point and the *darkhast* must be sent back to be disposed of in accordance with law.

Decree reversed.

(1) 21 B. 122; 11 Ind. Dec. (N. s.) 84.
(2) 34 Ind. Cas. 606; 43 C. 207; 20 C. W. N. 27 23 C. L. J. 390.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 416 OF 1920.
September 10, 1920.
Present:—Mr. Justice Gokul Prasad.
Musammat HAR PIARI—APPLICANT
versus
NATHE LAL AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), Ch. XII, s. 439—Proceedings under Ch. XII—Revision—High Court, interference by.

The High Court will not intefere with proceedings which are, in fact and in law, proceedings under Chapter XII of the Criminal Procedure Code. [p. 402, col. 2; p. 403, col. 1.]

Criminal revision against the order of the Magistrate, First Class, Muttra, dated the 10th June 1920.

Mr. *A. P. Dube*, for the Applicant.

Mr. *J. M. Banerjee*, for the Opposite Party.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application to revise an order under section 145 of the Code of Criminal Procedure. A preliminary objection has been taken by the learned Government Advocate that no application in revision lies having regard to the express provision of section 435, clause (3) of the Code of Criminal Procedure. If the matter had not been covered by authority, I would have had some difficulty in entertaining this application in revision, because, if the High Court cannot even send for the record of proceedings under Chapter XII of the Code of Criminal Procedure, I cannot understand on what principle it can interfere with those orders when the record has once come before it on, as I might say, an order passed for sending for the record under section 435 of the Criminal Procedure Code which was not warranted by law. However, leaving this aspect of the question aside, it has been held in a large number of cases that this Court can interfere if there has been not a proceeding either in fact or in law as contemplated by section 145 of the Criminal Procedure Code.

I shall now briefly refer to some of the reported cases of this Court.

In the case of *Brahma Nath* v. *Sundar Nath* (1) Mr. Justice Knox observed as follows:—"It has been held over and over again by this Court, for example, in *Jhingai Singh* v. *Ram Pratap* (2) that proceedings under section 145 must be in intention, in form, and in fact, proceedings under Chapter XII of the Code of Criminal Procedure by a Magistrate duly empowered to act under that Chapter. The same has been held by a Divisional Bench of this Court in *Syela Khatun* v. *Lal Singh* (3)."

In the case of *Mahadeo Kunwar* v. *Bisu* (4) Mr. Justice Banerji, at page 538, lays down the law thus:—"In my judgment the order to which finality is given under those sections must be an order which not only purports to be, but is in reality, an order under section 145, and has been passed with jurisdiction. Where the Court has exceeded its jurisdiction in making the order it is null and void, and this Court, in the exercise of its revisional powers, is competent to interfere with it. This has been held by the Calcutta High Court in several cases, of which I may mention the case of *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh* (5). The same view was held by the Bombay High Court in *Pandurang Govind, In re* (6), and the Madras High Court, in *Agra Bank Limited* v. *Leishman* (7), exercised its revisional powers in such a case. We have, therefore, to see whether the order which the Joint Magistrate purported to make under section 145 is in fact and substance an order under that section and was passed with jurisdiction."

In the case of *Jhingai Singh* v. *Ram Pratap* (2) Mr. Justice Knox observed:—"It has already been held by a Bench of this Court in *Maharaj Tewari* v. *Har Charan Rai* (8) that, as the law at present stands, where the proceedings below are in intention, in form and in fact, proceedings under Chapter XII of the Code of Criminal Procedure by a Magistrate duly empowered to act under that Chapter, this Court has no power to send for those proceedings either under the Code or under section 15 of the Indian High Courts Act, 1861. It has not been shown to me that the proceedings before the learned Magistrate

(1) 51 Ind. Cas. 170; 17 A. L. J. 434 at p. 442; 20 Cr. L. J. 410.

(2) 1 Ind. Cas. 762; 31 A. 150; 9 Cr. L. J. 382; 6 A. L. J. 113.

(3) 25 Ind. Cas. 324; 36 A. 233; 12 A. L. J. 344; 15 Cr. L. J. 572.

(4) 25 A. 537; A. W. N. (1903) 102.

(5) 26 C. 188; 3 C. W. N. 49; 13 Ind. Dec. (N. S.) 725.

(6) 24 B. 527; 2 Bom. L. R. 84; 12 Ind. Dec. (N. S.) 882.

(7) 18 M. 41; 2 Weir 100; 6 Ind. Dec. (N. S.) 378.

(8) 26 A. 144; A. W. N. (1903) 212; 1 Cr. L. J. 339.

were not proceedings under Chapter XII of the Code or that he was not duly empowered to act under that Chapter. According to the contention of the learned Advocate, it was after being properly seised of the case that the learned Magistrate went out of his way, passed an order which he had no jurisdiction to pass and that by it the learned Advocate's client has been debarred from all remedy and deprived of the fruits of the case won by him in the Civil Court. This may or may not be so. The fact remains that section 435 expressly excepts records of proceedings under Chapter XII, and I know of no other Act or Statute which confers upon this Court the power of sending for such proceedings."

This case was approved in the case of *Sayeeda Khatun* v. *Lal Singh* (3).

The case in *Mahadei* v. *Beni Pershad* (9) has been very strongly relied upon by Mr. Malcomson as a ruling in support of the proposition that this Court cannot interfere in revision in proceedings under section 145 of the Code of Criminal Procedure, but a careful reading of that case shows that it was admitted in that case that the proceedings under section 145 had been duly taken and they were so in fact and in law. At page 176* Mr. Justice Piggott, in the course of his judgment, says:—"A Magistrate received information that a dispute likely to cause a breach of the peace existed concerning certain immoveable property, *viz.*, a house, within his jurisdiction. He took proceedings *in due form* under section 145 of the Code of Criminal Procedure and came to the decision that possession over the entire house was with the present applicant, *Musammat* Mahadia, and that she was entitled to be maintained in that position unless and until a competent Court otherwise decided. In so far as he passed an order to the above effect, the case is altogether outside the revisional jurisdiction of this Court". The italics are mine, and they clearly show that this Division Bench ruling was not intended to lay down a different ruling of law from what had been laid down in the previous case. It is thus clear that, in order to oust the jurisdiction of this Court in revision, the Magistrate should have taken proceedings in fact and in law under the provisions of section 145, and further that his order should be one which is warranted by the provisions of that Chapter and has been passed with jurisdiction.

I have now to see how for the present case is one in which I should interfere in revision. The facts put briefly are as follows: On the 27th February 1920 a complaint was made by Nathe Lal for action to be taken under section 145 of the Criminal Procedure Code. It is not disputed that the report was made to a Magistrate having jurisdiction to deal with the matter. The Magistrate sent the complaint to the Sub-Inspector of Police for inquiry. After receipt of the report, which showed that there was a likelihood of the breach of the peace, the Magistrate on the 2nd March 1920 passed an order to the following effect:—"The report of the Police has come and was perused with the record. It is, therefore, ordered that notice be issued to the opposite party for the 12th March 1920, and the parties are to produce evidence of their ownership and actual possession." It is contended on behalf of the petitioner that this order is bad, inasmuch as it does not say in express words that the Magistrate was satisfied on reading the Police report and that there was a likelihood of the breach of the peace. It is true that the order does not say so in express words, but having regard to the fact that the Magistrate himself directed a Police inquiry in this matter for the purpose of satisfying himself whether there was any apprehension of the breach of the peace before he took any action, the order distinctly suggests that he took the proceedings under section 145 after having believed in the correctness of the result of the Police inquiry. His order distinctly refers to this report, and it cannot, with any stretch of imagination, be said that he did not consider it. Under these circumstances, the mere omission of the words like "I am satisfied from the Police report that there is a likelihood of the breach of the peace" cannot vitiate the proceedings and do not make it one which is not in law a proceeding under Chapter XII of the Code of Criminal Procedure. The proceedings being in fact and in law under Chapter XII of the Criminal Procedure Code, this Court cannot interfere in revision. I, therefore, reject the application.

Application rejected.

(9) 55 Ind. Cas. 194; 18 A. L. J. 171; 21 Cr. L. J. 242; 42 A. 214.

*Page of 18 A. L. J.—*Ed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASES NOS. 847, 863 AND 870 OF 1919.

December 22, 1919.

Present :—Mr. Justice Chaudhuri and Mr. Justice Newbould.

IN No. 847

THE INDIAN IRON AND STEEL COMPANY, LIMITED AND OTHERS—PETITIONERS

versus

BANSO GOPAL TEWARI AND OTHERS—OPPOSITE PARTIES.

SASIBHUSAN TEWARI—PETITIONER IN No. 863

UMESH CHANDRA MONDAL AND OTHERS—PETITIONERS IN No. 870

versus

INDIAN IRON AND STEEL CO., LD.—OPPOSITE PARTY IN BOTH.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute concerning right to bore for minerals—Court, jurisdiction of, to go into questions of possession and title—Breach of peace apprehended—Procedure—Government of India Act, 1915 (5 and 6 Geo. V, c 61), s. 107—Difference of opinion among Judges—Procedure.

Where in a proceeding under section 145 of the Criminal Procedure Code, the dispute between the parties is not one concerning land and does not involve any question of actual possession, but, as in this case, concerns the rights of the respective parties to carry on boring operations for coal over a specific area, the Court has no jurisdiction to go into intricate questions of title and possession which arise between the parties. If, in such a case, there is a likelihood of a breach of the peace, proceedings which are simple in nature and which summarily and expeditiously dispose of the matter should be adopted, and proceedings under section 107 of the Criminal Procedure Code are more appropriate in such a case than proceedings under section 145 [p. 409, cols. 1 & 2 p 410, col 1.]

Where a High Court exercises jurisdiction under section 107 of the Government of India Act, 1915, and the Judges hearing a case differ in opinion, the opinion of the Senior Judge prevails. [p. 411, col. 1.]

In the matter of a proceeding under section 145, Criminal Procedure Code, now pending in the Court of the Sadar Sub-Divisional Magistrate, Suri, in the District of Birbhum, and

In the matter of an application under section 107 of the Government of India Act of 1915, for quashing the said proceedings.

FACTS appear from the judgment.

In No. 847.

Babus *Dasarathi Sanyal* and *Manmatha Nath Mookerjee*, for the Petitioners.

Babus *Atulya Charan Bose*, *Sarat Chandra Bose*, *Probodh Chandra Chatterjee*, *Bir Bhusan Dutt*, *Mritunjoy Chatterjee*, *Jyotish Chandra Pal* and *Kshirode Behari Chatterjee*, for the Opposite Parties.

In No. 863.

Babus *Manmatha Nath Mookerjee* and *Pannalal Chatterjee*, for the Petitioners.

In No. 870.

Babus *Manmatha Nath Mookerjee* and *Satindra Nath Mookerjee*, for the Petitioners.

Babus *Atulya Charan Bose*, *Bir Bhusan Dutt* and *Mritunjoy Chatterjee*, for the Opposite Parties in both.

Babus *Dasarathi Sanyal* and *Manmatha Nath Mukherjee*, for the Petitioners:—Submit that the possession is with the Maharaja of Burdwan. The Maharaja of Burdwan never parted with the mineral rights. Refer to *Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* (1), *Durga Prashad Singh* v. *Brojo Nath Bose* (2). The real test is if the Zemindar has parted with the mineral rights. It must be in express terms. Refer to *Christian* v. *Tekaitni Narbada Koeri* (3). It is admitted that in the *putnidar's* rights there is no mention of the mineral rights. As regards the breach of the peace there is no apprehension. It is the Police who report that there will be a breach of the peace.

They cannot work the machinery without the permission of the Magistrate. The coal was being brought from outside for working the machinery. It is the duty of the Magistrate to bind down the wrongful party. It is nowhere stated that they were obstructing the opposite party. Further, the Magistrate has no jurisdiction. Where is the information before the Magistrate that there is an apprehension of the breach of the peace regarding the 5000 *bighas* of land? Assuming that the Magistrate had jurisdiction he ought to have confined his enquiry under section 145, Criminal Procedure Code, to the place where the breach of the peace was apprehended. It is all about boring operations. Refer to

(1) 6 Ind. Cas. 785; 37 C. 723; 37 I. A. 136; 14 C. W. N. 746; 11 C. L. J. 653; 7 A. L. J. 633; 8 M. L. T. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; (1910) M. W. N. 309 (P. C.).

(2) 15 Ind. Cas. 219; 39 C. 696; 16 C. W. N. 482; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 I. A. 133 (P. C.).

(3) 27 Ind. Cas. 471; 19 C. W. N. 796; 20 C. L. J. 527.

Dhanput Singh v. *Chatterput Singh* (4) and *Queen-Empress* v. *Gobind Chandra Dos* (5). In the latter case the Magistrate could not go beyond the two Police reports and the whole case was based upon the two Police reports. The information must show that there is a breach of the peace. Refer to the Full Bench case in *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (6), where the case in *Queen-Empress* v. *Gobind Chandra Das* (5) was approved of.

[CHOWDHURI, J.—With regard to section 145, Criminal Procedure Code, will you kindly say whether the word 'land' refers to mineral rights. I want to know that.]

It can come under "other produce" in clause (2) of the section.

[COURT.—Is there any case on mining rights ?]

Babu *Atulya Charan Bose* for the Opposite Party.—There is a case in *Andrew Yule* v. *A. H. Skone* (7). There is another case in *Sajuddi Mandal* v. *F. L. Cork* (8).

[CHOWDHURI, J.—The question is, would that be covered by section 145, Criminal Procedure Code ?]

That question has never been argued.

The only obstruction was with regard to certain carts bringing coal to work the machinery and nothing else. Refer to *Maharaj Bahadur Singh* v. *Raja Ranjit Singh Bahadur* (9). The grounds upon which the Rule was issued has been substantially proved. Refer to *Emperor* v. *Abbas* (10). The case lays down that where there is an apprehension of the breach of peace the Magistrate should exercise his discretion. The discretion should be judicially exercised.

Babu *Manmatho Nath Mukherjee*.—I appear on behalf of the Maharaja of Burdwan who is a party to the proceedings and on behalf of the *mokarraridars* who are not made parties. The Maharaja of Burdwan is admittedly the landlord. On the 5th January 1918 the Maharaja of Burdwan authorised the Parsundi Mining Syndicate to make the boring operations. A boring lease empowers the grantee to go upon the land. It does not confer possession. If there is a dispute between the Indian Iron and Steel Company and the person who is in possession of the lands where the boring operations are to be done, then the dispute comes under section 145, Criminal Procedure Code. On the 12th of April the Indian Iron and Steel Company was authorised to commence the boring operations. The Maharaja of Burdwan executed the lease. So far as we are concerned, there is no dispute between us and the persons who are in possession. The real dispute is with regard to certain cart loads of coal which came from a certain place.

Proceedings ought to have been drawn up under section 107, Criminal Procedure Code. That not having been done, the Magistrate now has no jurisdiction. The learned Magistrate who passed that order on the 16th July correctly appreciated the situation. The boring operations are not made on the whole land. Particular plots are to be selected. If coal is found, then mining leases have got to be obtained from the landlords. Proceedings should have been taken against the persons who are in actual possession of the land where boring operations are to be carried on and the proceeding should be confined to that particular plot. The real dispute is with regard to the whole of the *Mouzah*. I submit section 145, Criminal Procedure Code, does not apply here. The section says that the dispute must be a real and *bona fide* dispute. Refers to *Emperor* v. *Ram Baran Singh* (11). There must be a *bona fide* dispute about immoveable property. As regards the form of proceedings in a case like this see *Bejoy Nath Chatterji* v. *Bengal Coal Company, Limited* (12). The present case comes directly within the purview of this ruling. It is on all fours with the facts of the present case. A person can be said to be in actual possession who has touched coal and is in possession of the land. The mere fact that he has touched coal at a particular spot cannot be said to be in actual possession as regards coal. Prospective rights would not confer any rights to the minerals upon the parties. We are claiming the mineral rights.

(4) 20 C. 513; 10 Ind. Dec. (N. S.) 34°.
(5) 20 C. 520; 10 Ind. Dec. (N. S.) 352.
(6) 33 C. 352; 9 C. W. N. 1065; 2 C. L. J. 259; 2 Cr. L. J. 637.
(7) 49 Ind. Cas. 647; 4 P. L. J. 154; 20 Cr. L. J. 199.
(8) 46 Ind. Cas. 41; 22 C. W. N. 499; 27 C. L. J. 465; 19 Cr. L. J. 681.
(9) 11 C. W. N. 835; 6 Cr. L. J. 36.
(10) 12 Ind. Cas. 838; 39 C. 150; 14 C. L. J. 429; 16 C. W. N. 83; 12 Cr. L. J. 569
(11) 28 A. 406; A. W. N. (1906) 61; 3 Cr. L. J. 323.
(12) 23 W. R. Cr. 45.

INDIAN IRON & STEEL CO., LTD. *v.* BANSO GOPAL.

Proceedings under section 145 of the Criminal Procedure Code would lie if the proceedings were confined to the boring operations.

It must be a dispute as to the same plots of land and between the same parties. Otherwise, section 145, Criminal Procedure Code, does not come in. Such is not the case here. The objection is that we are carrying on boring operations at one part of the land and the other party at another part of the land, I submit that proceedings under section 145, Criminal Procedure Code, cannot be taken in the present case.

The petitioners wanted to limit the proceedings to the spot where the boring operations were being carried on. But the other side objected to that. The petitioners made a petition to the Magistrate to that effect. He heard them but made no order. His action was rather to extend it. The petitioners have got license to bore only. If the petitioners have the mineral rights in the soil then they have the right to the land. The Legislature never contemplated proceedings under section 145, Criminal Procedure Code being taken where the dispute comprises the whole 5,000 *bighas* of land but where the dispute is confined to a particular spot.

The opposite party do not say that they have the mineral rights. Upon the Police report it is quite clear that boring operations are going on. As to the question of possession I refer your Lordships to *Glyn* v. *Hawell* (13). The same proposition has been laid down in *Davis* v. *Shepherd* (14).

Babu *Atulya Charan Bose*, for the Opposite Party.—I submit that the question does not involve the question of jurisdiction. I shall satisfy your Lordships that there is an apprehension of the breach of the peace. The two Police reports, as well as the institution of proceedings under section 145 of the Criminal Procedure Code by the Magistrate forbidding the two parties from fighting each other, show that there was sufficient ground for apprehending the breach of peace. The words "collecting men" imply collection not for boring purposes but for obstructing our works.

The only question is who is in actual possession. It is for the trying Magistrate to decide that. Refers to *Krishna Kamini* v. *Abdul Jubbar* (15) reading at page 194 and also at page 183. This is not a question of jurisdiction as suggested by the other side. Refers to *Beioy Nath Chatterji* v. *Bengal Coal Company, Limited* (12). I submit that this case is distinguishable from the present case. Refers to *Sajuddi Mandal* v. *T. L. Cork* (8).

Babu *Sarat Chandra Bose* for the Opposite Party.—As to the point raised by my learned friend regarding the mineral rights I submit that the learned Magistrate has jurisdiction to draw up the proceedings. Under section 145 the Magistrate has power to confine it to the dispute and the dispute must be a dispute concerning land. The dispute here is as to the subsoil of the *Mouzah* Parsundi. As soon as it is found that there is a dispute regarding land the Magistrate at once acquires jurisdiction. My party is in possession of the minerals. We have not only the constructive possession but the right of appropriating the minerals. Refers to Benridge on Minerals, at page 39. The Magistrate has jurisdiction as to the dispute which arises out of the Police reports. Under the circumstances, if the proceedings are confined to one place then it will give rise to a series of disputes and proceedings. Now the dispute is confined to one place, then the dispute will be shifted to another place then it will give rise to roving disputes all over the *Mouzah*. The evidence is that we are exercising acts of possession. Possession of minerals means the possession of the sub soil.

As for the question of adding parties I have not the slightest objection. That is not a question of jurisdiction.

Babu *Dasarathi Sanyal* in reply.—Refers to MacSwinney on Mines, at page 242, Chapter XII, 3rd Edition. The only dispute is as regards the right to bore. The Magistrate has no jurisdiction under section 145, Criminal Procedure Code. The only documents to be relied upon are the two Police reports. Refers to *Queen-Empress* v. *Gobind Chandra Das* (5). The present case does not come under section 145 but it may come under section 147. The dispute is as to the right of boring Then, the question may be regarded from another point of view. In view of the *mokarraridars* refers to *Kali*

(13) (1909) 1 Ch. 666 at p. 668; 78 L. J. Ch. 391; 100 L. T. 324; 53 S. J. 269.

(14) (1866) 1 Ch. 410; 35 L. J. Ch. 581; 15 L. T. 122.

(15) 30 C. 155 at p. 198; 6 C. W. N. 737.

Kissen Tagore v. *Anund Chunder Roy* (16). If the case does not come within section 145 then it ought to come under section 147. Refers to *Bathoo Lal* v. *Domi Lal* (17), *Kali Kisen Tagore* v. *Anund Chunder Roy* (18). These cases lay down that the parties should be bound down to keep the peace.

Babu *Manmatha Nath Mukerjee* in reply.—So far as the Maharaja of Burdwan is concerned, my submission is that the name is not mentioned in the Police reports. He has given the Company the mining lease. Unquestionably, upon the authorities as they stand, the mineral rights belong to the Zamindars. My party has not done anything to break the peace. Messrs. Low and Co. has taken a lease from a party who has no right to the minerals. The Court in taking proceedings under section 145, Criminal Procedure Code, is exercising a jurisdiction in which it must take all the surrounding circumstances into considerations. The Court does not exercise its jurisdiction properly when it knows that the order that will be passed is an order under section 145. Relies strongly upon the case in *Bejoy Nath Chatterji* v. *Bengal Coal Company Limited* (12). The dispute is as to the possession of mineral rights and the Magistrate draws up proceedings with regard to the whole of 5,000 *bighas* of land. I submit that the Magistrate has committed an error in drawing up proceedings under section 145, Criminal Procedure Code.

As regards the *mokurraridars*, they made a petition to be made parties. They were not made parties. The order is without jurisdiction. Refers to section 145 of the Criminal Procedure Code, clause (4). If a man's property is affected and a proceeding under section 145 is drawn up and the man is not made a party, the only reason being that his name does not appear in the Police report, then it is intolerable. It is not necessary that the *mokurraridars* should have possession, it is sufficient that they have some interest in it. Refers to the case in *Harak Narain Singh* v. *Luchmi Bux Roy* (18) in support of his contention. Also refers to a case in *Krishna Kamini* v. *Abdul Jubbar* (15), where proceedings are taken and a man comes and asks to be made a party, then it is a question of jurisdiction, and the Magistrate acts without jurisdiction if he is not made a party under the circumstances no proceedings can be taken under section 145. The case ought to come under section 107. Refers to *Chandra Kanta Kanjilal* v. *Emperor* (19). Discretion which the Courts have must be judicially exercised. Proper course which the Magistrate ought to have taken was under section 107. The case in *Bejoy Nath Chatterji* v. *Bengal Coal Company Limited* (2) has been followed in *Krishna Dhone Dutt* v. *Troilokia Nath* (20). It lays down that right to do a thing upon immoveable property is different from right to the property itself. This case is an authority upon that proposition and has been followed in many cases.

Then, with regard to the *mokurraridars* and *lakhirajdars* I submit that the order refusing to make them parties ought to be set aside. No case has been more misunderstood than the case in *Krishna Kamini* v. *Abdul Jubbar* (18). The jurisdiction of the Magistrate should depend upon the information he has received from the Police. Refers to the Full Bench case in *Sukh Lal* v. *Tara Chand* (21).

JUDGMENT.—In these three matters Rules were issued on the same day practically based on the same facts. They arise out of some boring operations in *Mouzah* Parsundi comprising of about 5,000 *bighas* of land (4,906 according to the Revenue Survey). The Iron and Steel Company, who are the first party in the proceedings under section 145 initiated on the 10th July 1919, obtained as petitioners, Rule No. 847 on the following allegations, namely, that the Maharaja of Burdwan was the *Zemindar* of the *Mouzah* and sole owner of the minerals and mineral rights therein. On the 9th September 1839 he granted a *putni* settlement of the *Mouzah* to certain persons shortly referred to as the Chatterjees and Misras. On the 5th April he authorised one E. J. Seth Sam on behalf of the Parsundi Mining Syndicate to go on with boring operations in the *Mouzah* pending execution and registration of a formal document and Seth Sam in his turn on the 12th April 1918 authorised the petitioners to carry on boring operations therein in a similar way. On the 27th September 1918

(16) 23 C. 557; 12 Ind. Dec. (N. S.) 370.
(17) 21 C. 727; 10 Ind. Dec. (N. S.) 1115.
(18) 5 C.L. R. 287.
(19) 36 Ind. Cas. 144; 20 C. W. N. 981; 17 Cr. L. J. 464.
(20) 12 C. 539; 6 Ind. Dec. (N. S.) 366.
(21) 33 C. 68; 2 C. L. J. 241; 9 C. W. N. 1046; 2 Cr. L. J. 618.

the Maharaja granted Seth Sam a formal document and Seth Sam in his turn executed and registered a similar document in favour of the petitioners on the 28th April 1919 confirming the authority given to them on the 12th April 1918. The petitioners further allege that they were peacefully and uninterruptedly carrying on boring operations in the *Mouzah* and were "in possession thereof both surface and underground, for boring purposes by bringing boiler and boring instruments, fitting machinery, building bungalows and cooly huts, driving bore-holes and bringing out coal and exercising various other acts of actual possession in other ways;" that the place where boring operations were actually going on, having been claimed by Protapchandra Mondal and others as *mokurarridars* the petitioners had acquired all their rights including mining and mineral rights, if any, by documents, dated 4th December 1918 and 1st February 1919. The petitioners further allege that one Mr. Sampson of H. V. Low & Company had joined hands with the *putnidars* and had obtained an *amalnamah* from them on the 22nd January 1919 to carry on boring operations in the said *Mouzah* and that he had commenced boring operations on the 31st March 1919 in another part of the *Mouzah*, that he had prevented carts carrying coal for the petitioners at a place outside the *Mouzah* about three miles from their boring site and a breach of the peace being apprehended the petitioners had informed the Police and that the Police thereupon submitted reports.

On the 19th May the Sub-Divisional Officer of Suri passed an order under section 144, Criminal Procedure Code, based upon the Police reports, dated 6th April 1919 and 16th May 1919, to the effect that a breach of the peace was likely at any moment. Therefore, he directed both parties to abstain from doing anything which might cause a breach of the peace.

On the 8th July 1919 he passed a fresh order that as the first party was trying to commit a breach of the peace in connection with their boring operations they were to be stopped carrying them on.

On the 9th July the Deputy Superintendent of Police reported that he had failed to effect an amicable settlement that "both parties were strong and apparently irrevocably imbued with the idea of righteousness of their claim and possession and as a breach of the peace was likely it was necessary to take action under section 107 or 145, Criminal Procedure Code, as soon as possible" and thereupon proceedings under section 145 were taken on the 10th July by the Sub-Divisional Officer "in respect of such portion of *Mouzah* Parsundi where the parties had set up their boring operations and all land in and around such places which they intended to be used for the boring operations." The order proceeded thus: "Let all these lands be attached by the Police till the disposal of this case. Let copies of the proceedings be served on the parties as well as the lands in dispute and all other places according to law."

The *putnidars* and Mr. Sampson and his employers were named as the second party. They put in a petition for amendment of the order and the proceedings were accordingly amended on the 1st August 1919. Other names wereadded and the boundaries of the entire *Mouzah* Parsundi were given as being the bonndaries of the subject-matter of dispute. The dispute was mentioned as "concerning certain boring operations carried on in *Mouzah* Parsundi" and the parties were directed to put in written statements of their claim regarding the fact of actual possession of the land in dispute.

On the 19th August the parties appeared and further applications were made for addition of parties on behalf of the second party and the same were granted and the proceedings were again amended. The dispute was mentioned as "concerning certain boring operations carried on at Parsundi for possession of the underground coal and other mineral products in the said *Mouzah*." It also directed that written statements were to be put in to the respective claims of the parties regarding the fact of actual possession of the land in dispute.

On that day the petitioners put in an objection against the maintainability of the said proceedings, contending that the only overt act from which a breach of the peace was apprehended proceeded from the side of the second party, namely, obstruction to carts carrying coal for the petitioners, and that action should, therefore, be taken under section 107, Criminal Procedure Code, and that no proceedings under section 145 were maintainable as the Police report did not

disclose any dispute as to possession of the entire *Mouzah*, but only as to the boring operations carried on in certain portions of the said *Mouzah* and that the proceedings if at all maintainable should be confined to those portions. They further contended that the *Zemindar* alone was entitled to the minerals and mineral rights and having been authorised by the *Zemindar* and having carried on boring operations, were in actual possession thereof and the second party having been mere wrong doers claiming title through the *putindars* who had no right to the minerals and mineral rights could not be said to have such a claim to possession as would justify proceedings under section 145.

The Sub-Divisional Magistrate overruled these objections and again amended these proceedings mentioning that the dispute was "concerning certain boring operations carried on in the *Mouzah* for possession of the underground coal and other mineral products in the said *Mouzah*" and written statements were again directed to be filed regarding the fact of actual possession of the land in dispute. Written statements were filed and evidence was directed to be produced on the 1st September 1919. The petitioners filed a list of 26 witnesses to be summoned on their behalf.

On the 1st September 1919 the second party verbally applied for a further amendment which was objected to by the petitioners but the Sub-Divisional Officer amended the proceedings for the fourth time stating that the dispute was "concerning possession of the under ground coal and other mineral products in the said *Mouzah*" and the parties were directed to put in written statements of their respective claims regarding the fact of actual possession of the land in dispute.

The petitioners applied for the inclusion of the *mokarraridars* whose rights they had acquired as additional parties, which was refused. The *mokarraridars* themselves applied to be added and they were also refused on the 1st September 1919 which is the subject-matter of Rule No. 870. They alleged that they were vitally interested in the subject-matter and that if the Maharaja of Burdwan had not got the mineral and mining rights they as *mokarraridars* had them and that they had transferred such rights to the first party petitioners.

The third Rule relates to the application of one Soshi Bhusan Tewari as one of the *lakherajdars* of certain portions of the *Mouzah*.

It is quite clear that the dispute is as regards the right to carry on boring operations in the said *Mouzah*. The first party petitioners claim such right upon a grant by the Zemindar, that Sampson, that is to say, Low & Company, on the other hand claim a similar right from the *putnidars*. The issue as between the Zemindar and the *putnidars* is as to whether there being no express mention of the mining rights and minerals in the grant by the *Zemindar* to the *putnidars* as alleged by the *Zemindar* the *putnidars* are at all entitled to such rights. The *Zemindar* relies upon the recent Privy Council rulings and asserts that the *putnidars* have no such right. The *putnidars* alleged that they have been in possession of the *Mouzah* from long before 1839 and prior to the decennial settlement, that one Mritunjoy Chatterjee had executed a registered *kabuliyat* in favour of the *putnidars* in December 1907 in respect of the underground right of Nij *Mouzah* Nakrakuda which includes *Mouza* Persundi and that Mritunjoy had let out such rights to the Indian Mineral Syndicate in March 1917 who in their turn had leased them out to the Tata Iron and Steel Co., Limited, and that the company were "in possession of the *Mouzah* both surface and soil by bringing boiler, boring instruments, fitting machinery and building bungalows and cooly huts, driving vehicles, sinking shafts and bringing out coal and exercising other divers acts of actual possession since June 1917;" that Low & Co. had taken a settlement of the surface and underground rights of *Mouzah* Parsundi from the *putnidars* the Chatterjees and *mokarraridars* the Misras and have been "in peaceful and undisturbed possession by making borings, sinking shafts, raising coal and testing fire clay and digging stones;" that Low & Co. having derived their title from the *putnidars* have been exercising acts of possession and were in actual possession of the minerals of the whole *Mouzah* by making borings and sinking shafts and raising fire clay and coal and other minerals since January 1919." They contend that the sole question for determination is as to who was in actual possession of the disputed land at the time of the initiation of these proceedings. The second party say that the first party have not carried on any boring operations although they may have collected machinery

and men for that purpose, but that they themselves had bored in at least four different places and that two of their shafts were about 90 and 116 feet deep, a fact reported to by the District Superintendent of Police on the 9th July 1919. They further contend that the dispute is as to the right to carry on boring operations over the whole of the *Mouzah* and not in respect of portions in which boring operations are said to be going on and that it is not possible to give the boundaries of the separate plots where the boring operations are said to be going on and that these proceedings should, therefore, cover the whole of the *Mouzah*.

The *Mouzah* was originally let out to *putnidars*. The *putnidars* have let out portions to *mokurarridars* and the *mokurarridars* have tenants under them. The *Mouzah* is a very large one. The surface appears to be in the actual possession of tenants.

The first party contends that there has been no dispute with regard to the boring operations carried on by the second party which have not been interfered with, and say that they do not intend to interfere with their boring operations where they are being carried on; that so far as their own boring operations are concerned the tenants at the place do not object; that they have got their consent; that there was no dispute between them and the tenants who were in actual possession of the tracts where they were carrying on their boring operations. Mere recital of the above facts shows that the question of title in this matter is one of considerable difficulty in this case and involves a construction of documents, determination of rights of land owners prior to the decennial settlement and after the permanent settlement, and the consideration of Privy Council cases. It also involves a consideration of what is meant by possession in such matters and the difference between actual and constructive possession in the case of mines and minerals. The fact that the proceedings were amended four times shows that the Magistrate had difficulty in his own mind as to how to word the nature of the dispute. The dispute is not only as between the *Zemindar* and the *putnidars* but also between the *putnidars*, *mokurarridars*, alleged *lakherajdars* and actual tenants. What the Court has to find in proceedings under section 145 is actual possession only. Actual possession of the surface where the boring operations may have to be carried on is presumably in the tenants of the land. Finding of such actual possession will not help the matter at all. Sinking of a shaft and touching coal may be said to give title to the underground seam, but it is not for a Criminal Court to deal with these matters. It is not the function of that Court to go into such complicated questions of title and possession including that of adverse possession and of constructive possession of wide areas inferred from actual possession of limited areas, based upon disputed contractual rights and obligations and contested by independent claimants. The actual disputants do not hold mining leases but merely prospecting licenses. We have seen copies of the *Amalnamah* of the second party and the prospecting licenses of the first party. A license to dig minerals confers no estate or interest in the soil or mine containing them. Nor does it confer any estate or interest in the minerals before they are actually gotten. A license to dig minerals, coupled with a grant to carry them away, is a profit *a prendre*, an incorporeal hereditament lying in grant, and if exercised by an actual taking of possession it may be the subject-matter of use and occupation; and (if exclusive) may be, and (even if non-exclusive) probably may be, the subject-matter of an action to recover possession.

The documents, so far as we have seen them, give the holders a right to bore and in the event of their finding coal certain terms are to be arranged between the parties and leases granted. I do not think that, in a case like this, the dispute is one concerning land involving a question of actual possession. What is actually in possession of the parties is not in dispute, but what has given rise to the dispute between the parties is the right claimed by the first party, petitioners, and the second party, Low & Co., to bore holes for prospecting purposes over the entire *Mouzah*. I do not think that the Court has jurisdiction in a matter of this character to go into questions of title and possession which will arise between the various parties claiming and interested in the land both surface and underground.

A somewhat similar case is that of *Bejoy Nath Chatterji* v. *Bengal Coal Company, Limited* (12). The learned Judges there held that, although Courts are anxious not to unduly

tie the hands of Magistrates who are responsible for maintaining the peace, the High Court has always so construed the provisions of section 530 (corresponding to our present section 145) and the corresponding provisions of earlier enactments on the same subject, as to take care that the Magistrates do not volunteer decisions on question properly cognisable by other Courts and unnecessarily complicate investigations which afterwards take place in those Courts. That case related to a dispute regarding the right to dig for coal on some land comprised within the limits of the *Mouzah* which belonged to the proprietors under whom both the contending parties claimed. In that case the question of actual possession of the whole *Mouzah* was raised and it was asserted by one party that they were in possession of the whole of that property. It was clear in that case, upon the terms of the document relied upon, that all that the Coal Company took under the grant was the right to dig for coals under such portions of the estate as might be found fit for the purpose. Such right was distinctly limited to purposes ancillary to the working of coal underground. The learned Judges there say that the jurisdiction of a Magistrate under section 530 is defined in these words, "that if he is satisfied that a dispute likely to induce a breach of the peace exists concerning any land or the boundaries of any land or concerning any houses, water, fisheries, crops or other produce of land within the limits of his jurisdiction, he is directed, without reference to the merits of the claims of any party to a right of possession, to proceed to enquire and decide which party is in possession of the subject of dispute." It is practically the same thing under the present section. The learned Judges held that the possession in regard to which a Magistrate's jurisdiction under section 530 should be exercised must be of a real and tangible character. They thought that when a party claimed under a document or agreement the right of doing certain things over a large extent of territory, the performance of acts under such alleged right in one portion of the ground over which the right extends, although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a civil suit, was not of itself a sufficient possession on which the Magistrate's order under section 530 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession, though at variance with the right. They thought that the Magistrate was not the proper forum for determining such questions. I take the same view in this case.

One is always extremely unwilling to interfere with the orders of a Magistrate who is the proper authority for maintaining the peace, but I am of opinion that the same object can well be attained in this case by taking proceedings under section 107, Criminal Procedure Code. It is said that such proceedings may be infructuous as the man bound down may be immediately changed and re-placed by another set. There is no difficulty in binding down the principal officers in charge and any change in the officers can be immediately supplemented by taking proceedings against the re-placed men. Some vigilance is to be expected from the authorities. There has been no disturbance of any kind for a considerable number of months. No doubt there is a statement in the report that men had been collected on both sides; but it is clear from the report itself that such men had been collected for the purpose of carrying on mining operations. They are not mentioned as *lathials* and no reference is made that these men (coolies) who have been brought upon the land for the purpose of carrying on the boring operations have committed any unlawful acts. The only unlawful act mentioned is the stoppage of the first party's cart by the second party three miles away from the spot where they were preparing to carry on boring operations, and outside the *Mouzah* in question.

I am sorry that my learned colleague is of a different opinion. He thinks that the matter is concluded by the fact that the report shows that there is a likelihood of a breach of the peace and the dispute concerns land. He is opinion that if the Magistrate is unable to find possession he will act under section 146, if necessary, and that at this stage we ought not to interfere. I am of opinion that proceedings under section 146 with regard to such a

large *Mouzah* may cause great injustice to the persons in actual occupation. It strikes me also that if proceedings under section 107 may be rendered nugatory by re-placing the men bound down by different sets of men, proceedings under section 145 may also be made nugatory by persons who are not actual parties to these proceedings. All the persons interested in the *Mouzah* are not before the Court. The *mokurari-dars* and *lakhrajdars* and actual tenants of the whole *Mouzah* are not before the Court.

While I feel that it is our duty to support a Magistrate in orders passed by him to prevent breaches of the peace, it is also a duty cast upon us to see that proceedings are adopted which are simple in their nature and which may be summarily and expeditiously dealt with. I think that proceedings under section 107 ought to be adopted. We agree with the ruling of this Court in *Moniram Bewah* v. *Mirjan Sardar* (22), that in such matters the Senior Judge's opinion prevails as the jurisdiction exercised by this Court is under section 107 of the Government of India Act of 1915, and not under the revisional sections of the Criminal Procedure Code.

We direct that the proceedings under section 145 are to be set aside and that the Magistrate will take proceedings under section 107 if so advised, and if he considers the same necessary. All the three Rules are made absolute.

Rules made absolute.

(22) 54 Ind. Cas. 169; 24 C. W. N. 97; 31 C. L. J. 183; 21 Cr. L. J. 25; 44 C. 438.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 414 OF 1920.

August 16, 1920.

Present :—Mr. Justice Gokul Prasad.

MOLAI AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 379—Attachment of property without warrant—Property removed by owner—Offence, whether committed.

Accused having failed to repay a *takawi* advance, his property was attached, but the attaching officer had not with him, at the time of the attachment, a warrant of attachment : the property was subsequently ordered to be sold when it was discovered that the accused had removed it, he accordingly was placed on his trial and convicted under section 379 of the Penal Code :

Held, that as the attaching officer had not with him a warrant of attachment at the time he attached the property there was no valid attachment and, consequently, the conviction of the accused could not be sustained. [p. 412, col. 1.]

Criminal revision from an order of the Additional Sessions Judge, Allahabad, at Mirzapur, dated the 26th June 1920.

Mr. *Uma Shanker Bajpai*, for the Applicants.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision against an order of the Sessions Judge of Allahabad, confirming an order of Mr. Radha Mohan, Magistrate First Class of Mirzapur, which has arisen under the following circumstances :—*Takawi* loan was advanced to a certain number of persons on there joint and several responsibilities Except two, all the debtors repaid the advances made to them. So far as these two debtors were concerned, the Tahsildar made a report that efforts had been made to realise the loans but with no result. He solicited orders for the attachment of the property and obtained the necessary orders from the Magistrate of the district. He directed the *qurkamin* to make the attachment and the property was attached and put by the *amin* in charge of a *shahna*. The attachment having produced no effect, the *amin* was directed by the Tahsildar to sell the property and, when he arrived at the spot, it was reported by the *shahna* that the property (crops) was taken away by the owners, that is, the accused. The defence taken was that wild boars had destroyed the crops, but the first Court came to the conclusion that the accused committed the offence of theft inasmuch as they removed the property which was in possession of the *shahna* and that the story of the property (crops) having been destroyed by wild pigs was a myth. The applicants in revision went up in appeal to the Additional Sessions Judge and it was argued before him that, inasmuch as there was no valid attachment, there was no theft. The learned Additional Sessions Judge, in the course of his judgment, says that "when the

qurkamin took standing crops into his custody and placed it in the custody of *shahna* that amounts to attachment. Besides, all the accused admit that the property was attached," and he maintained the conviction. I am surprised to see this new proposition of law laid down by the learned Additional Sessions Judge of Mirzapur. The rules regulating recovery of *takawi* loans are embodied in section 5 of Act XII of 1884, and lay down that the same procedure has to be observed as in the case of arrears of Government revenue. Section 149 of the Land Revenue Act No. III of 1901 lays down that "every attachment and sale ordered under this section shall be made according to the law in force for the time being for the attachment and sale of moveable property under the decree of a Civil Court." So far as the Civil Courts are concerned, there can be no legal attachment unless the attaching officer has in his possession a warrant of attachment issued by a competent authority. In the present case it is *admitted that there was no warrant at all*; therefore, the attachment if it could be called so, under cover of the order of the Tahsildar was no attachment in law. The mere fact that the accused thought that there had been an attachment does not make the attachment a valid one. The remarks of the learned Additional Sessions Judge are incomprehensible. There having been no valid attachment effective in law, there was no transfer of legal possession and the property continued to be, in the eyes of the law, in the possession of the accused. Therefore, the accused could not be said to have committed theft. I am supported in this view of the validity or otherwise of the attachment by the case of *Emperor* v. *Ganesh Lal* (1). I am in full accord with the reasons given by Aikman, J., in that case. I am informed that the *takawi* due has been paid since but that, of course, does not influence my decision stated above. I, therefore, quash the conviction, set aside the sentence and direct that their bail bonds be discharged,

Conviction quashed.

(1) 27 A. 258; A. W. N. (1904) 229; 1 Cr. L. J. 896; 1 A. L. J. 525.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1040 OF 1920.

October 30, 1920.

Present:—Mr. Shadi Lal, Chief Justice.

EMPEROR—PETITIONER

versus

SUHELA—RESPONDENT.

Restriction of Habitual Offenders (Punjab) Act (V of 1918), s. 8—Order of restriction for period exceeding one year—Confirmation by Sessions Judge, whether necessary.

An order of restriction for a period exceeding one year passed under the provisions of the Restriction of Habitual Offenders (Punjab) Act does not stand in need of any confirmation by the Sessions Judge. [p. 418, col. 2.]

Case reported by the Sessions Judge, Karnal, with his No. 876 of 3rd July 1920.

GROUNDS.—Notice was issued to the accused Suhelu, a Gujar of *Mauza* Asan Kalan, Tahsil Panipat, to show cause why he should not be required to furnish a bond for Rs. 500, with one surety in a like sum, to be of good behaviour for three years, or to be restricted for a period of three years.

On the 14th May 1920 Mr. E. A. Penhearow, exercising powers of a Magistrate first Class, in the Karnal District, passed an order directing that the said Suhelu be restricted in his movements to his village Asan Kalan for a period of three years, and submitted the record of this case to this Court for confirmation of his order.

The case coming up for hearing in this Court on the 14th June 1920, the file was returned to the Magistrate on the ground that the Habitual Offenders (Punjab) Act V of 1918 did not require confirmation by the Sessions Judge of any order by a Magistrate restricting an accused for a period exceeding one year. As, however, some more cases of the same nature have been referred to this Court, I have deemed it expedient to obtain the file of Suhelu's case again from the Magistrate's Court with a view to referring the question to the High Court for a ruling.

Under section 123, Criminal Procedure Code, a reference is made to the Sessions Judge only in those cases where the accused, having been ordered to furnish security for a period exceeding one year, fails to do so and is committed to prison in consequence.

ZIAULLAH KHAN v. EMPEROR.

I am unable to find anything in the Habitual Offenders (Punjab) Act which makes the provisions of section 123, Criminal Procedure Code applicable to proceedings under it. Section 8 (1) merely empowers a Sessions Judge in a case referred under section 123, Criminal Procedure Code, to substitute an order of restriction for one requiring the accused to furnish security.

Under the Criminal Procedure Code an appeal lies to the District Magistrate from an order passed under section 118, but no appeal whatsoever is provided for against an order passed by the Sessions Judge under section 123 (3) of the Code. That order is an original one and not simply one of confirmation of the Magistrate's order. Under section 13 of the Habitual Offenders (Punjab) Act, the District Magistrate has power to hear appeals against orders of restriction passed by any Magistrate in the district.

This does not include an order passed by a Sessions Judge under section 8 (1) of the Act. If, then, a Magistrate passes an order of restriction for a period exceeding one year and such order is confirmed by the Sessions Judge the original order being that of the Magistrate, an appeal would still lie to the District Magistrate notwithstanding the order of the Sessions Judge confirming that of the Magistrate. Such a state of things was surely never contemplated by the Legislature.

For the reasons given, I refer the question as to whether an order of restriction for a period exceeding one year, passed by a Magistrate under the provisions of the Habitual Offenders (Punjab) Act V of 1918, requires to be confirmed by the Sessions Judge, to the Hon'ble Judges of the High Court for orders.

Sardar Bahadur Sardar *Mehtab Singh*, Public Prosecutor, for the Petitioner.

ORDER.—The question for determination in this case is, whether an order of restriction for a period exceeding one year passed by a Magistrate under the provisions of the Restriction of Habitual Offenders (Punjab) Act, (V of 1918), requires confirmation by the Sessions Judge. Now, I have perused the relevant sections of the aforesaid Act and am unable to discover any provision which requires the Magistrate to submit the proceedings to the Sessions Judge for his confirmation. It is true that in the Criminal Procedure Code there is a provision, contained in section 123, which makes it obligatory upon the Magistrate to submit the proceedings in connection with an order requiring a person to furnish security to the Sessions Judge for confirmation, but that provision applies only to a case where the period for which security is demanded exceeds one year and the person against whom the order is passed does not comply with it. In that case, failure to furnish security renders the man liable to imprisonment, and probably it was for this reason that the Legislature provided that a superior Court should examine the proceedings before the man is sent to jail.

Now, that reason is wholly wanting in the case of a person whose movements are restricted under Act V of 1918. If he disobeys the order, then he cannot forthwith be sent to jail. He can be only prosecuted, and the propriety of conviction can be questioned on an appeal from the order of conviction. It is, therefore, clear that there is no danger of a person dealt with under the aforesaid Act to be sent to jail without the Appellate Court adjudicating upon the question whether the order of imprisonment is or is not justified.

Accordingly, I am of opinion that the order of restriction for a period exceeding one year passed under the provisions of Act V of 1918 does not stand in need of any confirmation by the Sessions Judge.

Order accordingly.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 410 OF 1920.

August 20, 1920.

Present:—Mr. Justice Gokul Prasad.

ZIAULLAH KHAN AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Magistrate, power of, to proceed against person within jurisdiction, whose residence is outside jurisdiction.

ADEPU REDDI *v.* RAMAYYA.

The fact that a person is within the territorial limits of the jurisdiction of a Magistrate when an apprehension of a breach of the peace arises, is sufficient to give the Magistrate jurisdiction to bind such person over under section 107 of the Criminal Procedure Code, and such jurisdiction is not ousted merely because the person to be bound over has his place of residence outside the jurisdiction.

Criminal revision from the order of the District Magistrate, Basti, dated the 16th of February 1920.

Mr. *M. L. Agarwala*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The only point raised in this revision is that the Magistrate had no jurisdiction to bind over the accused under section 107 of the Criminal Procedure Code, inasmuch as the accused does not reside within the territorial limits of his jurisdiction. It is true that in the case of a Magistrate of the first Class one of the necessary requisites to authorise him to pass an order under section 107 of the Criminal Procedure Code is that the person informed against and the place where the breach of the peace or disturbance is apprehended are within the local limits of the Magistrate's jurisdiction. The contention on behalf of the applicants is that the accused are residents of a place outside such jurisdiction and, therefore, the Magistrate had no power to bind them over to keep the peace under section 107 of the Crimimal Procedure Code. I cannot agree to this contention. The words "is" and "are" used in this section have been the subject of several cases and have been held to be synonymous with "resides" and "reside" *vide Rajendro Chunder Roy Chowdhry, In the matter of the petition of* (1): *Dinonath Mullick* v. *Girji Prosonno Mookerjee* (2) and *Jaiprakash Lal, In the matter of the petition of* (3). It has been further held in the case of *Shama Charan Chakravarti* v. *Katu Mundal* (4) that temporary residence is sufficient to give a Magistrate jurisdiction to act under that section. It has been found that in the present case the accused were within his jurisdiction when the apprehension of the breach of the peace arose and I do not see how it can reasonably be said that the order passed by him was *ultra vires*. If the interpretation contended for by the learned Vakil, who appears for the applicants, is correct it simply means that the administration of justice would in some cases be impracticable, and a man residing on the boundary of a particular district cannot be prevented from making preparations for committing a breach of the peace in that district although he might be going there every hour of the day. This will seriously interfere with the administration of justice. I agree with the view of the Calcutta High Court referred to above and hold that the Magistrate had jurisdiction to bind over the accused for keeping the peace. The application is rejected.

Application rejected.

(1) 11 C. 737; 10 Ind. Jur. 221; 5 Ind., Dec. (N. S.) 1250.

(2) 12 C. 133; 6 Ind. Dec. (N. S.) 91.

(3) 6 A. 26 (F. B.); A. W. N. (1883) 208; 3 Ind. Dec. (N. S.) 641.

(4) 24 C. 344; 1 C. W. N. 129; 12 Ind. Dec. (N. S.) 897.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 18 OF 1920.
(CRIMINAL REVISION PETITION NO. 16 OF 1910).
March 19, 1920.

Present :— Mr. Justice Oldfield.

A. B. ADEPU REDDI—ACCUSED—PETITIONER

versus

K. RAMAYYA—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 517, 522, applicability of—Force, use of, proof of.

Section 517 of the Criminal Procedure Code is limited in its application to moveable property. [p. 415, col. 1.]

In order to make section 522 applicable to immoveable property it is not necessary that force should be an ingredient of the offence of which the accused is convicted, provided the use of force appears from the evidence. [p. 415, col. 1.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub Divisional First Class Magistrate, Rajampet, dated the 16th December 1919, in Criminal Appeal No. 63 of 1919 preferred against the judgment of the Court of the Third Class Magistrate of Rajmpet, dated the 31st October 1919, in Criminal Case No. 416 of 1919.

MAHAR SINGH *v.* EMPEROR.

Mr. *N. Chandrasekhara Aiyar*, for the Petitioner.

Mr. *L. A. Govindaraghava Aiyar*, for the Complainant.

The Public Prosecutor, for the Government.

ORDER.—The Deputy Magistrate has held, on the strength of a Lower Burma ruling, that section 517, Criminal Procedure Code, applies to immoveable property. He should confine himself to the rulings of the High Courts in which, for the present purposes, he would have found ample guidance. See *Baisureswar Singh* v. *Bhola Nath Pathuk (Emperor)* (1) and *Ahmed Ali* v. *Keenoo Khan* (2). Section 517 must be regarded as applying to moveable property only and the only question is, whether section 522 is applicable.

It is not necessary, in order to its applicability, that force should be an ingredient of the offence of which accused is convicted, if the use of force appears from the evidence. There seems in the present case to be evidence, on which a finding in favour of the use of the criminal force can be reached. The Deputy Magistrate's order as to possession is set aside and the case remanded, so that it may be restored to the file and the appeal, so far as it relates to possession, may be re-heard in the light of the foregoing. The petition is dismissed so far as it relates to the conviction.

M. C. P.

Petition dismissed as to conviction ;

Order set aside as to possession.

(1) 22 Ind. Cas 751; 18 C. W. N. 1146; 15 Cr. L. J. 175.

(2) 1 Ind. Cas. 202; 36 C. 44; 13 C. W. N. 77; 9 Cr. L. J. 294.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 466 OF 1920.

September 29, 1920.

Present :—Mr. Justice Gokul Prasad.

MAHAR SINGH AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 537 (a)—Warrant for arrest of woman in abduction case—Magistrate omitting to record reasons for issue of warrant—Irregularity.

The omission by a Magistrate to record, in the first instance, his reasons for issuing a warrant of arrest against the alleged abducted woman in a case under section 498 of the Penal Code, amounts to a mere irregularity within section 537 (*a*) of the Criminal Procedure Code. [p. 416, col. 1.]

Criminal revision from an order of the District Magistrate, Moradabad, dated the 23rd of June 1920.

The Hon'ble Mr. *Raza Ali*, for the Applicants.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—It seems that in the early part of February last one Niadar made a complaint against Mawashi and Naurang under section 498 of the Indian Penal Code for the abduction of his wife, *Musammat* Hardei. The Magistrate examined the complainant and, on the complainant stating that a warrant should be given to him for bringing the woman to the Court or else the accused would remove her from their house, the Magistrate issued a bailable warrant for her arrest. Two constables accompanied the complainant and arrested the woman. No one stood surety for her and, as they were taking the woman along, the accused came up and rescued the woman, but very little hurt was caused to the policemen. They were tried by a Magistrate of the second Class and convicted. They went up in appeal to the District Magistrate who dismissed the appeal saying that there was no cause for interference as the offence had been brought home to them. The points raised before me in revision are two,—(1) That the order for the arrest of the woman who was not an accused person was illegal, and (2), that the Magistrate had not recorded his reasons in writing as is required by the express provisions of section 90 of the Criminal Procedure Code. The case of *Sukheswar Phukan* v. *Emperor* (1) is quoted in support of this contention. I have not been referred to any decision of this Court on the point. I have carefully gone through the case above-mentioned. The Calcutta case was decided *ex parte* in the absence of any appearance on behalf of the Crown. The only thing to guide the Judges in that case was the order sheet. The provisions of section 537 of the Criminal Procedure Code were not even noticed. In the present case it appears that the complainant, when being examined, expressly stated that

(1) 11 Ind. Cas 593; 38 C. 789; 15 C. W. N. 1001; 15 C. L. J. 186; 12 Cr. L. J. 409.

the accused would remove the woman, if they came to know that her presence was required by the Court. This being sworn to, the Magistrate was justified in passing the order for a warrant which he did. Having regard to the provisions of section 537 of the Code of Criminal Procedure, clause (*a*), I think that the mere omission in the present case in recording the reasons for the issue of a warrant in the first instance amounted to a mere irregularity, and would not vitiate the proceedings. It is not shown that, from any point of view, the accused has in any way been prejudiced. I would, therefore, affirm the conviction and sentence and dismiss the application. The accused must surrender to his bail to serve out the remainder of his sentence.

Application dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE NO. 1092 OF 1920.

October 29, 1920.

Present :—Mr. Justice Chevis.

TAQI SHAH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 256—Accused, right of, to summon prosecution witnesses for cross-examination—Magistrate, whether can direct payment of costs.

Section 256 of the Criminal Procedure Code gives the accused an absolute right to re-call prosecution witnesses for cross-examination at the expense of the prosecution, and it is not open to the Magistrate to order the accused to pay costs for re-calling those witnesses.

Case reported by the Sessions Judge, Rawalpindi, with his No. 932 of 17th July 1920.

FACTS.—Taqi Shah, who is accused in a case under section 498, Indian Penal Code, in the Court of Sardar Hira Singh, Assistant Cantonment Magistrate Rawalpindi, applied to re call prosecution witnesses for cross-examination after the charge. The Magistrate, by his order, dated 3rd June 1920, ordered the petitioner to deposit the costs of witnesses belonging to the Jhelum District.

GROUNDS—Section 256, Criminal Procedure Code, gives the accused an absolute right to re-call prosecution witnesses for cross-examination at the expense of the prosecution. Section 257, Criminal Procedure Code, quoted by the Magistrate has, I think, no application. The petitioner complains of bias on the part of the Magistrate. The case seems to involve a Hindu-Muhammadan question.

I forward the files to the High Court for such orders as the Hon'ble Judges may think fit to pass.

Mr. *Abdul Razaq*, for the Petitioner.

ORDER.—In this case charge was framed, and the accused was then asked if he wanted to re-call prosecution witnesses for cross examination. He said he did. The Magistrate then said he must pay costs for re calling these witnesses.

This is wrong. Section 256, Criminal Procedure Code, lays down that the witnesses must be re-called, and after cross and re-examination, discharged. The remaining prosecution witnesses (if any) are then to be examined. And then the accused shall be called upon to enter upon his defence and produce his evidence. Section 257 only relates to the stage after the accused has entered upon his defence.

I direct that the prosecution witnesses whom the accused wishes to cross-examine be re-called for the purpose at Government expense.

With regard to the concluding portion of the learned Sessions Judge's order of reference I note that, if the accused wishes the case to be transferred to the Court of another Magistrate, it is open to him to present an application to the District Magistrate

Order accordingly.

THAYARAMMAL v. LAKSHIMI AMMAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 940 OF 1919.

March 29, 1920.

Present :—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

THAYARAMMAL - PLAINTIFF — APPELLANT

versus

LAKSHIMI AMMAL AND ANOTHER — DEFENDANTS—RESPONDENTS.

Specific performance—Sale-deed inoperative for non-registration—Deed, whether can be regarded as agreement to sell—Suit for specific performance, whether maintainable.

A sale-deed which becomes inoperative by reason of non-registration owing to the plaintiff's default cannot be treated as an agreement to sell and thus form the basis of a suit for specific performance of the contract of sale.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Vellore, in Appeal Suit No. 13 of 1918, preferred against the decree of the Court of the District Munsif, Ranipet, in Original Suit No. 470 of 1916.

FACTS appear from the judgment.

Mr. *P. R. Srinivasa Aiyangar*, for the Appellant.—The sale-deed having been executed, the vendee plaintiff is invested with a right to effectuate it. Courts could allow the document that is incomplete for want of registration to be completed and made effective. There is an implied agreement in the document which the plaintiff could enforce. See *Titali Venkata Seetharamaya* v. *Vedula Venkataramaya* (1). Directly there was execution the vendee acquires his rights.

Mr. *C. V. Anantha Krishnier*, for the Respondents.—The document has become inoperative owing to non-registration and plaintiff cannot base any rights on it. He has deliberately refrained from presenting the document for registration and he is precluded, after the expiry of the period, either to ask for its registration or for execution and registration of a new document.

The document which purports to be a completed sale cannot be treated as an agreement to sell. Plaintiff cannot seek for any remedy on the basis of such an implied agreement. See *Venkatasami* v. *Kristayya* (2). The opinion to the contrary in *Titali Venkata Seetharamaya* v. *Vedula Venkataramaya* (1) is an *obiter*.

JUDGMENT.—Exhibit A. was executed by the 1st defendant to the plaintiff and he was given possession of it. It is in terms a sale-deed but it was not registered. The finding is that the plaintiff made default in the payment of the purchase-money and the document was not, therefore, registered. He now sues to enforce specific performance of an agreement which, according to him, is implied in the sale deed, Exhibit A. The question for consideration is, whether it is open to the plaintiff to regard Exhibit A; which has become inoperative by reason of non-registration, as an agreement to sell. In our opinion this remedy is not open to the plaintiff. He could have presented the document for registration under section 32 of the Registration Act and could have enforced the attendance of the 1st defendant to admit execution under section 36 of the same Act. If there was a refusal to register, he could have enforced his further remedies in this behalf under the Act. If he failed to take advantage of these provisions of the law, it is not open to him to ignore the plain terms of the document and to read into it an agreement to sell which was superseded by the conveyance itself. It is true that Courts of Equity would assist a plaintiff to effectuate an incomplete title, if the default is due to act of God or conduct amounting to fraud on the part of the executant. But here no default is attributable to the 1st defendant. On the other hand, it is the default of the plaintiff in not paying the consideration that led to the document remaining unregistered. This case is within the principle of *Venkatasami* v. *Kristayya* (2). There it was held that, when the plaintiff did not avail himself of the remedies provided by the Registration Act, he is not entitled to ask either that the document should be registered or that a new document should be executed and registered.

This decision has not been dissented from in this Court hitherto. The *obiter dictum* in *Titali Venkata Seetharamaya* v. *Vedula Venkataramaya* (1), that such a document can be treated as an agreement to sell was pronounced without adverting to *Venkatasami* v. *Kristayya* (2). In Calcutta

(1) 15 Ind. Cas. 334; 37 M. 418.
(2) 16 M. 341; 3 M. L. J. 169; 5 Ind. Dec. (N. S.) 945.

there are direct authorities against the Madras view. But, with all deference, we fail to find the principle on which the contrary view can be based. The learned Judges apparently misunderstood the view taken in *Chinna Krishna Reddi* v. *Dorasami Reddi* (3), in saying that *Venkatasami* v. *Kristayya* (2), was dissented from. We are, therefore, not prepared to follow *Surendra Nath Nag* v. *Gopal Chunder Ghosh* (4), in preference to *Venkatasami* v. *Kristayya* (2). In *Amar Chand* v. *Nathu* (5) it is not shown who had the document and whether there was a suppression of it. On the whole, it seems to us that there is no ground for not acting on the principle of the decision in *Venkatasami* v. *Kristayya* (2). The second appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

(3) 20 M. 19; 7 Ind. Dec. (N. S.) 13.
(4) 8 Ind. Cas. 794; 12 C. L. J. 464.
(5) 7 Ind. Cas. 408; 7 A. L. J. 887.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 575 OF 1919.

March 1, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

PRANJIVANDAS NARSIDAS AND OTHERS —DEFENDANTS—APPELLANTS

versus

MIA CHAND BAHADUR—PLAINTIFF—RESPONDENT.

Dekkhan Agriculturists' Relief Act (*XVII of* 1879), *s.* 10 *A, proviso* 2, *applicability of*—Bona fide *purchaser for value without notice of less than twelve years' standing, whether protected.*

The object of the Legislature in enacting section 10A of the Dekkhan Agriculturists' Relief Act was to protect the mortgagor and not the transferee, if the mortgagor was sufficiently diligent in seeking to redeem the property. [p. 419, col. 1.]

The proviso does not protect a *bona fide* transferee for value without notice of the real nature of a transaction if he holds under a registered deed executed less than twelve years before the institution of the suit. [p. 418, col. 2.]

Appeal from the decision of the Assistant Judge, Surat, in Appeal No. 49 of 1918, confirming the decree passed by the Sub-ordinate Judge, Surat, in Civil Suit No. 26 of 1917.

Mr. *Y. V. Bhandarkar*, for the Appellants.

Mr. *K. N. Koyajee*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued for redemption under the Dekkhan Agriculturists' Relief Act alleging that the document, dated 6th March 1911, passed by him to the father of defendants Nos. 1 and 3 to 8 for Rs. 75 though in form a sale out and out was really in the nature of a mortgage. The defendant No. 9 obtained, on the 12th May 1905, a sale deed from defendants Nos. 1 to 8 for Rs. 525. It has been found by both Courts that the sale-deed in favour of Tyeballi, the father of defendants Nos. 1 and 3 to 8, was really a mortgage. Accordingly, a redemption decree was passed in favour of the plaintiff. The defendants Nos. 9 and 10 have appealed, and contend that the plaintiff ought not to have been allowed to redeem the mortgage of 1911 on the ground that defendants Nos. 9 and 10 were *bona fide* purchasers for value without notice from the heirs of Tyeballi.

The Appellate Court seemed to be of the opinion that defendants Nos. 9 and 10 had notice. But, except for the fact that Rs. 75 was mentioned as the consideration for the document of 1911, there was nothing that was brought to their notice which would put them on inquiry to ascertain whether, as a matter of fact, Tyeballi was a mortgagee or a purchaser. But the 2nd proviso to section 10A of the Dekkhan Agriculturists' Relief Act does not protect a *bona fide* transferee for value without notice of the real nature of a transaction if he holds under a registered deed executed less than twelve years before the institution of the suit. It has been contended that we ought not to read the proviso in that way, and that it has not been directly enacted that a *bona fide* transferee shall not be protected until after twelve years from the date of his title-deed. It is quite possible, from our point of view, that the intention of the Legislature might have been more clearly expressed. But it is difficult to see why this proviso was inserted unless it meant that a *bona fide* transferee for value without notice would only be

protected if twelve years had expired from the date of the transfer. If that is not the meaning and the effect of the proviso, then there was no necessity whatever for its insertion. If the ordinary rule under section 41 of the Transfer of Property Act applies that a *bona fide* transferee for value without notice is protected, where the owner of the property can succeed in proving that the document which he executed to the transferee's vendors was a mortgage and not a sale deed, then that rule would apply in spite of section 10A of the Dekkhan Agriculturists' Relief Act, and a *bona fide* transferee would in all cases be protected. But apparently the object of the Legislature in enacting section 10A of the Dekkhan Agriculturists' Relief Act was to protect the mortgagor and not the transferee, if the mortgagor was sufficiently diligent in seeking to redeem the property. In my opinion, the appeal should be dismissed with costs.

HEATON, J.—I concur. The judgment of the first Appellate Court is not, to my mind, altogether clear. It leaves me in doubt as to whether that Court really did find that the present appellant was a purchaser for value without notice. But I will assume, for the purpose of this judgment, that the appellant was a *bona fide* purchaser for value without notice, and that if the ordinary rule applied, *i. e.*, the rule contained in section 41 of the Transfer of Porperty Act, the appellant would be entitled to succeed. But I think that where section 10A of the Dekkhan Agriculturists' Relief Act applies, section 41 of the Transfer of Property Act ceases to have any application. It is re-placed by the 2nd proviso to section 10A. If that, is not the result, I confess I cannot conceive why section 10A was ever enacted. The fact that it is there, although it is not as explicit as it might be, seems to me to show quite clearly that the ordinary rule as to a purchaser for value without notice is abrogated. I find nothing surprising in this, for it has to be remembered that the rule in favour of a purchaser for value without notice is an exception to one of the fundamental rules of property, which is that the property belongs to its proper owner and cannot ordinarily pass away from its proper owner without the consent and active participation of that owner. But where you have an Act, such as the Dekkhan Agriculturists' Relief Act, which is intended to protect agriculturists, not only against the rapacity of money-lenders but also against adventitious circumstances which are likely to operate to the prejudice of an agriculturist on account of his ignorance, it is not, to my mind at any rate, in any way surprising to find that the rule which is legalised by section 41 of the Transfer of Property Act is abrogated altogether. I agree, therefore, that this appeal must be dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 375 OF 1918.

January 20, 1920.

Present:—Sir Henry Drake-Brockman, KT., J. C.

JAGANNATH—PLAINTIFF—APPELLANT

versus

BEHARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (*XI of* 1898), *s.* 41 (2)—*"Premium," meaning of—Sub-lease—Lessor agreeing to pay rent to creditor—Surrender of holding—Sub-lessee, right of, to possession—Joint family—One member tenant of holding—Other members, whether also tenants.*

The term "premium" in section 41 (2) of the C. P. Tenancy Act means a payment made in lump when a lease is granted or renewed and should not be pressed so as to make it include what is ostensibly a merely periodical payment. [p. 421, col. 1.]

On 3rd July 1914 *B.* with the consent of the *malguzar* executed a simple mortgage-bond of his absolute occupancy holding in favour of *L.*, and undertook to pay the amount due by 19 annual instalments. On the same day, *B.* gave a sub-lease to *L's.* son *J.* of the holding for 19 years and agreed to pay the rent to the *malguzar*, and to pay to *L.* the rent payable by the sub-lessee. On 8th July 1914, *B.* surrendered the holding to the *malguzar* for a consideration, and the *malguzar* let the land to *B's.* son for a *nazrana* who, through his mother and guardian, executed a sub-lease in favour of the *malguzar* for a term of two years. On 16th April 1917 *J.*, alleging that he had been illegally ejected in December 1914 brought the present suit for possession, and the question was whether the con-

sideration for the sub-lease to *J.*, *viz*, 19 annual payments, could be regarded as a premium :

Held, that the sub-lease to *J.* could not be treated as given in consideration of a premium and that he was entitled to possession thereunder. [p. 421, col. 2.]

The mere fact that one member of a joint family is a tenant of a holding does not make all the members of the family his co-tenants. [p. 421, col. 2.]

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 158 of 1917, dated the 24th April 1918

Mr. *V. R.* Pandit, R. B , for the Appellant.

Mr. *V. D. Sathaye*, for the Respondents.

JUDGMENT.—Behari, the first defendant in the case out of which this second appeal arises, owed money to one Lachhiram on a registered mortgage, dated the 6th September 1907. In 1914 an account was made and it was proposed that for the balance (Rs. 700) found due and future interest Behari should mortgage his absolute occupancy holding of which the rent is Rs. 16 10 6 per annum. The Malguzar having consented to this transaction, Lachhiram took, on the 3rd July 1914, a simple bond for Rs. 874 from Behari who undertook to re pay by 19 annual instalments of Rs. 46 each. The same day Behari gave Lachhiram's son, Jagannath, a sub-lease of the holding for 19 years. Under this document (Exhibit P-1) Behari agreed to pay the rent due to the Malguzar and stipulated that Rs. 46, the rent payable by the sub-lessee, should be handed over to Lachhiram to satisfy the latter's bond. The sub lease was registered forthwith. On the 8th July 1914 Behari surrendered the holding to the Malguzar for an ostensible consideration of Rs. 200 and the Malguzar then let the land to Behari's minor son, the defendant Babulal, for a *nazarana* of Rs. 200 Babulal, through his mother and guardian, at once executed a sub-lease in the Malguzar's favour for a term of two years.

Jagannath sued on the 16th April 1917 alleging that both the defendants illegally ejected him in December 1914. For each defendant a separate written statement was filed. Behari pleaded that the bond and sub-lease together constituted a device to evade the provisions of section 41, Central Provinces Tenancy Act, 1898; that the sub-lease was, therefore, unenforceable, and that the plaintiff did not obtain possession under the document. For the minor defendant it was urged that the consideration for the sub-lease was inadequate, Rs. 100 being a fair rent, but this is no longer of importance.

The Trial Judge dismissed the suit on the ground that the landlord's consent to the sub lease in favour of the plaintiff was essential and upon the surrender by Behari the sub-lease determined.

The plaintiff appealed to the District Judge who held that the sub-letting to the plaintiff was in consideration of a fine, or premium, of Rs. 874 and was, therefore, bad for want of notice to the landlord. The learned Judge considered that the plaintiff and his father, Lachhiram, being joint, the sub lease was merely a ruse for evading the necessity of giving notice to the landlord under section 41 (2) of the Tenancy Act. He also held on the evidence that the plaintiff never obtained possession and was, therefore, not dispossessed as alleged. The plaintiff has preferred this second appeal.

The defendant, Behari, has made no appearance in this Court. For the other defendant it is admitted that the question whether the plaintiff obtained actual possession of the holding is immaterial.

For the appellant it is urged that the consideration for the sub-lease in his favour consisted of rent proper, not of any fine or premium, within the meaning of those terms in section 41 (2) of the Tenancy Act, and that the transaction must, therefore, be held good, in spite of the surrender of the holding, in accordance with the well settled principle recognized in *Maharajsha* v. *Abheram* (1), *Saiyad Noor* v. *Ramji* (2), *Bhuray* v. *Vishwanath* (3) and *Baliram* v. *Ram Rao* (4). For the minor defendant-respondent, on the other hand, it is urged that the consideration for the bond in Lachhiram's favour should be regarded as a premium paid for the sub-lease.

The words 'fine' and 'premium' have not been defined in the Tenancy Act. In Stroud's Judicial Dictionary a fine is said to mean something which is to go irrevocably into the pocket of the person who requires

(1) 11 C. P. L. R. 5.
(2) 12 C. P. L. R. 158.
(3) 2 N. L. R. 170.
(4) 4 N. L R. 57.

it as a condition of consenting to an assignment, and in section 2 (*ix*), Conveyancing and Law of Property Act, 1881, 'fine' is said to include premium or foregift, and any payment, consideration or benefit in the nature of a fine, premium or foregift. The term 'premium' is used in section 105, Transfer of Property Act, for the purpose of defining a lease of immoveable property and, according to that section, the consideration may consist of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically to the transferor by the transferee. I think, then, that the term 'premium' should be regarded as the equivalent of the vernacular *nazarana* by which is commonly meant, a payment made in lump when a lease is granted or renewed. In these Provinces, it is usual when *nazarana* is taken to take also a periodical rent. The term 'rent' is defined in section 2 (8) of the Tenancy Act as meaning, whatsoever is paid in money, kind or service, by a tenant on account of the use or occupation of land let to him, and in this sense, may doubtless include a *nazarana*. In section 41 (2), however, the term 'premium' is evidently used in contradiction to rent and so, similarly, to its employment in section 105, Transfer of Property Act.

The question then to be considered is, whether the consideration for the sub lease, namely, 19 annual payments of Rs. 46 each, can be regarded as a premium. In this connection, I think, the Court should be guided by the terms of Exhibit P-1: it is where the consideration is plainly described as consisting of a periodical payment to the creditor. I would apply, in this connection, the principle laid down in *Beniprasad* v. *Mulchand* (5) that the restriction in section 41 (2) of the Tenancy Act should be strictly construed. The term "premium", therefore, should not be pressed so as to make it include what is ostensibly a merely periodical payment. If Behari had sub-let to a person unconnected with Lachhiram on terms identical with those in Exhibit P-1, I do not think it could possibly have been argued that the periodical payment constituted a premium. Why should the position be different merely because the sub-lessee is Lachhiram's son joint in estate with him? It is settled law in these Provinces that if one member of the joint family is tenant of a holding all the members are not necessarily his co tenants: see *Anant Ram* v. *Takatsingh* (6), *Gulabrao* v. *Sitaram* (7) and *Deochand* v. *Moti* (8).

For these reasons, I think the sub-lease to the plaintiff appellant should not be treated as given in consideration of a premium, and that he is consequently entitled to possession under his document. The decrees of the lower Courts are, therefore, set aside and, in lieu thereof, the defendants will be directed to put the plaintiff in possession of the land. There can be no doubt that the defendant Behari is responsible for this litigation: he must, therefore, pay the plaintiff's costs in all three Courts. The other defendant will bear his own costs in all Courts.

Appeal allowed.

(5) 6 Ind. Cas. 817; 6 N. L. R. 65.

(6) 4 C. P. L. R. 57.
(7) 8 C. P. L. R. 11.
(8) 1 N. L. R. 178.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 35 OF 1919.

March 3, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

SHRINIWAS KUPPUSWAMI MUDLIAR —OPPONENT—APPELLANT

versus

M. C. WAZ—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 104, O. XL, r. 4, O. XLIII, r. 1 (s)—Receiver—Order passing accounts—Order granting leave to sue Receiver—Appeal, whether lies—Suit, maintainability of.

Where a Court is seized with a particular matter under a particular rule, and an order under that rule is appealable, then the order actually made by the Court in that matter, whether it is a positive order or a negative order is also appealable. [p. 423, col. 1.]

An order passing a Receiver's accounts is an order made under rule 4 of Order XL of the Civil Procedure Code and is appealable under clause (*s*) of rule 1 of Order XLIII of the Code. [p. 423, col. 1.]

SHRINIWAS KUPPUSWAMI MUDLIAR v. WAZ.

No appeal lies against an order granting leave to sue a Receiver. Where the Court appointing a Receiver has gone into the accounts filed by the Receiver and has passed them, overruling the objections of the party impugning the accounts, a suit will not lie against the Receiver for damages for negligence, etc., based on the same allegations which have already been considered and overruled. [p. 423, col. 1.]

Appeal from an order passed by the Additional First Class Subordinate Judge at Poona, in Miscellaneous Application No. 35 of 1919.

Mr. *B. J. Desai* (with him *S. Y. Abhyankar*), for the Appellant.

The Hon'ble Mr. *T. Strangman*, Advocate General (with him Mr. *J. R. Gharpure*), for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The opponent, appellant in this case, was appointed Receiver in Suit No. 137 of 1913 which was a partnership suit. He applied for leave to pass his accounts and receive his remuneration. On the 26th October 1917, the plaintiff's Pleader in that suit raised objections that the Receiver had not done his work properly; that owing to the Receiver's conduct the defendant had misappropriated the goods to a great extent; that if the Receiver had done his duty carefully and punctually, and had properly made inventories of the goods, the goods could not have been misappropriated; that from the beginning the Receiver had been grossly negligent, and had also helped the defendant, and that under the circumstances he was not entitled to his fees for his services as Receiver, on the contrary he was liable for plaintiff's loss.

The record shows that, on the 22nd December 1917, the Subordinate Judge passed the following order:—"The accounts submitted by the Receiver from time to time examined. I find everything correct and regular. I see no reason whatever to doubt the *bona fides* of the same. Hence I order that the amount claimed by the Receiver for his fees and the expenses incurred by him be paid over to him out of the balance in the hands of the Nazir."

I think it must be taken that the learned Subordinate Judge considered the objection raised by the plaintiff to the Receiver passing his accounts, and it was open to him under Order XL, rule 4 to find that the Receiver had occasioned loss to the property by his wilful default or negligence and if he had found that the Receiver had been guilty, he could have directed the Receiver's property to be attached and sold and the proceeds applied to make good the loss.

More than a year after that order was made, the applicant, plaintiff in Suit No. 137 of 1913, applied to the Subordinate Judge, a different Subordinate Judge, for leave to sue the Receiver for damages caused to him by the negligence, laches, &c., of the Receiver. It is not suggested that the negligence or laches of the Receiver was in any way different from the negligence and laches alleged when the Receiver applied to pass his accounts. The Court has granted leave, although I doubt whether, if the application had been made to the same Subordinate Judge who had made the order of the 22nd December 1917, it would have been granted. All that the learned Subordinate Judge had before him, when he passed this order, was the allegation made by the applicant. Apparently, the learned Judge did not consider that those allegations had been made on the previous occasion and had been found to have no weight whatever by his predecessor.

The first question is, whether an appeal from that order giving leave to sue the Receiver lies. Admittedly, the order giving leave is not an order under the Court. But it is an order according to the practice of the Court. The Receiver is an officer of the Court, therefore, any action taken against a Receiver without leave of the Court is contempt. But, unfortunately, section 104 of the Civil Procedure Code only provides for appeals against orders specified in that section. Therefore, the preliminary objection that no appeal lies against this order must prevail.

Then it was suggested that we could deal with the matter under section 115 of the Code. But there also it is difficult to find that the learned Judge has exercised a jurisdiction not vested in him by law, or has failed to exercise a jurisdiction so vested or has acted with material irregularity. He had jurisdiction to entertain the application and it was in his discretion whether or not he should grant it. We cannot say that he acted with material irregularity in the exercise of his discretion,

But it seems to us that an appeal lay against the order of the 22nd December 1917. Though the order was not against the Receiver, it was an order really refusing relief against the Receiver, so an appeal lay because under Order XLIII, rule 1there is an appeal against an order under rule 4 of Order XL, and in *Zipru Talhoo* v. *Hari Supdushet* (1) it was held that an order made upon an application under rule 100 of Order XXI of the Civil Procedure Code, dismissing the application was an order made under rule 101. So that, where a Court is seized with a particular matter under a particular rule, and an order under that rule is appealable, the order made by the Court, whether it is a positive order or a negative order dismissing the application, is still appealable under Order XLIII, rule 1. Therefore, this order passing the Receiver's accounts was in fact a final order, and I should certainly like to express the opinion that the Court ought to protect its officers and to see as far as possible that they are not pestered with actions by parties to the suit who are not satisfied with their conduct, when they had every opportunity of making allegations against the Receiver at the time his accounts were passed. I do not say that all actions against persons who act as Receivers are to be excluded after their accounts are passed. There may be cases where the misconduct of a Receiver has been concealed, and could not have been ascertained even with due inquiry before the accounts were passed. When the Receiver applies to pass his accounts, then is the time for the parties to the suit to object to the accounts, and to make allegations of misconduct against the Receiver, and if the accounts are passed in spite of those objections, then the matter, as far as I can see, is decisive against those parties as far as the allegations which are made against the Receiver at that time. The appeal will, therefore, be dismissed, but, in the circumstances, without costs.

HEATON, J.—I concur in the order proposed. The matter of real importance and interest which has been the subject of argument before us is, whether a suit, in the circumstances of this case, will or will not lie against a Receiver. In my opinion, the suit will not lie. A Receiver was appointed and presented his accounts, and with it an application asking that his accounts be passed and his remuneration awarded to him, and in reply the plaintiff respondent objected. His application in objection has been read out by my Lord the Chief Justice, and I need not repeat it. But it follows that there was before the Judge a matter in dispute between the Receiver on the one hand, and the planitiff in the suit on the other, and this dispute concerned the performance of his duties by the Receiver, and the plaintiff alleged those very matters which the Judge, as is especially provided by rule 4 of Order XL, can take into account. The Judge, of course, considered whatever was placed before him when the matter came to be heard. The objections stated by the plaintiff were not made good. The accounts were passed, and the Receiver was allowed, to have his remuneration.

Now, was the order then made by the Judge an order under rule 4 of Order XL? I consider that Order XL is somewhat imperfectly framed, but I feel no doubt whatever that the order I speak of was an order made under rule 4. If we turn to section 94 of the Code, we find it is provided that in order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, appoint a Receiver of any property and enforce the performance of his duties by attaching and selling his property. "So prescribed" means prescribed by the rules, and it is prescribed by the rules that a Receiver may be appointed, and it is further prescribed by the rules that the performance of his duties may be enforced by attaching and selling his property. That appears from rule 4 of Order XL which I have already referred to. It is clear also that the order made by the Court was an order in a matter in which the Court had to determine whether the Receiver's duties had been properly performed, and, if not, it was a matter in which the Court had power to enforce the proper performance, or, as it may be otherwise stated, to punish the non-performance, of the Receiver's duties by an order relating to his property. If that was the nature of the proceedings, then the order was either an order under rule 4 of Order

(1) 42 Ind. Cas. 73; 19 Bom. L. R. 774; 42 B. 10.

XL, or an order which you cannot possibly account for in any part of the Code. It certainly is an order which the Court must be empowered to make. That is quite plain. If you have a Receiver, the appointment of whom is provided for by the Code, and if he has to submit his accounts, and that is also provided for, the Court must necessarily have power to say whether those accounts are right or wrong, and whether it will accept them or not, and it is only to rule 4 that you can ascribe the order which was made in this case. Therefore, it was an appealable order. Where you have a Tribunal expressly pointed out, as here, which is the Court which appointed the Receiver; where you have an inquiry specifically indicated, and an irquiry is indicated here: where you have the power to make an order, such as there is here, and an appeal is provided for against that order, and that also is the case here; then you have an instance of a remedy and a Tribunal which excludes what otherwise would be the ordinary remedy, a suit. But having this special Tribunal and special method laid down in the Code, the suit is excluded. It was objected that the inquiry under rule 4 was a summary inquiry. Well, if by summary inquiry is meant an inquiry which secures the usual degree of fairness, and efficiency, and which gets rid of a good deal of formality and delay, I have no objection to this inquiry being described as summary. But if it fulfils the conditions I have mentioned, instead of being inferior, it would actually be superior to the ordinary method of a suit. I do not suppose, I do not think there is any reason for supposing, that an inquiry made under rule 4 of Order XL would in any material degree be either less fair or less efficient than a trial such as takes place in an ordinary suit. Once having arrived at the conclusion that a suit will not lie, that suffices for the purpose of this case, in which it is unnecessary to do more than express an opinion. For, if a suit is hereafter presented, and I doubt whether it will be, it will, of course, be at once either rejected or dismissed by the Court to which it is presented. It is, therefore, quite superfluous for us to deal with the matter under section 115 of the Code of Civil Procedure; even if to do so were not open to the objection that it would be setting at naught the pronouncements which from time to time we have ourselves made, as to the scope of section 115. I agree, therefore, to the order proposed by my Lord the Chief Justice.

Appeal dismissed

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2562 OF 1919.

November 20, 1920.

Present:—Mr. Justice Broadway.

THE FIRM KOTU MAL-CHARAN DAS OF AMRITSAR, THROUGH CHARAN DAS —DEFENDANT—APPELLANT

versus

THE FIRM BIHARI LAL-JAGGA MAL OF AMRITSAR, THROUGH TIRATH RAM —PLAINTIFF—RESPONDENT.

Sale of goods—Warranty of quality—Re-sale—Buyer, duty of, to ascertain contents—Negligence—Damages, whether can be claimed.

Where there has been a re-sale, in order to recover special damages for a breach of warranty it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he re-sells or deals with them. [p. 426, col. 1.]

One *S.* sold two cases said to contain muslin of a particular description and lying at Karachi to certain persons by making over the relative documents. The vendees passed on the goods in a similar manner until they were bought by the defendant firm *K C.* on the 17th May 1918. They sold it to a firm *B. J* on the 19th *K. C.* had never taken delivery of the cases at Karachi but *B. J.* took delivery on the 30th May. On the 25th July 1918 *B. J.* sold these cases to *H. S* and gave them delivery on the 31st. *H. S*, however, did not open these cases till early in September 1918 when they were found to contain muslin of a different description. On the 22nd October *B. J.* wrote to *K. C.* claiming damages which not having been paid, they instituted the present suit:

Held, that, although the sale by the defendants carried with it an implied warranty that the cases contained muslin of a particular quality, the plaintiffs ought to have ascertained earlier whether the contents of the cases corresponded with the invoice, and that, having been negligent, they were not entitled to recover any damages. [p. 425, col. 2; p. 426, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Amritsar, dated

the 1 th November 1919, reversing that of the Munsif, first Class, Amritsar, dated the 2nd July 1919.

Lala *Durga Das*, for the Appellant

Lala *Bhagat Ram Anand*, for the Respondent.

JUDGMENT.—The facts of this case are as follows :—One Sant Ram was the owner of two cases of muslin which were lying at Karachi. They were said to be muslins of a particular description and known to the trade as Mull No. 951. He sold these cases to certain persons making over the relative documents. His vendees passed on the goods by making over the said documents to other purchasers until they were bought by a firm known as Barkat Ram-Mehar Chand who sold them to a firm styled Kotu Mal-Charan Das on the 17th May 1918. This firm in its turn sold to a firm named Bihari Lal Jagga Mal on the 19th of May 1918. Kotu Mal-Charan Das had never taken delivery of the cases at Karachi but their vendees Bihari Lal-Jagga Mal took delivery on the 30th May 19 8.

On the 25th of July 1918 Bihari Lal-Jagga Mal sold these two cases to Hira Lal-Sheo Narain and gave them delivery on the 31st July 1918. Hira Lal-Sheo Narain, however, did not open these cases till early in September 1918 when it is said the cases were found to contain muslin of a different description, namely, Mull No. 2043 which Mull is of an inferior description to No. 951. On the 22nd October 1918 Bihari Lal Jagga Mal wrote to Kotu Mal-Charan Das pointing out this discovery and claiming from them a sum of Rs. 84[illegible]. As the sum was not paid Bihari Lal-Jagga Mal instituted this suit against Kotu Mal-Charan Das for the amount.

The Trial Court dismissed the suit on the ground that the plaintiff firm ought to have examined the goods within a reasonable time. They had taken delivery on the 30th of May 1918 and had not written to the defendants till the 22nd October 1918. The other issues in the case were not decided, and *inter alia* it had been pleaded that the contents of the two cases had not been shown to be other than Mulls No. 951. Bihari Lal Jagga Mal thereupon preferred an appeal to the learned District Judge who disagreed with the Court below and, under Order XLI, rule 23, Civil Procedure Code, remanded the case for a decision on the merits.

Against this order of remand Kotu Mal-Charan Das have preferred this appeal through Lala Durga Das and I have heard Lala Bhagat Ram for the plaintiffs-respondents. Mr. Durga Das referred me to *Mitchell* v. *Murree Brewery Co.* (1) and Remfry's Sale of Goods, page 697. It was contended that, although the sale by the appellants carried with it an implied warranty that the cases contained muslin of a specific description, namely, that known as No. 951, the plaintiffs should have ascertained within a reasonable time, (which according to Mr. Durga Das would be one week), what the contents of those cases were. Instead of ascertaining the contents, the plaintiffs sold the cases to a third party and gave delivery and that, by so doing, the plaintiffs have practically waived any claim under the warranty and the decision of the Trial Court was, therefore, correct. On the other hand, Mr. Bhagat Ram contended that his clients, the plaintiffs, had bought specific articles, namely, muslin known as No. 951, that the articles actually received by them were of a different kind and description, namely, muslin No. 2043, and that, therefore, provided the plaintiffs could prove that the cases were found to contain muslin No. 2043, they were entitled to a decree. He contended that the reasonable time referred to by Mr. Durga Das must refer to the time taken in making the claim after it had been ascertained that the warranty had been broken. The matter is not free from difficulty as there is a good deal to be said for Mr. Durga Das's contention that to allow a case of this nature, after a delay such as took place in this case, would materially interfere with trade. A good deal of business is done in Amritsar and elsewhere in the same way as was done in this case. Goods lying at Karachi, Calcutta and Bombay are sold in various up-country stations without inspection. All that passes are the invoices and bills of lading which contain descriptions of the goods contracted to be sold and, no doubt, it often happens that goods change hands several times merely by delivery of the relative documents of title before the goods are actually reduced to possession. In the present case the plaintiffs purchased the two cases from the defendants on the 19th of

(1) 5 P. R, 1870.

May 1918 and took delivery at Karachi on the 30th May 1918. The two cases were thus in their possession from the 30th May to the 25th July 1918 when they were sold to Hira Lal-Sheo Narain. The plaintiffs thus had ample opportunity to ascertain whether the goods in their possession corresponded to the goods they had bought and answered to the description in their documents of title. Instead of taking the trouble to examine the goods, they kept the cases unopened and sold them unopened to Hira Lal-Sheo Narain. These persons in their turn, although they had taken delivery on the 31st July, did not open the cases till September 1918. In Remfry's Sale of Goods, page 697, it is said "where there has been a re-sale in order to recover special damages for a breach of warranty, it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he re-sells or deals with them;" and various English authorities are cited in support of this proposition. In *Mitchell* v. *The Murree Brewery Co.* (1) it was held that if a purchaser who complains of a breach of warranty, does not challenge the quality of the article without delay, the presumption against him is that the warranty is complied with.

Taking all these circumstances into consideration, it seems to me that the plaintiffs have in the present case been negligent. They had the two cases in their possession for a period of nearly two months and yet took no steps whatever to ascertain whether the contents of the cases corresponded with the invoices and, for these reasons, I think that the decision of the learned Munsif is right.

Mr. Bhagat Ram contended that the present was not a case of the goods being of an inferior quality but of a different kind. I have carefully considered this contention but I am unable to agree. The goods bought by the plaintiffs were muslins of a certain number known in the trade, and muslins of that number are known in the trade to be of a certain quality. The cases were alleged to contain muslin but of a different quality known in the trade by a different number. The article bought was, therefore, the same article but of a different quality.

I accordingly accept this appeal with costs and, setting aside the order of remand, restore the decree of the trial Court dismissing the suit.

Appeal accepted.

BOMBAY HIGH COURT

SECOND CIVIL APPEAL No. 456 OF 1919.

March 3, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

CHINTAMANI HARGOVAN AND OTHERS —PLAINTIFFS—APPELLANT

versus

RATANJI BHIMBHAI AND OTHERS— DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), s. 28—Right of way, extent of—Intention of parties—Right of way for carts, whether includes right of way for sweepers.

Under section 28 of the Indian Easements Act the extent of any easement, (other than an easement of necessity), and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired. In the absence of evidence as to such intention and purpose, a right of way of any one kind does not include a right of way of any other kind [p. 427, col. 1.]

A right of way for persons, cattle, carts, etc, does not include a right of way for sweepers removing night-soil. [p. 427, col. 2.]

Appeal from the decision of the Assistant Judge, Surat, in Appeal No. 89 of 1918, confirming the decree passed by the Subordinate Judge at Bulsar, in Civil Suit No. 194 of 1917.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *M. H. Mehta*, for Respondents Nos. 1 and 2.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued for an injunction against defendants Nos. 1 to 3 restraining them from using the way in question as a way for Bhangis, and other persons of an untouchable class, to clean the privy intended to be erected by them. The plaintiffs' claim has been rejected in both Courts. The defendants Nos. 1 to 3 are the owners of a house which is marked on the left side of the plan, and they instituted Suit No. 623 of 1912 against the present plaintiffs and defendant No. 4 to establish their right of passage for persons, cattle, carts, etc., over the open

CHINTAMANI HARGOVAN v. RATANJI BHIMBHAI.

ground in front of the houses of the then defendant. The then plaintiffs' right of easement was held to be proved to a passage of six feet in width, and a decree was passed in their favour together with an injunction for the removal of the obstruction placed by the then defendant. At that time, the privy in the defendants' house was situated at the opposite end of their premises, and there was no suggestion, during the proceedings in that suit, that the defendants had ever used the road, or the ground over which they claimed the right of way for the purpose of removing night-soil fr m their privy. They now wish to alter the position of the privy, and claim that they are entitled to a passage for the Municipal sweepers carrying night-soil from their privy over the passage which is referred to in the decree in Suit No. 623 of 1912.

Under section 28 of the Indian Easements Act, the extent of any easement (other than an easement of necessity), and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired. In the absence of evidence as to such intention and purpose, a right of way of any one kind does not include a right of way of any other kind. Therefore, when this right of way was fixed by the decree in Suit No. 623 of 1912, it is quite clear it was never intended by the Court to hold that the then plaintiffs had acquired a right of way over this ground for the Municipal sweepers removing night-soil from their privy.

Taking into consideration the conditions in this country, it seems to me that if a party is able to prove that he has used a certain way for himself and his servants during the time required by the Indian Easements Act, the Court, holding that he has a right of way, is bound to consider the evidence in the case, and decide in what way exactly the right of way claimed has been used.

We have been referred to the case of *Esubai* v. *Damodar Ishvardas* (1). That was a case where the plaintiff claimed an easement of necessity, and different considerations apply in the case of such an easement. Here there is no question of an easement of necessity. That would only arise supposing access to the defendants' property could only be obtained through the passage over the plaintiffs' land.

A very similar question arose in *Narayanacharya* v. *Ganu*, S. A. No. 255 of 1919, decided on the 13th February 1920. The plaintiff there proved that he and his people had a right of passage over the plaint ground, and he sued to obtain a perpetual injunction restraining the defendants from obstructing his sweeper. But it was proved that the plaintiff had erected a privy within five years of the suit, and that before his right of passage over the plaint ground had been acquired the passage could never have been used by the sweepers carrying night-soil. It was held in the lower Appellate Court that the right which the plaintiff had established did not include the right of passage for a sweeper carrying night-soil. That decree of the lower Appellate Court was affirmed by us in second appeal.

In my opinion, therefore, it was never intended, when the Court passed the decree in Suit No. 623 of 1912, that the then plaintiffs should be held to have a right of passage over the way for their sweepers carrying night-soil because there was no evidence whatever that the then plaintiffs had used the passage for their sweepers and if such a passage had been claimed, we cannot say what the Court would have decided. The decree in that suit upholding the then plaintiffs' claim to a right of way must be strictly construed according to the facts of the case, and to hold now that the right of way of the present defendants for themselves and their servants should be extended so as to include a right of passage for sweepers carrying night-soil would be going, in my opinion, further than the decree intended. I think then that the appeal must be allowed and the plaintiffs' claim decreed with costs throughout.

HEATON, J.—The defendants Nos. 1 to 3 have acquired by the decree of a Civil Court a very extensive right of way over certain property common to the plaintiffs and defendant No. 4. It is a right of way for the passage of persons, cattle, carts etc. to the house of the defendants. Of course, it includes everything that is properly

(1) 16 B. 552; 8 Ind. Dec. (N. S.) 847.

incidental to such a right of way. If, for example, the defendant at the time that his right of way was declared by the Court possessed only one cart, and he afterwards came to possess two or three carts, he would have the right of way for all those carts. If his family become larger in number, or his servants more numerous, he would have the right of way for the additional members of his family and the additional servants. All that is included in the fundamental idea of a right of way, and is properly incidental to it.

But when you come to what is the subject of contention in this appeal, and that is a right of way for Municipal sweepers carrying night-soil, you introduce a new element altogether. It certainly is not generally incidental to a right of way that a sweeper carrying night-soil should use it. Such a person is not one of the normal class of servants of a house-hold in this country. Even in Municipal towns where there are privies and Municipal sweepers, even there the passage of a sweeper over a particular way is by no means a necessary feature of the general use of that way. There are ways over which these sweepers may pass: and there are other ways over which they do not pass. So that we have, in a case like the present, to determine whether the right of way as declared did either expressly or impliedly include the right of Municipal sweepers to pass over the way. It certainly did not expressly include it. In order to say whether it impliedly included it, we have to examine the circumstances of the case at the time when the right of way was declared by the Court. At that time there was no privy in existence which sweepers would reach by using this particular way. There was a privy, but it stood elsewhere, and was approached by a different way altogether, and what the defendants have done is to remove the old privy, or at any rate establish a new one, which can only be served apparently if the sweepers are allowed to use this particular way. By so doing, the defendants have introduced a new element into the matter which the established circumstances show was not, and could not have been, in the contemplation of the parties or of the Court at the time when the right of way was declared by the Court. I think, therefore, having regard to the circumstances which are established, that the appeal must be allowed and the claim decreed with costs throughout.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 545 OF 1918.

April 30, 1920.

Present:—Mr. Macnair, A. J. C.

SIDH GOPAL—PLAINTIFF—APPELLANT

versus

HARILAL—DEFENDANT—RESPONDENT.

Co-sharers—Suit by joint co-sharer for village profits without asking for partition, whether maintainable—Undivided share, sale of, whether effects partition.

P. at an auction-sale in execution of a decree purchased an undivided share in ancestral village property and obtained symbolical possession. He now sued for village profits:

Held, that as *P.* had not sued for partition, his suit for profits was not maintainable, and that the auction-sale had not effected a division of the village shares. [p. 429, col. 2.]

Appeal against the decree by the District Judge, Chhindwada, in Civil Appeal No. 73 of 1918, decided on 2nd September 1918

Mr. *M. B. Kinkhede*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—The learned District Judge in first appeal has assumed certain facts in favour of the appellant and decided that on these facts the suit must fail. These facts are as follows:—Mohanlal held an undivided share in ancestral property. This share was attached and sold in execution of a decree in favour of the plaintiff. The plaintiff at the auction sale purchased the share and obtained symbolical possession. He now sues the latter for village profits.

The learned District Judge holds that the plaintiff cannot sue for profits when he has not sued for partition. He cites

Pirthi Pal v. *Jowahir Singh* (1) in support of this proposition. I consider that his finding on this point is entirely justified. The decision in *Amritrao* v. *Govind* (2) shows an alienee of a co-parcener is in no better position than his alienor. The alienor, a member of a joint family, could not sue the manager of the joint family for profits. The fact that the member is a co-sharer of a village and the manager is the *lambardar* cannot affect the case. It is only a separated co sharer who can sue the *lambardar* for profits. It seems to be urged in ground No. 3 of the appeal that the auction-sale effected a division of the village shares. This plea is opposed to all rulings regarding rights of the purchaser of an undivided share.

It might have been urged that the filing of this suit indicated the intention of the plaintiff to vary his status from that of an undivided co-sharer in the village to that of a divided co sharer holding a share not to be divided by metes and bounds: but this has not been urged. Had it been urged, it might possibly have been shown that the share which he would receive in partition was different from the share in this particular village to which he is *prima facie* entitled.

I do not need to decide the question whether the plaintiff is to be considered as in possession of the undivided share. The appeal fails and is dismissed. Costs on appellant.

Appeal dismissed.

(1) 14 C. 493 at p. 494 (P. C.); 14 I. A. 37; 11 Ind. Jur. 232; 4 Sar P. C. J. 758; Rafique and Jacksons' P. C. No. 97; 7 Ind. Dec. (N s.) 327.

(2) 21 Ind. Cas. 590; 9 N. L. R. 145.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 274 OF 1917.

March 8, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

KOOVERBAI SORABJI MANEKJI—APPELLANT

versus

THE ASSISTANT COLLECTOR, SURAT—RESPONDENT.

Land Acquisition Act (*I of* 1894), *ss.* 11, 12—*Award, when final.*

An award made by a Collector in land acquisition proceedings becomes final and binding only when it is filed under section 12 of the Land Acquisition Act, the mere signing of the award by the Collector does not make it conclusive. Before filing an award it is open to the Collector to destroy one which he has already signed and to substitute another in its place. [p. 430, col. 1.]

First appeal from the decision of the District Judge, Surat, in Reference No. 5 of 1914.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is an appeal from a judgment of the District Judge of Surat in Reference No. 5 of 1914. The land acquired was notified by Government in June 1912 on behalf of the B. B. & C. I. Ry. Co. The award under section 11 of the Land Acquisition Act by the officer appointed by Government amounted to Rs. 70 per Guntha, the area to be acquired being one acre and one Guntha. The learned District Judge came to the conclusion that the market-value of the ground was Rs. 60 per Guntha. He allowed Rs. 369 damages for severance. The total being under the Collector's award, the Collector's award stood.

The first point taken before us was that the first Acquisition Officer, Mr. Sedgwick, made an award which was binding on the Government, amounting to Rs. 132 per Guntha. That award was never communicated to the parties. The claimant never knew that Mr. Sedgwick had formed an opinion that the land was worth Rs. 132 a Guntha, until Mr. Sedgwick was called in the case as a witness and cross-examined.

The appellants now rely upon the decision in *Dosabhai Beranji* v. *Special Officer, Salsette Building Sites* (1). What happened in that case was that the Collector made an award in the following form:—"Government in their Memorandum No. 10578, R. D, of 17th October 1908, have directed me to award compensation at the rate of Rs. 4 per acre for *khajan* land and Rs. 120 per acre for *kharif* land, and I, therefore, make my award accordingly." The Court held it was not competent to Government to direct the Collector to substitute a smaller amount than that which, as the result of his inquiry, he had determined to offer.

I gather from the judgment of Mr. Justice Heaton that he concurred with the judgment of Mr. Justice Batchelor to this extent that the award stated the sum which, according to the opinion of another authority altogether, was the compensation which should be awarded, and, so far as could be judged from the terms of Mr. Waterfield's order, it was a sum which he would never himself have offered as compensation, and which in his judgment was strikingly inadequate. Therefore, Mr. Justice Heaton thought it was quite impossible to hold that an award in that form was an award made by a Special Acquisition Officer.

As appears from his judgment, Mr. Justice Batchelor went somewhat further than that, because at page 604* the learned Judge says:—"Then it was suggested that the order of Mr. Waterfield's proposing to award Rs. 50 per acre was not an award but was a mere proposal for an award. It seems to me that this argument comes with a certain want of grace from the representative of Government, since if the order fell short of being an award, it fell short only by reason of those very executive orders of the Government whose validity is now in dispute. And if I am right in thinking that those orders are of no effect, then it follows that the award is that which Mr. Waterfield would have made had he not been restrained by these orders." So that the learned Judge seemed to be of the opinion that, when an Acquisition Officer had come to the conclusion as to what should be awarded for a particular piece of land to be acquired, and had recorded his reasons in writing for the conclusions he had come to as to the value of the land, though, under special orders of Government, he had referred the matter of compensation to his superior officers, the Special Acquisition Officer had already made an award which was binding on Government, and if its contents could be proved, the claimant would be entitled to get that amount and nothing less in the first instance, while he could get more by an application to the Court.

If that had been the opinion of both the learned Judges in that case, then it would be binding on me. But my learned brother tells me that he did not agree with that opinion which was expressed by Mr. Justice Batchelor, but merely agreed with the conclusion arrived at that the award in that case, in the form in which it had been promulgated, was not an award by the Collector as was intended by section 11 of the Land Acquisition Act. He did not agree with the opinion expressed by Mr. Justice Batchelor that, as soon as the Collector had reduced his reasons to writing and signed them, there was an award which could not be altered, and that certainly is not my opinion either.

Section 12 of the Act appears to me to make it clear when an award becomes an award which is conclusive and binding on Government. First, the Collector makes, under section 11, an award under his hand. It cannot be, in my opinion, the case that as soon as he has signed the document that then it becomes conclusive. He can tear it up and substitute another if he pleases. But, under section 12, the award shall be filed in the Collector's office, and shall, except as thereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested. Then, under subsection (2)—"The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made." Therefore, it is the filing of the award in the Collector's office which makes it final and conclusive as against the parties interested. It is not suggested in this case that the award of Mr. Sedgwick

(1) 16 Ind. Cas. 549; 36 B. 599; 14 Bom. L. R. 592.

*Page of 36 B.—*Ed.*

had been filed in the Collector's office. The claimant has had to rely merely on the fact that he did sign what purported to be an award, and then asked for instructions from his superiors as to what should be done. Therefore, I think the learned Judge in this case was correct in declining to be bound by the opinion expressed by Mr. Sedgwick with regard to the amount of compensation to be awarded.

The only question remaining is, whether the District Judge's decision declining to interfere with the amount awarded by Mr Parekhji, who made a final award on behalf of Government, should be disturbed. Mr. Parekhji allowed Rs. 70 a Guntha, Mr. Murphy, Rs. 60 *plus* compensation for severance. The latter depends for his valuation on the amount realized by the owner under the leases which were signed by his tenant Ardeshir. It seems that the rent was increased by 50 per cent. about April 1912 very shortly before the land was notified for acquisition ; and that the parties were aware that the Railway Company were about to apply to Government that acquisition proceedings should be taken, is clear from the terms of the document itself.

If I thought that the learned Judge had based his valuation on any wrong method, or that in any respect his figures were erroneous then it might possibly be held that he has undervalued the property. But, as far as I can see, there is no clear error in the judgment. Then an Appellate Court, in my opinion, should not be prone to upset the judgment in the matter of a valuation by the lower Court which has heard the evidence, unless the Judge has fallen into an obvious error in coming to his conclusions. It is quite possible that one Judge might allow a few rupees more here or there than another Judge. But it is not the function of an Appellate Court to interfere in such a case. The claimant has been awarded Rs. 2,400 an acre for his land. Considering all the circumstances of the case, I should say that is a fair value. In my opinion, therefore, the appeal fails and should be dismissed with costs.

HEATON, J.—On the merits of the case, that is to say, the market-value of the land, I have nothing to add. But I confess I was rather surprised to find it was argued that the decision in the case of *Dosabhai Bezanji* v. *Special Officer, Salsette Building Sites* (1) supplied us with a solution of the problem in this particular case. Here there was merely a writing signed by a person who at the time was the Acquiring Officer. But that writing was never given effect to. It was never promulgated. It was never apparently filed in the Collector's office even. It was submitted to Government, and, before any promulgation came to be made, it was withdrawn. A different Acquiring Officer had taken up the affair, and it was his award based on the results of his inquiry which was promulgated, and was filed in the Collector's office and so forth. It seems to me to be perfectly clear that we have no award from the first Acquiring Officer. We have nothing more than what might have become an award if certain other proceedings had been taken, which in fact never were taken. This, to my mind, is quite clear when we take the facts and look at them in the light of the provisions of sections 11 and 12 of the Land Acquisition Act.

What we have to deal with in this case is the award which really was made, and it was made, not by Mr. Sedgwick, the first Acquiring Officer, but by Mr. Parekhji who came later. Consequently, what is said in *Dosabhai Bezanji* v. *Special Officer, Salsette Building Sites* (1) does not seem to me to help at all. In that case we were dealing with what undoubtedly was an award, in that it fulfilled all the formalities, it had been filed, had been promulgated and so forth, and we were dealing with matters which were stated in that award, and which appeared from that award. If in that case Mr. Justice Batchelor really went the length of saying, or implying, that a statement of opinion which had not been filed, and which had not been promulgated, was an award, then I certainly did not agree with that opinion, nor, in my judgment, did I state anything which would justify the supposition that I did agree. I find nothing in my judgment in that case which I would like to vary now, and I feel no doubt that the appeal in this case ought to be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL SUIT No. 1121 OF 1910.
September 2, 1915.
Present:—Mr. Justice Woodroffe.
SURENDRA KRISTO RAY—
PLAINTIFF
versus
GOOROO PRASAD GHOSE—
DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Calcutta High Court, Original Side, Rules—Sale held by Registrar under rules, without attachment—O. XXI, whether applicable.

Although the provisions of Order XXI of the Civil Procedure Code apply ordinarily to sales on mortgage-decrees after attachment under the provisions of the Code, those provisions do not apply to cases where the sale is held by the Registrar of the High Court, without attachment, under, and in conformity with, the rules on the Original Side, of that Court. [p. 433, col 1]

Mr. *A. K. Ray*, for the Plaintiffs.

Messrs. *B. L. Mitter*, and *D. N. Basu*, for the Defendants.

JUDGMENT.—This is an application under Order XXI, rule 89, of the Civil Procedure Code in respect of an English mortgage executed in Calcutta upon which a decree for sale has been made by this Court. There was no attachment before sale. For, according to the practice of this Court, no such attachments are made in execution of mortgage-decrees. The question raised is whether Order XXI, rule 89 applies to the case. Such an application is contrary to the practice is not provided for and is in respects at variance with the rules of this Court and is without authority for the case before Chaudhuri, J., was (my learned brother tells me) by consent of all parties concerned and not after contest. Mention has been made of some case before Imam, J., but there was no judgment and what the circumstances of that case were and whether it was contested does not appear. The decision in *Kedar Nath Raut* v. *Kali Churn Ram* (1) is against the application. Since then the new Code has been enacted. I must, therefore, determine whether that order has abrogated the practice of the High Court and the Rules which express it. The question has greater importance than a mere matter of regularity of practice, for a disturbance of that practice would involve an alteration in the rules which have only recently been approved by the Judges and is likely to interfere with the sales by this Court. The conditions and practice existing as regards such sales are different from those prevailing in the *mofussil*. Good prices are fetched at such sales owing to the procedure here adopted, the security of title and certainty in the procedure. There is a considerable risk that the values of property will be affected if it is understood that it is open to the mortgagor to apply to set aside the sale on payment under rule 89.

These considerations are sufficient to make one cautious in reversing established practice. It may, however, have been the intention of the Legislature to do so and, therefore, we must examine the Code itself.

Rule 89 refers to a "sale in execution of a decree." When we turn to rule 64, which deals with "sales generally", we find that a Court may sell in execution any property attached by it and liable to sale. Properties are not attached under mortgage-decrees of this Court and in fact there has been no attachment in this case. If rule 89 applies, it will be necessary to alter the practice in this respect. It has been argued that Order XXXIV now incorporates the provisions of the Transfer of Property Act relating to mortgages and that this is a sale in execution of a decree and that rule 89 of Order XXI, therefore, applies.

That every rule in that Order does not apply to mortgages is shown by rule 20. This particular case, however, may be explained by the fact that rules 18 and 19 refer to decrees for money. Rule 83 (3) excepts property sold under mortgage-decrees. There is no such exception in rule 89. Assuming, however, for the sake of argument, that that rule applies to the execution of mortgage decrees where there has been attachment, as in the *mofussil*, it has not been made out to my satisfaction that the section applies to the case of a sale such as this without attachment by the Registrar of this Court under its special rules, and that it was intended to abrogate the special practice of the Court in this respect. It is admitted that the case must strictly come within the terms of the section and therefore, though the application does not so state (and is, therefore, not in form) it is conceded that provisions (*a*) and (*b*) must

(1) 25 C. 703; 2 C. W. N. 353; 13 Ind. Dec. (N. S.) 460.

be strictly followed. The same considerations apply to the preceding portion of the rule. For the other side it is contended that if rule 89 does apply, which is denied, then the purchaser is, under the Court's Rules, entitled to extra charges and expenses in addition to the 5 per cent. mentioned in rule 89 of the Code. It is pointed out that there are purchaser's costs and commission of the Registrar and Accountant-General and the scale of *mofussil* expenses is different from those of this Court. A further question has been raised as to whether the deposit should accompany the application or not, and it has been pointed out that the Registrar does not accept deposits without a Court's order. I mention these contentions to show that, in these and other matters, the practice under the Rules of Court and the Code are not workable together. Although, therefore, it may be the fact that the provisions of Order XXI of the Code apply ordinarily to sales on mortgage-decrees after attachment under the provisions of the Code, I hold that it does not apply to cases such as this without attachment where the sale has been held by the Registrar under, and in conformity with, the Rules of this Court. The application, therefore, is dismissed with costs. I may, in conclusion, point out that the notice of motion is entirely out of order. It is alleged that the order sought was consented to but this is denied. The notice asks that the sale be set aside on such alleged consent. This, however, has not been proved. Learned Counsel has pressed for a decision on the law. The notice further asks that the sale be set aside on payment of 5 per cent. only of the 25 per cent deposit and not of the whole of the purchase-money. Lastly, no offer is made in respect of payment to the decree-holder. I have, however, for the purpose of this judgment, assumed that the notice was an order and that the applicant was ready and in a position to comply with the terms of the rule. Even assuming this to be so, I hold that the application fails on the grounds above stated.

Application dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1086 OF 1918.

March 9, 1920.

(*Present* :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

KULSAMBI—PLAINTIFF—APPELLANT

versus

ABDUL KADIR—DEFENDANT—RESPONDENT.

Muhammadan Law—Marriage—Dower, husband's liability to pay—Wife pregnant at time of marriage, effect of.

Although marriage, under the Muhammadan Law, is spoken of as a contract, the performance of the contract accompanied by the appropriate ceremony involves a change of status. The contract is merged in the new status acquired by the parties, and, as long as that status continues, so long do the rights and liabilities of the parties under the contract continue. [p. 434, col. 1.]

Defendant married plaintiff and agreed to pay the latter a certain amount of prompt dower. Five months after the marriage the plaintiff gave birth to a fully developed child. Shortly afterwards, the defendant turned the plaintiff out of his house, but did not divorce her. Plaintiff brought a suit to recover the amount of her dower from the defendant:

Held, that the suit was maintainable.[p. 434, col. 2.]

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 12 of 1918, reversing the decree passed by the Subordinate Judge at Karwar, in Civil Suit No. 25 of 1917.

Mr. *Tyabji*, with him Mr. *V. R. Sirur*, for the Appellant.

Mr. *S. V. Palekar*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The parties to the suit are Sunni Muhammadans. The plaintiff filed the suit against her husband to recover her dower. The facts are that the parties were married in 1912 the defendant agreeing to pay as prompt dower 525 *putlis*. Five months after the marriage, the plaintiff gave birth to a fully developed child. Though it must be presumed that the marriage was consummated as the parties lived together for some time after the marriage, the child was begotten by an unknown father. The defendant turned the plaintiff out of his house shortly after the child was born, but it has not been proved that he divorced her. No question of limitation, therefore, arises. The dower agreed upon was prompt and could be sued for.

KULSAMBI v. ABDUL KADIR.

The plaintiff obtained a decree in the Trial Court but this decree was reversed by the learned District Judge on the ground that the marriage was invalid owing to the concealment of pregnancy, and since cohabitation during pregnancy was contrary to Muhammadan Law the initial invalidity could not be cured by illegal cohabitation.

Now, although marriage is spoken of as a contract and no doubt in the first instance there must be an agreement between the parties to marry, the performance of the contract accompanied by the appropriate ceremony involves a change of status. The contract is merged in the new status acquired by the parties, and as long as that status continues so long do the rights and liabilities of the parties under the contract continue. There may be facts which, if proved, will bring about the cancellation of the marriage, in which case the parties will be relegated to the position they occupied before the marriage as if there had been no contract at all, or the marriage bond may be dissolved by divorce. But we have not been referred to any authority for the proposition that an agreement to pay dower can be separated after marriage from the marriage status and can be treated as voidable on the ground of fraud, while the marriage bond continues.

The plaintiff, as long as she is a wife, can sue for her dower unless the defendant can show there was no marriage at all. Where, however, a man marries a woman, and upon the condition that she is a virgin, provides a dower higher than the proper dower, he is only bound to pay the proper dower if it is proved that she does not comply with the condition of virginity. Radd ul-Muhtar, Volume II, page 374. Amir Ali in Volume II, page 434 of his work on Muhammadan Law says under the Shia Law when a man marries a woman stipulating her to be a virgin and finds her not one, he has no power to cancel the marriage. Under the Sunni Law there is a divergence of opinion some of the priests agreeing with the Shia Doctors, others holding that if the husband has been fraudulently deceived he could have a right of option. The latter is the generally accepted view.

I think it can be inferred from these authorities that where concealment of pregnancy is not by itself a ground for cancelling the marriage, the husband has his remedy by divorce.

Though it might be said that there is an implied condition in a marriage contract that the bride is a virgin, still, unless there is an express stipulation, the dower agreed upon must be paid.

We have been referred to Amir Ali, Volume II, page 408, as an authority for the proposition that a marriage is invalid where consent has been obtained by force or fraud. It is true that the proposition was accepted in the case of *Abdul Latif Khan* v. *Niyaz Ahmad Khan* (1). But it was found in that case after the marriage that the bride was so ill that consummation was impossible, so that the suit by her representatives after her death for her dower was dismissed. There were grounds, therefore, apart from the question of fraud, for treating the marriage as a nullity which is a different matter from setting aside a contract for dower on the ground that an implied condition has been broken. The Court said there was concealment of a fact which should have been brought to the notice of the husband in order to obtain his free consent to the marriage and so a fraud was perpetrated on him at the time of the marriage.

This is going further than the law as stated by Amir Ali appears to go. If fraud can be a ground for cancellation of marriage it must be express and not implied.

In my opinion, therefore, the plaintiff is entitled to succeed. This appeal must be allowed and the decree of the Trial Court restored with costs throughout.

The appeal being allowed, there must be the usual order for payment of Court-fees by the respondent under Order XLIV, rule 1, read with Order XXXIII, rule 10.

HEATON, J. The marriage contract under the Muhammadan Law is not a bare contract. Amongst Muhammadans, as amongst others, marriage brings about a change of status, which introduces conditions different from those which result from a bare contract. The difference is well-illustrated by a consideration of the differences in result and in remedy following from (*a*) a breach of a promise to marry, and (*b*) a marriage brought about by deception. In the first

(1) 1 Ind. Cas. 538; 31 A. 343; 6 A. L. J. 423.

case, the contract is broken ; in the second, it is fulfilled, though one party or the other may have been deceived and may obtain something different from what he or she bargained for. What is obtained, however, is a wife or a husband, as the case may be, and that, as I understand it, is enough under Muhammadan Law.

That law provides ample remedies in the case of a husband, and here it was the husband who was deceived. He may divorce his wife.

The marriage in this case was not, I think, invalid. It was not prohibited or irregular, and the only ground asserted for invalidity is founded on deception. That is a ground which, as I understand, the theory of the Muhammadan Law of marriage, is not enough. The case of *Abdul Latif Khan* v. *Niyaz Ahmad Khan* (1) may suggest that deception may invalidate a marriage, but in that particular case the object of the marriage could not be fulfilled the wife was too ill. If, in the present case, the wife claimed that she was the defendant's wife, the claim would, I think, have to be allowed, unless it was shown that the defendant had divorced the plaintiff.

As the marriage was a valid marriage, it follows that the dower can properly be claimed unless the claim can be defeated either by the provisions of the Muhammadan Law or by some relevant provision of the law of contract. We are unable to find anything in the Muhammadan law which forbids the claim to dower in such a case as the present.

Nor does the law of contract forbid it, unless we can imply some term in the contract vital to the right to dower, which implied term was not fulfilled. There is no implied term that the wife shall be a virgin. Is there an implied term that she shall not, at the time of marriage, be with child by some man other than the husband? It would not, I think, be irrational to imply such a term, but we are unable to find that it has ever been done.

I am not prepared to introduce, what would apparently be, a new feature into the law regulating marriage in the case of Muhammadans, so I agree to the order proposed by my Lord the Chief Justice.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 266 OF 1917.

March 17, 1919.

Present:—Mr. Justice Greaves and Mr. Justice Newbould.

SACHINDRA NARAIN SAH—DEFENDANT—APPELLANT

versus

HIRONMOYEE DASI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4, applicability of, to non-contentious proceedings in Probate—Duty of Court—Probate and Administration Act (V of 1881), s. 50—Minor—Guardian appointed without consent—Guardian refusing to act—Probate—Minor, whether entitled to revocation.

Order XXXII, rule 4, of the Civil Procedure Code does not apply to a non-contentious proceeding in Probate, but where minors are concerned and citations are issued to them, it is necessary for the protection of their interest for the Court to be satisfied not only that a guardian has been appointed but that a guardian has been appointed who has consented to accept the appointment and take upon himself the onus that by virtue of the appointment falls upon him on behalf of the minors. [p. 437, col. 1.]

Where a guardian *ad litem* of a minor is appointed, without his consent, for the purpose of a petition for Probate, and he refuses to accept service of a citation on behalf of the minor, and Probate is granted, the minor, when properly represented, is entitled to maintain an application, under section 50 of the Probate and Administration Act, for revocation of the grant. [p. 437, col. 1.]

Appeal against the decree of the District Judge of Dacca, dated the 8th of August 1917.

Babus *Dwarka Nath Chakrabarty*, *Bireswar Bagchi*, *Rajendra Chandra Guha* and *Satish Chandra Bhattacharjee*, for the Appellant.

Babus *Mohendra Nath Roy* and *Jyotish Chandra Sarkar*, for the Respondent.

JUDGMENT.—This is, an appeal from the decision of the District Judge of Dacca, dated the 8th of August 1917.

The real point at issue is, whether the citation served upon a minor in an uncontested Probate proceeding by serving it upon her husband after the husband has been appointed her guardian in the proceeding is bad because the husband was appointed guardian without his consent.

The facts are shortly as follows:—On the 10th August 1914 one Mohendra Narain Saha died leaving a Will, dated the 14th Sravan 1321 B. S., corresponding to 30th July 1914. He left him

surviving a widow, Mrinalini Debya, and a daughter, Hironmoyee Dasi. On the 11th November 1914 Mrinalini applied for Probate of the Will. The petition states that the testator had two near relatives, namely, Hironmoyee Dasi, minor wife of Susen Behari Ray, residing at 13, Nather Bagan Street, Calcutta, represented by her husband Susen Behary Ray, residing at the same place, and also a sister's son named Jotindra Nath Saha. Upon the same day that the petition was presented a petition was also presented on behalf of the petitioner for the appointment of guardians of the two minors. The petition states that Hironmoyee is under the guardianship of her husband Susen Behary Ray, and that he has no interest adverse to the minor and that he was a fit and proper person to be her guardian. It appears from the order sheet that, on the 14th November 1914, Susen Behary Ray was appointed guardian *ad litem* of Hironmoyee Dasi. We have an affidavit, dated 23rd January 1915, of the bailiff of the Small Cause Court of Calcutta stating that, according to the identification of Debendra Chandra Datt, he affixed a copy of the notice with regard to guardianship on the outer door of 13, Nather Bagan Street. The first opposite party, that is, Hironmoyee, being a Hindu *pardanashin* lady and Susen Ray not being present the bailiff states that Hironmoyee's father-in-law, Gosto Behary Roy, was present and that he refused to accept service and sign the original. There is an affidavit also on the record of Debendra Chandra Datt stating that he accompanied Gosto Behary Gupta bailiff to serve notices on the two minors and he states that the bailiff served a copy of the notice by affixing it on the outer door of the dwelling house of the first opposite party, that is, Hironmoyee at 13, Nather Bagan Street. Upon the widow's application the grant of Probate was issued to her and no body appeared on behalf of Hironmoyee to contest the application for the grant. Upon the death of Mrinalini the present application was made on behalf of Hironmoyee Dasi by her husband and guardian, Susen Roy, asking for revocation of the grant of Probate upon certain grounds stated in the petition, one of them being that the Will was a forgery and that it was never signed by the testator, and another being that no notice of the proceeding was served upon Hironmoyee Dasi or upon her guardian, and also alleging that she was never represented in the Probate proceeding and was not bound by the same.

We have been referred to section 83 of the Probate and Administration Act which provides that, in any case before the District Judge in which there is contention the proceeding shall take as nearly as may be the form of a suit, and it is suggested that the proceeding for Probate by Mrinalini had not become contentious and that, therefore, the provision of the Civil Procedure Code, that is to say, Order XXXII, rule 4, which provides that no person shall, without his consent, be appointed guardian of a minor for the purpose of the suit had no application, and that, consequently, the application for revocation of the grant under section 50 of the Probate and Administration Act was not well founded as there had been no real defect in substance.

It is urged on behalf of the appellant that the learned District Judge who, upon the fact being brought to his notice that Hironmoyee Dasi's husband never assented to his appointment as guardian, revoked the grant, acted prematurely and that he should not have so acted unless he were satisfied by evidence that Susen Ray, the husband, was not a fit and proper person to be Hironmoyee's guardian, or that in fact Hironmoyee through her guardian had no notice of the proceeding, and it is pointed out with some force that Susen Ray must have been the proper person to be appointed as guardian and that it is not likely that his interest was in any way adverse to the minor, as we find that in the present proceeding he is her guardian for the purpose of these proceedings.

This is the only question that arises, and the point seems to be uncovered by any actual authority. We were referred to section 69 of the Probate Act which provides that in all cases it shall be lawful for the District Judge, if he thinks fit, to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of Probate or

MANAK *v.* NARAYAN.

Letters of Administration, and we were referred to the case of *Nistariny Dabya* v. *Brahmomoyi* (1) as an authority for the proposition that the mere non-issue of citations was not a defect in substance within the meaning of section 50 of the Probate and Administration Act and that the mere non-service of citation was not sufficient to invalidate the proceeding provided that the person to whom the citation should have issued had notice of the proceeding. We were also referred to Tristram and Coote's Probate Practice, page 305, which deals with the question of service on minors and from which it is stated that it appears that service on a minor is to be effected in the presence of the person who is the natural guardian of the minor, but that no provision is made for the assent of the guardian. We were also referred to Mortimer on Probate Pratice, Edition 1911, at page 530, on the same point. So far as the case in *Nistariny Dabya* v. *Brahmomoyi Dabya* (1) is concerned, this does not seem to have any application, for in that case the minor had been represented in the Probate proceeding by a guardian whose right to appear as guardian was disputed. But in those proceedings there had been contest as to the Will and Probate had only been granted after the contest had taken place. I am prepared to accept the contention of the learned Vakil who appeared for the appellant that Order XXXII, rule 4, does not apply as the proceedings had not arrived at the contentious stage, but, even so, I think that it was for the person who got the guardian appointed to show the Court that that person assented to the guardianship and took upon himself the burden thereof. It seems to me that it is a necessary protection in the interest of an infant that not only should the Court be satisfied that a guardian has been appointed, but that a guardian has been appointed who had consented to accept the appointment and take upon himself the onus that by virtue of the appointment falls upon him on behalf of the infant. We think, therefore, that the learned District Judge was right in the decision at which he has arrived, namely, in revoking the grant and directing the Will to be proved in solemn form in the absence of any evidence that Hironmoyee's husband assented to his appointment as guardian. We do not think that it was necessary for the Judge to await proof either as to the unsuitability of Hironmoyee's husband for the position of guardian or that the service had not been properly effected.

Under these circumstances, the appeal fails and must be dismissed with costs. We assess the hearing fee at two gold *mohurs*.

NEWBOULD, J.—I agree.

Appeal dismissed.

(1) 18 C. 45; 9 Ind. Dec. (N. S.) 31.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 472 OF 1917.

August 7, 1919.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

MANAK—DEFENDANT—APPELLANT

versus

NARAYAN—PLAINTIFF—RESPONDENT.

Bombay Land Revenue Code (Act V of 1879, s. 121—Boundaries fixed by Collector—Adverse possession—Suit to recover portion of survey number, maintainability of—Jurisdiction of Civil Courts.

The fixing of boundaries of different Survey Numbers by the Collector under section 121 of the Bombay Land Revenue Code has the effect merely of showing what land belongs to the persons in whose names the Survey Numbers are registered. It does not affect the right of any one of those persons to show in a Civil Court that he has acquired a title by adverse possession against a registered occupant. [p. 438, col. 1.]

JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued to recover possession of 4 acres of land out of Survey No. 676 situated in Thalner, alleging that he owned Survey No. 678 which is adjoining Survey No. 676 that the plot in dispute was separated from Survey No. 676 by a *bandh* and included in his Survey Number, that he had been in possession of the plot in dispute for about 50 years; that Survey No. 676 was measured about twelve months ago at the request of the defendant by the Revenue Authorities; that they found out that the plot in dispute

formed part of Survey No. 676 which belonged to the defendant, and that, accordingly, he was dispossessed by the defendant in July 1915. He claimed that he had acquired title to the plot in dispute by adverse possession, and prayed, therefore, that possession might be restored to him.

It has been found in both Courts that the plaintiff had been in possession adversely of the plot in dispute for more than twelve years. But it has been contended that the order of the Revenue Authorities adjusting the boundaries of Survey No. 676 was a bar to the present suit. We cannot agree with that contention. Reliance has been placed for the argument on section 121 of the Land Revenue Code. But it does not follow that, because the Collector placed the boundary mark of Survey No. 676 at the place where it ought to be in accordance with the Survey map, that he in any way adjudicated upon the plaintiff's claim to be possessed of the plot in dispute by adverse possession. It is quite true that the fixing of the boundaries of these two Survey Numbers would show what land belonged to the persons in whose name Survey Numbers were registered. But that would not in any way affect the right of any one of those parties to show in a Civil Court that he had acquired a title by adverse possession against a registered occupant. I agree, therefore, with the opinion of the learned Assistant Judge that the order of the Deputy Collector adjudging that the plot in suit formed part of Suvey No. 676 does not at all stand in the way of a Civil Court going into the question of adverse possession. Therefore, I think, the order of the lower Appellate Court was right and the appeal must be dismissed with costs.

HEATON, J.—I also think that the appeal must be dismissed with costs. The words of sub-section (*b*), clause (1), of section 121 of the Land Revenue Code are not perfectly clear, and are not free from difficulty. They might be construed as meaning that, when the Collector has determined the boundary, he has also determined all the rights of ownership. But I do not think that this is what they do mean, and I do not think it is what the words express, when we remember that they appear in the Land Revenue Code. The words are these,—"The settlement of a boundary shall be determinative of the rights of the landholders on either side of the boundary fixed in respect of the land adjudged to appertain, or not to appertain, to their respective holdings." I think the rights that are finally determined by the fixing of the boundaries are those rights which flow from the fact that the land is incorporated in a particular Survey Number, and I do not think they mean more than this. Land may be in one Survey Number, and yet may become by adverse possession the property of the owner of an adjoining Survey Number. That is what is found to have happened in this particular case. I think the Land Revenue Code itself provides the very soundest reasons for taking this view. In giving to the Revenue Authorities power to fix the boundaries it says in section 119 that, "the boundaries would be fixed by the Collector who shall be guided by the land records, if they afford satisfactory evidence of the boundary previously fixed, and, if not, by such other evidence as he may be able to procure". It is quite inconceivable to me that those words should have been used had anything more been intended than that the Collector should fix the boundary and so determine finally what land is to be incorporated in a particular Survey Number. He is not to inquire into the rights of ownership, but is to inquire into the position of the boundary, and nothing else. That being so, it is, to my thinking, quite impossible to suppose that the words of sub-section (*b*) gave to the Collector's decision a finality as regards those rights of ownership which are not dependent on the circumstance whether the land does or does not form part of a particular Survey Number.

Appeal dismissed.

In the matter of AN ARBITRATION BETWEEN BAIJNATH KALOORAM & ALIBHOY MAHOMED.

CALCUTTA HIGH COURT.
ORDINARY ORIGINAL CIVIL JURISDICTION
NOS. 350 AND 351 OF 1919.
December 9, 1 19.
Present:—Mr. Justice Greaves.
In the matter of THE IND'AN ARBITRATION ACT OF 1899.
In the matters of AN ARBITRATION BETWEEN BAIJNATH KALOORAM AND ALIBHOY MAHOMED.

Arbitration—Agreement in contract to refer disputes to arbitration—Arbitrators, power of, to decide what are terms of contract.

Where by the terms of a contract,—in this case an Advice Note,—it is provided that any dispute whatsoever arising on, or out of, the contract should be referred to arbitration under the Rules of the Bengal Chamber of Commerce, for the time being, for decision, and that such decision should be accepted as final and binding on both parties to the Adivce Note, it is within the authority of the arbitrators under a submission made to them to decide what are the terms of the contract, and whether or not a particular term was included in the contract as originally made. [p. 440, col. 1.]

Mr. *A. N. Chaudhuri* (with him Mr. *S. N. Banerji*), for the Applicants.

Sir *B. C. Mitter* (with him Mr. *S. M. Bose*), for the Respondents.

JUDGMENT.—This is an application by Allibhoy Mahomed to set aside two awards of the Bengal Chamber of Commerce, Nos. 663 and 664, both dated the 27th August 1919, in favour of Baijnath Kalooram and to restrain Baijnath from withdrawing a sum of Rs. 21,067-10-0 deposited by Allibhoy Mahomed with the Sheriff of Calcutta on the 4th September 1919 in respect of the execution of the awards.

On the 24th June 1918 Baijnath applied for arbitration in respect of difference due to him from Allibhoy Mahomed on Advice Notes Nos. 28 and 31 and also in respect of Advice Note No. 34. On the 20th January 1919 Allibhoy Mahomed commenced against Baijnath Suit No. 223 of 1919 to stay the arbitration on the ground that there was an interpolation in Advice Note No. 31 stating that thereby Advice Note No. 28 was settled. Mr. Justice Chaudhuri refused an interlocutory application for stay and intimated, so I am told, that the question of interpolation was for the arbitrators to decide. Against Mr. Justice Chaudhuri's refusal to stay the arbitration there was an appeal which was dismissed. The order states that Counsel who appeared on the appeal stated that he had then no materials to establish the interpolation but that he reserved his rights to raise the question when the suit was heard.

On the 12th September last Allibhoy Mahomed applied in the suit to restrain the withdrawal by Baijnath of the Rs. 21,067-10-0. It was argued before Mr. Justice Rankin that the awards were bad as there was a suit pending when they were made which had not been restrained, reliance being placed on the case of *Doleman & Sons* v. *Ossett Corporation* (1). Mr. Justice Rankin held that this case had no application, as the arbitration had been allowed to proceed and he left the applicant to apply in the arbitration to set aside the awards, he stated in his judgment that, although the question whether or not there had been an interpolation had been determined by the arbitrators that no question upon which the validity of the submission depended could be finally determined by the arbitrators, and that it must be open to the complaining parties to make that contention on motion to set aside the award. This is the application which is now before me. On behalf of the applicant it is first argued that I should grant the relief sought or, at any rate, the later portion, on the ground that as the suit was not stayed the arbitration could not continue and the awards are of no avail; and, secondly, it is said that the question of interpolation goes to the root of the contract, inasmuch as if this is established, the contract is void and that this is a matter to be decided by the Court on evidence. On behalf of Baijnath it is said that the first point is not open as it has already been decided by Mr. Justice Rankin adversely to the applicant, and as to the second point reliance is plased on *Produce Brokers Co., Ltd.* v. *Olympia Oil and Cake Co., Ltd.* (2) as deciding that the question of what the contract is and the terms thereof are matters to be decided by the arbitrators who have already decided adversely to the applicant.

With regard to the question of the failure to stay the suit invalidating the arbitration, this point has already been decided by Mr. Justice Rankin adversely to the applicant and

(1) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 16 J. P. 457; 10 L. G. R. 915.
(2) (1916) 1 A. C. 314; 85 L. J. K. B. 160; 114 L. T. 94; 21 Com. Cas. 320; 60 S. J. 74; 32 T. L. R. 115.

I do not think that it is open to the applicant to re open it in this Court. As to the second question, although Mr. Justice Rankin expressed the opinion that the arbitrators could not decide finally with regard to the interpolation, it seems to me that this was an expression of opinion rather than a decision and that I am bound to decide this point. Moreover, I am told that Mr. Justice Chaudhuri expressed a contrary opinion although he, too, did not decide this point. By the terms of the contract it was provided (Term 13) that any dispute whatsoever arising on or out of the Advice Note should be referred to arbitration under the Rules of the Bengal Chamber of Commerce, for the time being, for decision and that such decision should be accepted as final and binding on both parties to the Advise Note.

Now, as I read the decision in *Produce Brokers Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.* (2) it is a decision that, under a submission to refer all disputes arising out of a contract, which are the same words as in the Advice Note before me, the arbitrators have authority to decide what are the terms of the contract. This being so, it is difficult to escape from the conclusion that they have authority to decide whether a particular term was included in the contract at the time it was made. I suppose that, strictly speaking, the decision referred to above is not binding on me although it would, of course, demand my respectful consideration but, if I may say so, I respectfully agree with it and I think it would be a pity to be compelled to hold that, where business men have agreed that an Arbitration Tribunal shall decide any dispute arising on or out of the Advice Note in suit, it is not competent for them to decide whether or not a particular term was included in the contract when it was made. I do not think that I am forced to any such conclusion and I accordingly hold that it was competent for the arbitrators under the terms of the submission to decide whether or not this particular term was in the contract as originally made. With regard to Mr. Chaudhuri's argument that the question goes to the root of the contract itself and raises the question whether in fact there was any contract at all under which there could be a submission there seems to me to be a difference between a dispute which raises the question whether in fact X. entered into a contract at all or a question whether X. was induced to enter into a contract by fraud and a question such as the present whether a contract contained a particular term at the time it was made. In the result, the application fails and must be dismissed with costs.

Application dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 87 OF 1919.

February 20, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

BHAGA MOTIJI—PLAINTIFF—APPELLANT

versus

DORABJI SORABJI—DEFENDANT—RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), s. 121—Boundary fixed by Collector—Adverse possession—Suit to recover portion of Survey Number from registered occupant, maintainability of—Jurisdiction of Civil Courts.

When the settlement of a boundary is made by the Collector under section 121 of the Bombay Land Revenue Code, it does no more than establish where the boundary line lies and that the owners of the respective Survey Numbers are entitled to their property according to the boundary line as fixed by the Collector. This, however, does not prevent any of them filing a suit in the Civil Court on the ground that he has acquired a portion of his neighbour's Survey Number by adverse possession. [p. 441, col. 2.]

Second appeal from the decision of the District Judge, Surat, in Appeal No. 86 of 1917, confirming the decree passed by the Additional Subordinate Judge at Bulsar, in Civil Suit No. 125 of 1916.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *K. N. Koyjee*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover possession of the plaint land measuring 19 *gunthas*, said to belong to Survey No 420, alleging that the land originally belonged to one Kasna Mavji exclusively; that even if the said Kasna was not the

sole owner of that land, he had become the sole owner thereof by adverse possession for more than twelve years. The plaintiff was the owner of Survey No 419. The defendant was the owner of Survey No. 420. The plaint land was situated between these two Survey Numbers. The question arose whether it formed part of Survey No. 419 or 420.

In April 1913 the defendant presented an application to the Mamlatdar of Pardi complaining of an encroachment made by the plaintiff over the land in suit, and praying that the boundary of the two Survey Nos. 419 and 420 might be determined and the encroachment removed. Statements of the plaintiff and the defendant were recorded before the Patel and the Talati and the Circle Inspector and, finally, the Collector of Surat decided, on the 25th November 1914, that the plaintiff was wrongfully in possession of the land in question, and he ordered his eviction therefrom under section 121 of the Bombay Land Revenue Code. The Collector in his decision said,—

"This is clearly a case to which the provisions of section 121 (2) of the Land Revenue Code might properly be applied. Dorabji had a complete and perfect title to the whole Survey Number but finding that he was in actual possession of too small an area he paid for measurement, he had the proper boundaries of his holding determined by the Collector under section 119, clause (2). As the result of that determination, I find that Bhagoji Motiji, (*i. e.*, the plaintiff in this case) is wrongfully in possession without any proper title and I order his eviction under section 121 in favour of Dorabji."

An appeal was preferred from the said order to the Commissioner, but it was rejected about May 1915.

All that was decided then was that the boundary line between these two Survey Nos. 419 and 420 was as contended by Dorabji, and as Dorabji had a complete and perfect title to the whole Survey Number the Collector came to the conclusion that the plaintiff was wrongfully in possession of that portion which was in dispute, and which had been in the inquiry held to belong to Survey No. 420.

The plaintiff's suit, therefore, was to recover possession on the ground that he had acquired a perfect title to the land in dispute by adverse possession. Both Courts have held that they had no jurisdiction to hear the suit.

The learned Appellate Judge considered that the decision of the Collector was final, relying upon the case of *Bai Ujam* v. *Valiji Rasulbhai* (1). In that case, the Collector had settled the boundaries between the two Survey Numbers, and the Court held that as the defendant did not claim to have acquired, since the Collector's decision, the right to hold the plaintiff's land except by adverse possession, which the Subordinate Judge found not proved, the plaintiffs were entitled to have the possession of it restored to them.

A very similar point came before us in *Manak* v. *Narayan* (2). There had been a dispute between the owners of two Survey Numbers and after the Survey Numbers had been measured by the Revenue Authorities, it was found that the plot in dispute belonged to the Survey Number which belonged t the defendant. The plaintiff claimed that he had acquired a title to the plot in dispute by adverse possession, and prayed, therefore, that possession might be restored to him. We came to the conclusion that the order of the Deputy Collector adjudging that the plot in dispute formed part of Survey No. 676, which belonged to the defendant, did not stand in the way of a Civil Court going into the question of adverse possession. The meaning of section 121 of the Bombay Land Revenue Code was considered, and we held that when the settlement of a boundary was made by the Collector it did not more than establish where the boundary line lay, and that the owners of the respective Survey Numbers were entitled to their property according to the boundary lines as fixed by the Collector. But we held that it did not prevent one of the disputing parties filing a suit in a Civil Court on the ground that he had acquired a portion of his neighbour's Survey Number by adverse possession. Therefore, in my opinion, both Courts were wrong in coming to the conclusion that they

(1) 10 B. 456: 5 Ind. Dec. (N. S.) 692.

(2) 59 Ind. Cas. 437; 22 Bom. L. R. 1114 (*Footnote.*)

had no jurisdiction to hear the suit, and that they ought to decide whether the plaint property was, as a matter of fact, the property of the plaintiff or of the defendant according to the facts proved in the case. They have jurisdiction to decide those questions, and it depends on the findings of fact whether the plaintiff is entitled to succeed.

It was argued that the Secretary of State was a necessary party to the suit, and that if he was not a party, then the Court had no jurisdiction. But that point was never taken at the hearing, and no issue was raised. It may be, the Courts may hold that the plaintiff, before he can succeed, must get the order of the Revenue Authorities set aside. But that again is a question which is entirely apart from the question of jurisdiction. The appeal must be allowed, and the case remanded to the Trial Court to be heard on the merits. The appellant to get costs in both Appeal Courts. Costs in the Trial Court to be costs in the cause.

HEATON, J.—I concur. The judgments from which we are hearing this appeal were delivered before our decision in *Manak* v. *Narayan* (2). However, our decision in that case really settles the point which arises here. It is perfectly true that the decision of the Collector is final as to the boundary line between two Survey Numbers. Nevertheless, as we held in *Manak* v. *Narayan* (2), one party or the other may by adverse possession acquire a title to a portion of his neighbour's Survey Number. In my judgment in that case I discussed pretty fully the reasons which led me to that conclusion, and I need not repeat them. It is argued that clause (2), which was in the year 1913 added to section 121 of the Bombay Land Revenue Code, makes a difference. I do not, however, think that it makes any difference whatever to the reasoning, or to the decision, in *Manak* v. *Narayan* (2). It merely enables the Collector to evict summarily a landholder who is wrongfully in possession of land which has been adjudged by the settlement of a boundary, and no doubt the Collector might after inquiry decide that he ought to evict a person who had encroached upon his neighbour's Survey Number. But whether the Collector's order would be legally correct or not would still remain to be determined by a Civil Court if a suit were brought. The Courts below have based their decision on the view that they had not any jurisdiction to determine whether the plaintiff had or had not acquired a title as against the defendant by adverse possession. That is contrary to our previous decision, and I think is wrong. So the decrees of the lower Courts must be set aside, and the case must be remanded to be tried according to law.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1335 OF 1917.

May 19, 1920.

Present :—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

KHETRA NATH MONDAL, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES HARENDRA NATH MONDAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

LAKHAN SARDAR AND OTHERS—PLAINTIFFS AND DAHARI BUNANI—*Pro forma* DEFENDANT—RESPONDENTS.

Landlord and tenant—Abandonment of tenancy—Landlord taking possession under agreement with tenant, whether abandonment—Bengal Tenancy Act (VIII of 1885), Sch III, Art. 3—Landlord holding after termination of right to hold—Suit by tenant to recover holding—Limitation.

A landlord who, under an agreement with his tenant, takes possession of the tenancy with a view to cultivate it, cannot set up the plea that the land has been abandoned by the tenant. [p. 443, col. 2.]

Where a landlord takes over the tenancy of his tenant under a usufructuary mortgage, and continues in possession after termination of his right under the mortgage, his possession is adverse, and a suit by the tenant to recover possession is not governed, as to limitation, by Article 3, Schedule III to the Bengal Tenancy Act, as there was no dispossession within the meaning of that Article. [p. 443, col. 2.]

Appeal against the decree of the Subordinate Judge, Rajshahye, dated the 16th of March 1917, affirming that of the Munsif Naogaon, dated the 12th of June 1916.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Satya Charan Sinha*), for the

Appellants.—The defendant is the appellant. The appeal arises out of a suit for recovery of *khas* possession of an occupancy holding. The *raiyat* executed a usufructuary mortgage in my favour in respect of 5 out of 8 plots in 1896. Sometime after, the mortgagor, *raiyat*, left the village and has died. I took possession of the mortgaged plots by virtue of the mortgage which has not been re-paid. It has been found that I have also taken possession of the other plots as well. The representatives of the *raiyat* have brought this suit in 1915. The Courts below have decreed the suit in respect of the mortgaged lands. I would submit the *raiyat* having left the village after the mortgage there has been an abandonment of the holding. The plaintiff, therefore, cannot get a decree as the tenancy has been determined. The plaintiffs have no cause of action. My next point is that the suit is barred by limitation under Article 3, Schedule III of the Bengal Tenancy Act. The two years prescribed therein from the date of dispossession has long elapsed. I have been all along continuing in possession. Refers to *Ram Pershad Koeri* v. *Jawahir Roy* (1).

Babu *Krishna Kamal Maitra*, for the Respondent was not called upon to reply.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the defendant in a suit for recovery of possession of an occupancy holding. The holding belonged to one Budha Buna who executed a usufructuary mortgage of five out of eight plots on the 24th August 1896, in favour of the superior landlord, the present defendant-appellant. The usufructuary mortgage was to terminate on the 13th April 1911. The landlord went into possession as usufructuary mortgagee of the five plots years later, the occupancy *raiyat* left the village, with the result that the landlord seized the opportunity to take possession of the remaining plots included in the holding. The occupancy *raiyat* is now dead. Upon the expiry of the usufructuary mortgage, the landlord has not vacated possession, and on the 8th March 1915, the representatives of the occupancy *raiyat* instituted the present suit for recovery of possession. The claim has been decreed in respect of the five plots included in the usufructuary mortgage, but has been dismissed with regard to the remaindar. As there is no cross-appeal we need not consider whether the claim in respect of the other three plots has been rightly dismissed.

As regards the five plots now in dispute, two contentions have been advanced by the landlord, namely, *first*, that as there was an abandonment of the holding in 1898, there is no subsisting tenancy on the basis whereof the plaintiffs, as the representatives of the occupancy *raiyat*, can succeed, and *secondly*, that the suit is barred by the two years' rule of limitation embodied in Article 3 of Schedule III to the Bengal Tenancy Act. In our opinion, there is no foundation for either of these contentions.

It may be conceded that a holding is deemed to be abandoned by a *raiyat* if three elements are established, namely, non-residence in the village, non-cultivation of the land of the holding, and non-payment of rent to the superior landlord. These elements, however, do not justify an inference of abandonment if the landlord himself by an arrangement with his tenant, be placed in possession of either the whole or a part of the holding. The person competent to set up the plea of abandonment is the landlord himself, because it is his interest that no portion of the cultivable land of the *Zemindari* should remain uncultivated, but if the landlord himself, under an arrangement with his tenant, takes possession with a view to cultivate it, he cannot set up the plea that the land has been abandoned. In the circumstances of this case, the plea of abandonment consequently fails.

The plea of limitation is equally untenable. Under Article 3 of Schedule III to the Bengal Tenancy Act, a suit by a *raiyat* against his landlord must be instituted within two years from the date of *dispossession*. In this case, there was no *dispossession*. What happened was that, after the 13th April, the possession of the landlord became adverse, he continued in possession, although he should have made over possession to his tenant upon termination of his right under the usufructuary mortgage. Such a chain of events cannot attract the operation of Article 3 [*Panchoo Kapali* v. *Jajneswar Majhi* (2)].

(1) 12 C. W. N. 899; 7 C. L. J. 72.

(2) 58 Ind. Cas. 844; 32 C. L. J. 9.

The result is that the decree of the Subordinate Judge is affirmed and this appeal is dismissed with costs.

FLETCHER, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 1 OF 1920.

INSOLVENCY PETITION No. 732 OF 1914.

August 9, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

LAKHMIRAM KEVALRAM BHATT— APPELLANT

versus

PUNAMCHAND PITAMBER — RESPONDENT.

Jurisdiction of High Court to restrain suit in Foreign Court—Presidency Towns Insolvency Act (III of 1909), s. 45—Insolvency proceedings in British India—Discharge—Suit against insolvent in Foreign Court, maintainability of.

The High Court has jurisdiction to restrain a party within its jurisdiction from prosecuting a suit in a Foreign Court, and the principle on which this jurisdiction is exercised is that the Court acts *in personam* and will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction. [p 445, col. 1.]

It is contrary to all ideas of equity that an insolvent trading and incurring debts in British India and having property in foreign territory, which the Official Assignee could not get hold of, should be able to completely get rid of all his liabilities as regards his creditors inside British India, and then proceed to enjoy his property outside British India, free from all those liabilites. If, in such a case, after the insolvent has obtained his discharge, a creditor brings a suit against him to recover a debt in a Foreign Court within the jurisdiction of which the insolvent owns property, the High Court will not restrain the creditor from proceeding with the suit. [p. 445, col. 2.]

Mr. *Bhandrakar*, for the Appellant.

Mr. *B. J. Wadia*, for the Respondent.

JUDGMENT.—The appellant in this appeal is an insolvent who has filed his petition under the Presidency Towns Insolvency Act, in Bombay on the 27th November 1914. As far as this Court is concerned, the insolvent proceedings came to an end on the 1st of October 1918, when the insolvent got his discharge. One of the opposing creditors mentioned in the schedule, the respondent in this case, has obtained a decree for Rs. 2,834-4 0 in the Court of the Sirohi State, in respect of the debt for costs in Bombay High Court, Suit No. 581 of 1911. In the insolvency proceedings it had been alleged that the insolvent had succeeded, as the heir of his brother, to certain property in the Sirohi State, but he was able to prove that he was separate from his brother and that his brother's widow had adopted the insolvent's son. It would appear that the respondent still hopes to be able to attach that property. The appellant then took out a Rule in this Court calling upon the respondent to show cause why he should not be restrained from proceeding in the suit filed by him against the insolvent in Sirohi State and from executing the decree passed in the said suit.

The Rule was discharged on the 7th of October 1919 by Mr. Justice Kajiji. The learned Judge in the course of his judgment says :—

"It is contended on behalf of the insolvent that, under section 45 of the Presidency Towns Insolvency Act, the discharge amounted to a release and, therefore, there was no debt and no cause of action for the suit in Sirohi State. In my opinion section 45 of the Act only applies when a creditor seeks to recover property of the insolvent which is in British territory or in foreign country or State if such foreign country or State will recognise the Official Assignee of Bombay and hand over the property belonging to the insolvent in order that it may be applied for the benefit of all the creditors and he may not be allowed to keep it. But in this case the Sirohi State has refused to recognise the Official Assignee and has refused to hand over the property, as appears from paragraph 6 of the opposing creditor's affidavit of 23rd September 1919. I, therefore, hold that there is nothing in the Insolvency Act, under these circumstances, to prevent a decree-holder from filing a suit in a Foreign Court and recovering his money from the property of the insolvent."

The opposing creditor undertook not to

arrest the insolvent personally and to give notice to the other creditors mentioned in the schedule of any property and money received in execution of the decree in order to enable them to claim rateable distribution. No doubt, the point for agrument before the learned Judge was whether the order of discharge is a complete release or not from the debts mentioned in the schedule. Such an order, no doubt, would be recognised by all Courts in the British Empire, but certainly there would be no obligation on Courts outside British India to recognise the order of discharge as a complete release from debts mentioned in the order. The real question is whether this Court has got jurisdiction to restrain a party from proceeding in an action in a foreign country and, if it has, on what principle it will act in considering the question. This matter is discussed in *Vanichand* v. *Lakhmichand* (1) by Mr. Justice Pratt:—

"There is no doubt as to the jurisdiction of this Court to restrain a party within its jurisdiction from prosecuting a suit in a Foreign Court. The principle on which this jurisdiction is exercised is set forth in the judgment of Lord Cranworth in the case of *Carron Iron Co.* v. *Maclaren* (2). It is that 'the Court acts *in personam* and will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction.'"

Therefore, if we think that the action of the opposing creditor in filing the suit in the Sirohi State on the judgment of the Bombay High Court is contrary to our notions of equity, we should certainly restrain him from proceeding with that action. Of course, that will not prevent him from continuing the action in the Sirohi State; but if he came within the jurisdiction of this Court, proceedings might be taken against him for contempt. Now, on the particular facts of this case, there is nothing, as far as I can see, which offends our notions of equity in the opposing creditor continuing his proceedings in the Sirohi State against the insolvent, who had filed his petition to get rid of the obligation to pay the costs decreed against him in the suit I have referred to. He had no assets to hand over to the Official Assignee and, as far as his obligations in British India were concerned, the order of discharge freed him from the liability to pay those costs. But if he has assets in the Sirohi State, there is no reason why the opposing creditor should be at liberty to take proceedings in that State in order that he may recover his debt from any property he may discover situate in that State. Generally speaking, it would certainly be contrary to all ideas of equity that a party trading and incurring debts in Bombay and having property in foreign territory, which the Official Assignee could not get hold of, should be able to completely get rid of all his liabilities as regards his creditors inside British India, and then proceed to enjoy his property outside British India, free from all those liabilities. This case, in my opinion, does not come within any of the three classes of cases which were referred to in *Carron Iron Co.* v. *Maclaren* (2), in which it would be considered that a party within the jurisdiction should be restained from taking proceedings outside the jurisdiction of the Court.

I, therefore, think the appeal fails and it will be dismissed with costs.

Appeal dismissed.

(1) 53 Ind. Cas. 395; 21 Bom. L. R. 955 at p. 957; 44 B. 272.

(2) (1855) 5 H. L. C. 416; 24 L. J. Ch. 620; 3 W. R. 597; 101 R. R. 229; 10 E. R. 961.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 30, 1920.

Present:—Viscount Cave, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

Musammat BHAGWAT KOER AND ANOTHER —APPELLANTS

versus

DHANUKHDHARI PRASHAD SINGH AND ANOTHER—RESPONDENTS.

Hindu Law—Widow—Surrender of estate—Widow receiving maintenance in lieu of estate, effect of.

A Hindu widow can renounce the estate in favour of the nearest reversioner, and by a

voluntary act efface herself from the succession, as effectually as if she had then died, and this effacement may be effected by any process having the effect of a surrender or relinquishment or abandonment of her rights, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property. The receipt of maintenance by a widow in lieu of her estate amounts to a complete relinquishment of that estate. [p. 449, col. 2; p. 450, col. 1.]

Appeals from a judgment of the Calcutta High Court, (Chitty and Teunon, JJ.), dated the 22nd May 1913.

Mr. *De Gruyther*, *K. C.* and Mr. *Dube*, for the Appellants.

Mr. *Upjohn*, *K. C.*, Sir *W. Garth*, *K. C.* and Mr. *Parikh*, for the Respondents.

JUDGMENT.

VISCOUNT CAVE.—These are consolidated appeals against three decrees of the High Court of Calcutta, dated the 22nd May 1913, two of which affirmed decrees of the First Subordinate Judge of Saran, dated, respectively, the 17th March and the 12th May 1910, while the third modified a decree of the same Court dated the 18th July 1910.

The facts leading up to the litigation may be shortly stated as follows: Sri Kishun Singh, Bachchu Singh and Jugalkishore Singh were three Hindu brothers governed by Mitakshara Law and possessed of considerable properties in the districts of Saran and Gaya and in Oudh. Jugalkishore died on the 5th July 1872 without issue, leaving a widow *Musammat* Anandi Koer; Srikishun died on the 18th July 1872 without male issue, leaving a widow and two daughters; and Bachchu died on the 9th February 1874 leaving a son, Mahabir Singh.

After Jugalkishore's death Bachchu applied to the District Judge of Saran, under Act XXVII of 1860, for a certificate to collect debts due to the estate of Jugalkishore, alleging that the three brothers had been joint in estate and that he was entitled as survivor to Jugalkishore's estate. This application was opposed by Jugalkishore's widow, Anandi Koer, who claimed that a partition between the three brothers had been effected in the year 1864 and accordingly that at the date of her husband's death the brothers were separate and she was entitled to succeed to her husband's estate. Bachchu died while this dispute was pending, but in the result the District Judge decided that the alleged partition had not taken place and accordingly that the three brothers were joint and granted the certificate to Mahabir. This decision, being given only upon a question of representation, did not preclude Anandi Koer from raising the question of title again in a suit properly instituted for that purpose; but in fact Anandi, acting through her brother and Attorney, accepted the decision and executed an agreement, dated the 17th May 18 4, agreeing, in consideration of certain property being allotted to her for maintenance during her life, not further to contest the matter; and thereupon Mahabir took possession of the estate. This transaction, the effect of which is in dispute, will be referred to at greater length hereafter.

Mahabir died on the 21st June 1894 leaving no issue but leaving two widows, the defendant *Musammat* Bhagwat Koer and *Musammat* Rupkali Koer, the latter of whom was then *enceinte* and gave birth, on the 11th October 1894, to a daughter named Ramdulari Koer, Mahabir before his death executed a Will (to be referred to later), Probate of which was, on the 5th January 1895, granted to his two widows. The posthumous daughter, Ramdulari, died on the 4th June 1895, her mother, Rupkali, on the 8th February 1899, and Anandi, the widow of Jugalkishore, on the 4th August 1904. On the 13th February 1906, Bhagwat Koer, the surviving widow of Mahabir, purporting to act under a power conferred upon her by her husband's Will, adopted the defendant Ragheshwar Indar Sahi as his son and executed in his favour a deed of adoption, dated the 17th February 1906.

The plaintiff Dhanukhdhari Prasad Singh is the nearest reversionary heir to Jugalkishore and Mahabir, and claims to be entitled to their estates; and on the 20th August 1907, he instituted the three suits out of which these appeals arise against the surviving widow and the alleged adopted son of Mahabir in the Court of the First Subordinate Judge at Saran. One Ambika Prashad Singh, the purchaser of a part of the property, joined as co-plaintiff in two of the suits, but need not be further referred to. The causes of action in the three suits are different, and

it will be convenient to deal with them separately.

In Suit No. 200 of 1907 (out of which Appeal No. 100 of 1916 arises) the plaintiff Dhanukhdhari sued to set aside the adoption of the defendant Ragheshwar as invalid and contended that the power of adoption conferred by the Will of Mahabir had, in the events which had happened, no operation. The terms of that Will must now be referred to in detail.

The Will of Mahabir, which was dated the 20th December 1894, was divided into paragraphs. By paragraph 1 the testator, after reciting that he had then no male issue but had two wives living, directed that if any child should be born of either wife, or if children should be born of both wives, they should after his death become possessors of all his moveable and immoveable properties whether ancestral or self-acquired, whereby the name and reputation of his ancestors might be perpetuated and the religious merit of his family might be preserved. By paragraph 2 he directed that if at the time of his death his children should be minors, his wives successively should act as their guardians and manage the estate. It was contended that, although the word "children" (*aulad*) is used in the above two paragraphs, they were in fact intended to operate in favour of male children only but it is unnecessary to determine this question, as, in any event, the first two paragraphs are controlled, so far as female issue are concerned, by the third paragraph of the Will. The third and fourth paragraphs of the Will are in the following terms:—

"3. If there be no son born of either of my wives and only, (*a*) daughter be born, in such a case also the management of the *reasat* shall be conducted by either the senior or the junior wife, whoever may be existing and her (the daughter's) guardianship and training and education shall be conducted as provided in paragraph 2. She will have the daughter married in a good family as is the custom in my family. My wives up to the terms of their respective lives shall remain proprietresses and possessors as provided in paragraph 2. After the death of both of them my daughter shall become the proprietress, and she shall perpetuate the name and reputation of my family by residing in my house and maintaining the same as the absolute proprietress.

"4. If by the will of Providence no male or female child be born to me, in that case both my wives, one after another as provided in paragraph 2, shall remain in concord, proprietors and managers and perpetuate the name and reputation of the family up to the terms of their lives. I also authorise my wives that if both of them exist, they, in concurrence, or if either of them die, the surviving wife alone shall select according to her choice some worthy boy from my family or the families of my relatives and adopt him, who shall remain obedient and dutiful as a son up to the terms of the lives of my wives; and the said adopted son after the death of my two wives shall remain absolute proprietor in my place as my son, and he shall have all authority such as is possessed by me."

In the suit now under consideration it was contended by the plaintiff that, under the express terms of the Will, the power of adoption conferred by paragraph 4 was contingent on no male or female child being born to the testator, and that, as a daughter was born to him (although after his death), the power of adoption never arose. He also contended that Ragheshwar was not a member of the class, consisting of the testator's family (*khandan*) or the families of his relatives, from which alone any adoption could be made. Both these contentions were upheld by the Subordinate Judge who accordingly set the adoption aside; and on appeal the High Court, while holding that Ragheshwar was within the class described in the Will, agreed with the Subordinate Judge in holding that, in the events which had happened, the power of adoption did not arise, and accordingly dismissed the appeal.

On appeal by the defendants to this Board, the appellants relied on the strong presumption that the testator, a Hindu, would have desired that, in the event (which happened) of his having no child who survived him and attained maturity, a son should be adopted to him by his widow, and contended that the Will must be construed as having that effect. The presumption is no doubt strong and in a case of this kind the Courts would not be astute

to defeat an adoption not clearly in excess of the power; but in the present case it appears to their Lordships to be impossible, without unduly straining the words of the Will, to put upon it the construction contended for on behalf of the defendants. The words "if no male or female child be born to me" clearly govern the whole of paragraph 4 of the Will, including the power of adoption; and it is impossible without going outside the terms of the Will and in fact making a Will for the testator, to hold that, in the events which happened, the power took effect.

The result is that the decision of the High Court in this suit is right and that this appeal must fail.

In the Suit No. 198 of 1907 (out of which Appeal No. 131 of 1916 arises) the plaintiff Dhanukdhari sued for a declaration that, under the terms of the Will of Mahabir and in the events which had happened, the plaintiff was entitled to immediate possession of Mahabir's estate. He based his claim on the contention that, on the true construction of paragraph 3 of the Will, the widows were only entitled to be guardians of the testator's daughter and to manage the estate during her lifetime, and that upon her death the estate passed to her mother Rupkali and on the death of the latter to the plaintiff. The Subordinate Judge held that, on the true construction of paragraph 3, the widows took life-estates in succession and that on the death of the surviving widow the property passed to Ramdulari or her representatives under section 1 6 of the Succession Act. He, therefore, dismissed the claim for possession, but added to his judgment a declaration, under section 42 of the Specific Relief Act, of the right of the plaintiff as heir or Ramdulari to succeed to the estate of the testator after the death of the surviving widow Bhagwat Koer. Both sides having appealed to the High Court, that Court affirmed the decree of the Subordinate Judge dismissing the suit for possession, but struck out the declaration as to the plaintiff's reversionary right, holding that his plaint contained no claim for such a declaration and that the plaintiff had not made out his title to succeed to the estate of Ramdulari. The plaintiff thereupon appealed to this Board. Their Lordships agree with the decision of the High Court in this case. They are satisfied that, on the true construction of the Will and in the events which happened, the estate was given to the testator's widows successively for life, and after the death of the survivor to Ramdulari. So that Ramdulari became entitled at birth to a reversionary estate under section 106 of the Succession Act; but the plaintiff has not in this suit adduced evidence proving his claim to be entitled to her estate, and accordingly no declaration should be made in his favour, under the Specific Relief Act. This appeal, therefore, also fails.

In the Suit No. 199 of 1907 (out of which Appeal No. 117 of 1917 arises) the plaintiff sued to recover the estate of Jugalkishore, alleging that in the year 1864 the three brothers, Srikishun, Bachchu and Jugalkishore, separated and partitioned their properties between them, and that accordingly on the death of Anandi in 1904 the plaintiff, as the next reversionary heir, succeeded to Jugalkishore's estate. The plaintiff also alleged in this suit that certain properties in Gaya held under *mokurrari* leases in favour of Bachchu alone in fact belonged to the three brothers jointly and were partitioned with the other properties. The defendants denied the alleged partition and, as an alternative, relied upon the agreement of 1874 above referred to as amounting to a relinquishment by Anandi of her estate to the next reversionary heir Mahabir, so as to vest the whole proprietary right in the latter. They also alleged that the Gaya properties belonged to Bachchu alone.

Upon the issues so raised a large amount of oral and documentary evidence was adduced, and, in the result, the Subordinate Judge was satisfied, notwithstanding the decision in 1874, that the alleged partition had in fact taken place, and accordingly that Jugalkishore at his death was separate in estate. He also held that the Gaya properties belonged to the three brothers and were included in the partition. With regard to the transaction in 1874, the learned Judge held that the agreement executed on behalf of Anandi was not within the authority of her agent and was obtained by corruption, and that such agreement was never ratified by Anandi. He accordingly made a decree in favour

of the plaintiff. An appeal to the High Court against this decision was dismissed. On the appeal by the defendants to the Board, it at once appeared that, upon the question of the partition and upon the question of the ownership of the Gaya properties, there were concurrent findings of fact in favour of the respondents which could not well be questioned; and accordingly the argument of the appellants turned on the legal effect of the transactions of 1874, which must now be more fully stated.

After the decree of the District Judge, delivered on the 18th April 1874, by which he held that the three brothers were joint in estate and accordingly that Mahabir was entitled to a certificate, negotiations were entered into between Mahabir and the Attorney of Anandi, her brother, Babu Dukharan Singh, and on the 17th May 1874, two *ekrarnamas* or agreements were executed. By one of these *ekrarnamas*, which was executed by the Attorney on Anandi's behalf, after a recital of the recent litigation and the grant of the certificate to Mahabir, it was stated that Anandi, "in admission and acceptance of the judgment and order of the District Judge," and in consideration of the fact that Mahabir was the heir, proprietor and possessor of the estate of the three brothers, and that she had no proprietary interest therein and was entitled to maintenance according to the position of the family, "ceased from litigation," and that Mahabir, as the heir of the three brothers, had given her an 8-annas share of a certain *Mouzah* out of the joint estate of all the three brothers for her maintenance during her life; and after reciting that Mahabir had on the same day executed an *ekrarnama*, to the same effect, the agreement concluded: "Now, contrary to the terms of these *ekrarnamas*, my principal shall have no right, claim, dispute or demand in respect of the estates of the deceased persons against Babu Mahabir Prashad Singh." On the same day Mahabir executed another *ekrarnama* in similar terms, whereby he secured the agreed maintenance to Anandi during her life. In pursuance of these documents, Mahabir was forthwith let into possession of the whole property of the three brothers; and from the date of these documents until her death in 1904 Anandi duly received the agreed maintenance without dispute or objection.

It was considered, both by the Subordinate Judge and the High Court that these documents were executed by the agent of Anandi without authority and in consideration of the payment of a bribe to him. Their Lordships cannot accept that view. There was indeed some evidence to show that a sum of Rs. 3,000 was paid by Mahabir to the Attorney some time after the execution of the documents; but it was not proved that this sum was not paid in due course to the Attorney as agent for Anandi and duly accounted for to her. In any case, the agreement having been accepted and acted upon by both parties for a period of thirty years without objection, and the stipulated maintenance having been duly received by Anandi during the whole of that period, it is not open to the plaintiff now to dispute the authority which was plainly admitted by Anandi herself during her lifetime; and, in view of this circumstance, it appears to the Board that the agreements in question must be treated for all purposes as binding upon Anandi and the transaction cannot now be disturbed. In this aspect of the matter it became necessary for their Lordships to consider what was the true legal effect of the transactions referred to.

The power of a Hindu widow to surrender or relinquish her interest in her husband's estate in favour of the nearest reversioner at the time has often been considered and was fully dealt with by the Board in the recent case of *Rangasami Gounden* v. *Nachiappa Gounden* (1). As pointed out in that case, it is settled by long practice, and confirmed by a series of decisions, that a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from the succession, as effectively as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights; and it may

(1) 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66 (P. C.).

be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property. In the present case there was indeed no formal surrender by the widow of her estate; but there was an express agreement, binding upon her, that for considerations which appeared to her sufficient she would abandon the claim which at the time she had a good right to make and would have no right, claim or demand in respect of the estate of her late husband. It is true that the documents were drawn up on the footing, not of a surrender of an acknowledged right, but of an admission that the right did not exist; but, in substance, and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate. The question is no doubt one of difficulty, but, upon the whole, their Lordships have come to the conclusion that the execution of the two *ekrarnamas* followed by the acceptance for thirty years of maintenance under the terms of those documents, amounted to a complete relinquishment by Anandi Koer of her estate in favour of Mahabir, and accordingly that the title of Mahabir's representatives is established and the plaintiff's action should have been dismissed on this ground.

Their Lordships will accordingly humbly advise His Majesty that the appeals in Suits Nos. 200 and 198 be dismissed and the appeal in Suit No. 199 allowed, and that the last mentioned suit be accordingly dismissed. The plaintiffs will pay to the defendants their costs of the hearing of Suit No. 199 before the Subordinate Judge except the costs of Issues Nos. 4 and 5 (relating to the partition and the Gaya estates) on which they succeeded, and will also pay to them their costs of the appeal to the High Court in that suit. The defendants will pay the plaintiffs' costs of Issues Nos. 4 and 5, with the usual set-off. Upon these consolidated appeals to the Board, in which each party has partly succeeded and partly failed, there will be no costs on either side.

Solicitors for the Appellants:—Messrs. *Watkins* and *Hunter*.

Solicitors for the Respondents:—Mr. *E. Delgado*.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 385 OF 1920.

November 18, 1920.

Present:—Mr. Justice Wilberforce.

THE FIRM MAKHAN LAL TEJ PAL OF DELHI—DEFENDANT—PETITIONER

versus

THE FIRM JAI NARAIN-BIRJ RAJ OF DELHI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Interlocutory order—Order allowing party to produce additional evidence after closing case—Revision, whether competent.

Interference by way of revision with interlocutory orders is only justified where irremediable damage is likely to result [p. 451, col. 2.]

In a suit for the recovery of a sum of money five issues were framed and both the parties produced their evidence, at the conclusion whereof the plaintiffs asked for permission to produce additional evidence on the second issue. The Court refused the application but allowed the plaintiffs to produce further evidence on the fifth issue. The defendants applied for revision to the High Court:

Held, that there was no possibility of irremediable damage being done to the defendants and that, therefore, the petition for revision was not competent. [p. 451, col. 2]

Balakrishna Udayar v. *Vasudeva Aiyar*, 40 Ind. Cas. 650; 40 M. 793; 11 Bur. L. T. 48; 15 A. L. J. 643; 2 P. L. W. 101; 33 M. L J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N 50; 44 I. A. 261 (P. C.), followed.

Petition, under section 44 of Act I of 1919, for revision of the order of the Senior Subordinate Judge, Delhi, dated the 20th April 1920.

Lala *Mehr Chand Mahajan*, for Bakhshi *Tek Chand*, for the Petitioner.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—In this case five issues were framed between the parties and both parties produced their evidence. At the conclusion of the evidence the plaintiffs asked for permission to produce additional evidence on the second issue. The trying Court, in an order which is somewhat difficult to understand, refused plaintiffs' application but allowed them to produce further evidence on the 5th issue. Against this order the defendants have put in an application for revision, stating that their case will be materially prejudiced if plaintiffs are given further opportunity, although the trying Court has agreed to give them an opportunity for rebuttal. Against this

application Mr. Moti Sagar for the plaintiffs-respondents has urged that no question of jurisdiction is involved and that there is, therefore, no ground for revision. He has referred specially to *Balakrishna Udayar* v. *Vasudeva Aiyar* (1), a Privy Council judgment. He has also referred to *Haur Kaur* v. *Munni Lal* (2), *Raoji Baburao* v. *Bansilal Narayan Marwari* (3), *Ma E Ko* v. *Ma Pwa Hmi* (4) and *Har Sahai Mal* v. *Brij Lal* (5). He further points out that an appeal will be allowed against the decision of the trying Court and that any objection against the procedure adopted can be made in appeal. He cites a practically similar case reported in *Gaya Singh* v. *Name Singh* (6) in which a Division Bench refused on revision to hear objections to an order allowing additional evidence to be recorded. Finally, he refers to the plain wording of section 115, Civil Procedure Code, to the effect that on revision the High Court may call for the record of any case which has been decided and urges that the powers of revision of this Court are limited to interference in decided cases. He cites many authorities on this point on which the latest appears to be *Bai Rami* v. *Jaga Dullabh* (7). As against this preliminary objection the learned Counsel for the petitioners cites *Hindley* v. *Joynarain Marwari* (8) to the effect that any illegality committed during the course of the trial is a question of jurisdiction, inasmuch as no Court has jurisdiction to pass an illegal order. This judgment appears to me to stretch unduly the language of section 115 and to be plainly opposed to the Privy Council judgment reported in *Balakrishna Udayar* v. *Vasudeva Aiyar* (1). He also refers to two recent judgments of this Court *Imdad Ali Shah* v. *Sayed Ali* (9) and *Gauri Shankar* v. *Ganga Ram* (10), in which it was held permissible to interfere with interlocutory orders on the revisional side. These judgments, for one of which I was responsible, may or may not lay down a correct view of the law, but any how they only go so far as to lay down that interference is only justified where irremediable damage will result. In the present case there is no possibility of such irremediable damage.

Agreeing with Mr. Moti Sagar's objections, I dismiss the petition with costs.

Petition dismissed.

(1) 40 Ind. Cas. 650; 40 M. 79'; 11 Bur. L. T. 48; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50, 44 I. A. 261 (P. C.).

(2) 53 Ind Cas. 441; 134 P. R. 1919; 46 P. L. R. 1920.

(3) 53 Ind. Cas. 135; 43 B. 735; 21 Bom. L R 835.

(4) 54 Ind. Cas. 501; 3 U. B. R. (1919) 179.

(5) 58 Ind. Cas. 182; 18 A. L. J. 373; 2 U. P. L. R. (A.) 86.

(6) 56 Ind. Cas. 983; 5 P. L. J. 261; 1 P. L. T. 701.

(7) 57 Ind. Cas. 556; 44 B. 619; 22 Bom. L. R. 891.

(8) 54 Ind. Cas. 439; 46 C. 962 at pp. 971, 972; 24 C. W. N. 283.

(9) 40 Ind. Cas. 65; 26 P. R. 1917.

(10) 52 Ind. Cas. 859; 77 P. R. 1919.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 15-B OF 1919.

January 22, 1920.

Present :- Mr. Mittra, A. J. C.

UDEBHAN—PLAINTIFF—APPELLANT

versus

RANGRAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Acceleration, how effected—Limited owner and full owner, distinction between.

The succession of the next reversioner can be accelerated only by a limited owner, like a Hindu widow, by making a surrender or by relinquishment. A full owner can only transfer either by sale or gift and such transfer can only be by a registered instrument. [p. 452, col. 1.]

First appeal from the decree of the Sub-Judge, Morsi, dated the 23rd December 1918, in Civil Suit No 225 of 1915.

Mr. *M. V. Joshi*, for the Appellant.

Sir *B. K. Bose* and Mr. *Barlingay*, for the Respondents.

JUDGMENT.—The plaintiff claims to be the assignee of a mortgage-deed. The deed of assignment has been executed by *Musammat* Yashoda, the step mother of the last male-holder, Chandrabhan, who died about the year 1905. It is no longer disputed that upon Chandrabhan's death his estate devolved upon his grandmother, *Musammat* Bayajabai, who died in 1908. It is also now admitted that, after the death of *Musammat* Bayajabai, the estate

devolved on Chandrabhan's step-sisters, Shewanti and Jaiwanti, and not on Chandrabhan's stepmother, *Musammat* Yashoda. In the plaint the plaintiff appears to have thought that *Musammat* Yashoda was a preferential heir and no reference was made to her daughters, Shewanti and Jaiwanti. Later, in the course of the pleadings, the plaintiff stated that Shewanti and Jaiwanti orally relinquished their rights in favour of their mother when the deed of assignment was executed by her. The lower Court has held that the relinquishment has not been proved and cannot also be effected without a registered instrument.

It is unnecessary to deal with all the points raised in this appeal. Shewanti and Jaiwanti, being the step sisters of the deceased, obtained an absolute estate; it is only a limited owner like a Hindu widow who can accelerate the next reversioner's succession by making a surrender or relinquishment. A full owner can only transfer either by sale or gift. As the Transfer of Property Act was in force in Berar at the time, such a transfer can only be by a registered instrument. There being no such registered instrument it is unnecessary to examine the oral evidence in the case. But I entirely agree with the estimate of that evidence formed by the learned Subordinate Judge.

No question of estoppel is raised in the pleadings nor are there any facts established by evidence which would entitle the appellant to argue that Jaiwanti is estopped by reason of her conduct. On this view it is unnecessary to examine the other grounds of appeal. The appeal is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 86 OF 1918.

June 7, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

MADHAVRAO MORESHWAR BHADANEKAR—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Pensions Act (XXIII of 1871), ss. 4, 6—Suit to recover sardeshmukhi haq, *maintainability of—Certificate, whether necessary.*

A suit against the Secretary of State for India to recover the *sardeshmukhi haq* falls within the purview of section 4 of the Pensions Act, and is not maintainable in the absence of the requisite certificate under section 6 of the Act. [p. 453, col. 2; p 454, col. 1.]

First appeal from the decision of the District Judge, Ratnagiri, in Suit No. 1 of 1916.

Mr. *Patwardhan* (with him Mr. *P. B. Shingne*), for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff filed this suit against the Secretary of State to recover his two per cent. *Sardeshmukhi haq* in certain villages in Deogad Taluka not on the old *jamabandi* but on the survey assessment. The suit was dismissed by the District Judge on the ground that the suit came within section 4 of the Pensions Act, and that, as the plaintiff had not produced a certificate as provided for by section 6, he could not proceed any further in the suit.

The only ground which has been argued in appeal is that the Pensions Act, so far as it deals with pensions and grants of land revenue in Ratnagiri, is *ultra vires*. The appellant relies on the decision in *Secretary of State for India* v. *J. Moment* (1). The question, therefore, arises whether a suit would have lain against the East India Company to recover on a grant of land revenue in Ratnagiri; if such a suit would have lain, then it would also lie against the Secretary of State, and any provision to

(1) 18 Ind. Cas. 22; 40 I. A. 48; 18 M. L. T. 53; 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 24 M. L. J. 459; 40 C. 391; 7 L. B. R. 10 (P. C.).

the contrary contravenes section 65 of the Government of India Act of 1858.

In *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State for India* (2), Sir Barnes Peacock, Chief Justice, considered what suits would lie against the Company and what suits would not lie. At page 14 he said : "Where an act is done or a contract is entered into, in the exercise of powers, usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a Sovereign, or private individual, delegated by a Sovereign to exercise them, no action will lie."

In *Vasudev Sadashiv Modak* v. *Collector of Ratnagiri* (3) the plaintiff filed a suit to recover from Government certain emoluments due to him as *deshmukh* of four *mahals*, plaintiff alleging that he was the hereditary *deshmukh* thereof. It was held by the Privy Council that the learned Trial Judge was right in dismissing the suit on the ground that it was excluded from the jurisdiction of the Civil Courts by the Pensions Act of 1871, section 4. At page 125 their Lordships say : "It is difficult to see how the Government could impose upon the *ryots* the obligation of paying these allowances to their officers, except by the exercise of their sovereign right of imposing and receiving a revenue from all lands which were not in their nature rent-free".

The East India Company, therefore, were exercising their sovereign rights in collecting land revenue. It would follow that, if they chose to grant any share of that land revenue to individuals, they were doing so, not as a mere matter of contract in the ordinary affairs of life, but in the exercise of sovereign rights. It would follow then, from the passage I have already cited from the judgment of Sir Barnes Peacock, that an action would not lie against the East India Company on a grant of land revenue. It is true that the point was not taken in *Vasudev Sadashiv Modak* v. *Collector of Ratnagiri* (3) that the Pensions Act, so far as it barred a suit against the Secretary of State on a grant of land revenue, was *ultra vires*. But, in my opinion, it would have to be directly pointed out to us that a suit on a grant of land revenue would have lain against the East India Company before we can say that the Pensions Act is *ultra vires*. I do not think that it can be argued that, because under Regulation XXIX of 1827, which applied only to the Zillas of Poona and Ahmadnagar subsequent to the conquest by the Company of the territories of the late *Peshwa* in the Deccan and Khandesh, such suits would not lie in those Zillas, it can be deduced therefrom that such suits would have lain as regards grants of land revenue in any other territories of the East India Company. In my opinion, the real test is whether the East India Company was exercising sovereign rights and powers or was acting as an ordinary individual, as it would be doing, for instance, if it engaged in trade and in the course of such business caused wrongful damage to the inhabitants within its territories. In my opinion, therefore, the judgment of the learned Judge in the Court below was right and the appeal must be dismissed with costs.

FAWCETT, J.—I concur. The point before us was considered in *Secretary of State for India* v. *Jwahir Lal* (4), where a similar contention was overruled on the ground that the jurisdiction of the Courts had, prior to the enactment of the Pensions Act of 1871, been expressly barred by Regulation XXIV of 1793, section 17. Accordingly, it was held that the East India Company could not have been sued in respect of a pension falling under the Pensions Act at the time of the transfer of the Company's powers and liabilities to the Crown.

The appellant's Counsel has, no doubt, been able to show that a similar clear enactment does not apparently exist in regard to the territories administered by the East India Company in the Bombay Presidency, except the Zillas of Poona and Ahmadnagar, under section 6 of Bombay Regulation XXIX of 1827. The learned Government Pleader has not referred us to any enactment for the other territories which expressly bars claims against Government on account of pensions except Regulation II of 1815 section 15. That enact-

(2) 5 B. H. C. R. App. 1; Bourke A. O. C. 166.

(3) 4 I. A. 119; 2 B. 99; 3 Suth. P. C. J. 390; 3 Sar. P. C. J. 701; 1 Ind. Jur. 387; 1 Ind. Dec. (N. S.) 494.

(4) 29 Ind. Cas. 146; 37 A. 338; 13 A. L. J. 430.

ment lays down the principle that, except in certain specified cases, the continuance or discontinuance of all pensions shall depend solely on the pleasure of Government, and shall not be subject to cognisance or determination in any Court of Justice. But the efficacy of this is somewhat weakened by the subsequent provision that, where any person deems himself aggrieved by the act of the Collector in respect to a pension, he can sue for redress in a Civil Court. This enactment is also rescinded by section 1 of Regulation I of 1827; and it is possible to contend that claims against Government on account of pensions fell under the wide terms of section 21 of Regulation II of 1827. But, in view of the clear principle laid down in Regulation XV of 1815, I very much doubt whether in practice claims against Government on account of pensions were taken cognizance of by Civil Courts in the time of the East India Company, and no such case has been cited to us. It is possible, therefore, that it was not considered necessary to make an express enactment in regard to the old territories of the kind specified in Regulation XXIX of 1827.

If the question before us depended entirely on this particular point I think further inquiry would be desirable. But I agree with the learned Chief Justice that a suit could not have lain against the East India Company, because the continuance of the pension on which the plaintiff bases his claim was a sovereign act, as is clearly shown by the judgment in the case of *Vasudev Sadashiv Modak* v. *Collector of Ratnagiri* (1). Therefore, I am of opinion that the contention fails and the appeal should be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 223 OF 1917.

December 5, 1918.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

BIPIN CHANDRA SARKAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

BASANTA KUMAR CHAKRAVARTI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and Tenant—Permissive occupancy—Status of occupant—Ejectment, liability of occupier to.

A person who enters upon land subject to an agreement to be afterwards arrived at as to the rent, etc, and continues on the land without any concluded agreement having been arrived at, does not hold the land as a "*raiyat*" within the definition of that term in the Bengal Tenancy Act, because, his possession being merely permissive, he does not acquire a right to hold the land for cultivation and is subject to eviction at the will of the landlord after reasonable notice to remove his effects. [p. 455, col. 1.]

Appeal against the decree of the Additional District Judge, Mymensingh, dated the 25th of September 1916, affirming that of the Munsif first Court, at Kishoregnnj, dated the 22nd of March 1916.

Mr. *N. C. Das* and Babu *Herambo Ch. Guha*, for the Appellant.

Babu *Gopal Chandra Das*, for the Respondent.

JUDGMENT.—The plaintiffs in the suit out of which this appeal arises are the proprietors of a plot of land which is in the possession of the defendant. They brought the suit to eject the defendant on the ground that he was in wrongful possession without, as the plaintiffs allege, obtaining any settlement from the plaintiffs or from the predecessor of the plaintiff No. 2. The defendant, on the other hand, claims the right to occupy the land as an ordinary *raiyati* holding. The issue which arises is, whether the defendant has a right to hold the land as a tenant or *raiyat* under the plaintiffs. On that issue the Trial Court found in favour of the defendant and dismissed the suit. The plaintiffs appealed from that decision. The learned District Judge took a different view of the facts. He found that the defendant had been permitted by the landlord to enter upon the land subject to an agreement to be afterwards arrived at "as to the rent, etc."

He further found that no concluded agreement was ever arrived at In these circumstances, it seems to us that the defendant, if not a trespasser, has no right to hold the land as a *raiyat*, he does not come within the definition of "*raiyat*" in the Bengal Tenancy Act, because he has not acquired a right as against plaintiffs to hold the land for the purpose of cultivating it. His possession is permissive. At the highest, his position would appear to be that of a person who is known in England as a tenant-at-will or a tenent by sufferance. He is subject to eviction at the mere will of the plaintiffs though he is doubtless entitled to reasonable time to remove his effects. We cannot agree with the learned District Judge that, on the facts found, the defendant has an implied tenancy or an implied right to hold the land as a *raiyat*. Nor can we agree with him that the plaintiffs are estopped from denying that he has such a right.

It may be that, if the defendant had asked for compensation in this suit for the improvements which he says he has made upon the land, he might have been entitled to some small sum on that account. He has, however, never asked for compensation and there are no materials on the record on which compensation can be assessed. The defendant, moreover, has been in possession throughout the time that this suit has lasted more than three years and, as the plaintiffs have expressed their willingness to give up any claim for mesne profits, we are of opinion that it would serve no useful purpose to pursue the matter further. The result is that the appeal is allowed and the plaintiffs will have a decree entitling them to eject the defendant. The claim for mesne profits is disallowed. The parties will pay their own costs throughout.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 59 B OF 1918.

April 10, 1920

Present:—Mr. Hallifax, A. J. C.

GOPAL RAO—DEFENDANT No. 4—APPELLANT

versus

AMBABAI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 62, applicability of—Suit for recovery of rent received by joint lessor.

A lease for a period of five years was executed in favour of *G. R.* and his brother in respect of a field which was the separate property of the latter, and of a field which was the separate property of *G. R.*, separate rents being reserved for the two fields. *G. R.* received the rents. The brother died and his widow brought the present suit to recover from *G. R.* the rent received by him in respect of her husband's field, on the 2nd February 1908. The suit was instituted on 2nd February 1914, and the question was whether the suit was barred by limitation:

Held, that the suit was governed by Article 62, Schedule I, to the Limitation Act as the rent received by *G R* was received to the use of the plaintiff, and, as it was not brought within the time prescribed by that Article, it was barred. [p. 457, col. 1.]

Appeal against the decree of the District Judge, Akola, in Civil Appeal No. 67 1917, dated the 23rd October 1917.

Mr. *R. M. Deshmukh*, for the Appellant.

Messrs. *M. V. Joshi*, for the Respondent.

JUDGMENT—*Musammat* Ambabai, the widow of one Balwant Rao, sued the first three defendants, with whom we are no longer concerned, and her husband's brother, Gopal Rao, for the rent of field No. 212 of Mouza Mhasang in the Akola District for the three years beginning on 1st February 1907 and ending on 1st February 1910, at Rs. 313 per annum, on the following allegations, while on his death bed her husband asked his brother, Gopal Rao, to get the lease of the field, which was his separate property, executed and registered, and Gopal Rao got a lease executed in the joint names of himself and his brother. He included in it a lease of field No. 212 which was his own separate property, or was under his management for another relative. Separate rents were reserved for the two fields. The suit was for the rent of the last three of the five years for which the lease was given, the claim in respect of the first two years being barred by time.

It appears that the three first defendants paid the rent for the first year of the three to Gopal Rao. The date of this payment is stated vaguely to have been "at the end of January or beginning of February" in 1908, and the parties in this Court have agreed that it shall be assumed to have been paid on 2nd February 1908 as the *kabuliyat* lays down that it is payable on the 1st of February every year.

In answer to the plaint, Gopal Rao pleaded in the first Court that he was joint in estate with his brother, and after Balwant Rao's death he became sole owner of field No. 210. In the lower Appellate Court it has been found that the field was the separate property of Balwant Rao; that Gopal Rao received Rs. 313 as the rent for the first year of the three in question on a date which the parties have now agreed was the 2nd February 1908; that the other defendants had not paid any rent for the last two years of the lease, and that consequently Gopal Rao is liable to pay Rs. 313 (with interest) and the other defendant Rs. 626 (also with interest) to the plaintiff.

Gopal Rao alone has appealed, and it seems that his appeal must succeed on the plea of limitation. This plea was raised by all the four defendants in both the Courts below and was rejected on the ground that the suit is one for compensation for the breach of a contract in writing registered and is, therefore, governed by Article 116 of the Limitation Act, which allows a period of six years. The suit was filed on the 2nd February 1914. The matter does not seem to have been considered with sufficient care. Article 116 applies to the suit against the first three defendants, but even against them it does not bring the claim for the rent payable on the 1st February 1908 within time. The rent for all the three years was primarily claimed from them, Gopal Rao being impleaded as possibly having received payment from them. But Article 116 cannot possibly apply to the claim against Gopal Rao, which is not based on the written registered document. Further, it would be impossible to decide whether the claim against him was laid within six years or not, till the Court had decided whether the payment to him was made before the 2nd February 1908 or not. The lease provides for payment on the 1st February and the parties can give no more definite information than that it was made shortly before or shortly after or on that date. The plaintiff and Gopal Rao have, however, agreed, as has already been stated, that the payment shall be deemed to have been made on the 2nd February 1908. The learned Advocate for the contesting respondent (the plaintiff) was, of course, constrained to admit that Article 1 6 had no application to the claim against the appellant. He contested, however, the submission of the learned Counsel for the appellant that Article 62 governs the case, and submitted that it is properly governed by Article 120. Article 62 allows a period of three years for suits "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." Article 120 provides a limitation of six years for all suits for which no period is provided elsewhere in the Schedule.

The learned Advocate for the respondent contended that Article 62 could not govern the case for the reason that Gopal Rao did not receive the money for the plaintiff's use, but under a claim of right adverse to her, and he cited *Ghasiram* v. *Dhanraj* (1) and *Mohammad Farrukh* v. *Kadir Ali Khan* (2). The former case would appear to give support to his contention. The plaintiff was paid a sum of money deposited in Court in satisfaction of a decree against one Wali Muhammed. His decree was set aside in appeal and he repaid the money into Court, and it was then rateably distributed amongst other creditors of Wali Muhammad. The decree was, however, restored in second appeal, and he sued the other creditors for the money. It is true that Neill, J. C., does say at the end of the judgment: "I do not think that Article 62 is applicable and I am satisfied that the suit must be governed by Article 120 of Schedule II" and this follows the statement that "the suit is one to recover money wrongfully paid to the defendants to which plaintiffs were legally entitled". But the question

(1) 5 C. P. L. R. 9.
(2) 10 C. P. L. R. 98.

before the learned Judicial Commissioner was not between Article 62 and Article 120, but between Article 29 (which allows one year only) on the one hand and Article 62 or 120 on the other, as the suit was filed more than one year and less than three years after the payment, and the decision that Article 62 is not applicable must be regarded as an *obiter dictum*. The second case, that of *Mohammad Farrukh* v. *Kadir Ali Khan*(2) is very clearly distinguishable. That was a suit by a co-sharer proprietor of a village against a *lambardar* co-sharer for profits of the village and in discussing the applicability of Article 62 the learned Judicial Commissioner said: "Nor is it a question of merely suing for money received by the *lambardar*. The *lambardar* is entrusted with the general management of the village and has to incur expenditure as well as to receive money. From the nature of the business, the starting point of the period of limitation could not be taken to be the date 'when the money is received' as provided in Article 62, even if the words 'when the money is received' be taken in the widest sense as meaning, 'when the money is received for the plaintiff'." It seems to me that the suit is, in its nature, one for an account and that the right to receive the account accrues every year at the end of the agricultural year.

The leading case on the point seems to be the decision of Harington and Mookerjee, JJ., in *Mahomed Wahib* v. *Mahomed Ameer* (3), where we have an exhaustive review by Mr. Justice Mookerjee of all the authorities. In that case the plaintiff was entitled to a part of the money that the first defendant advanced to the second defendant on a mortgage executed in his favour alone, and when the second defendant repaid the principal to the first defendant, the plaintiff sued for his share. It was held that the suit was governed by Article 62 of the Second Schedule of the Limitation Act. The respondent in that appeal relied on *Nund Lall Bose* v. *Meer Aboo Mahomed* (4) from which decision both the learned Judges dissented. Mookerjee, J., said:—

"I am unable to hold that the view taken by the learned Judges who decided the case of *Nund Lall Bose* v. *Meer Aboo Mahomed* (4) is well founded, if they intended to rule that money is not received to the plaintiff's use in any case where, at the time of receipt, the defendant does not so intend to receive it. It seems to me to be clear, as pointed out by Markby, J., in *Raghumoni Audhikary* v. *Nilmoni Singh Deo* (5), that the Article, when it speaks of a suit for money received by the defendant for the plaintiff's use, points to the well known English action in that form; consequently, the Article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law render the receipt of it, a receipt by the defendant to the use of the plaintiff. As pointed out by Lord Mansfield, C. J., in *Moses* v. *Macfearlan* (6), this form of action lies for money paid by mistake, or upon a consideration, which happens to fail, or for money got through imposition (express or implied) or extortion or oppression or an undue advantage taken of the plaintiff's situation contrary to loss made for the protection of persons under those circumstances; in other words, this form of action would be maintainable in cases in which the defendant at the time of receipt, in fact or by presumption of fiction of law, receives the money to the use of the plaintiffs."

I have, then, no hesitation whatever in holding that Article 62 of Schedule I of the Limitation Act governs the present case and it is, therefore, barred by time as against Gopal Rao. It would seem that Article 109, prescribing the same period of limitation for a suit "for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant," would also govern the case. The learned Advocate for the respondents was bound to admit that he was unable to bring the circumstances outside these words. In either case, the suit against Gopal Rao is barred by time and must be

(3) 32 C. 527; 1 C. L. J. 167.
(4) 5 C. 597; 5 C. L. R. 45; 2 Ind. Dec. (N. S.) 988.
(5) 2 C. 393; 1 Ind. Dec. (N. S.) 541.
(6) (1760) 2 Burr. 1005; 1 W. Bl. 219; 97 E. R. 676.

dismissed. The decree of the lower Appellate Court is, therefore, modified by the omission of the words "for Rs. 53₹ against the defendant No. 4 and", and the addition of the words "and the suit against the defendant No. 4 is dismissed" to the operative part of it. The plaintiff must pay Gopal Rao's costs in all three Courts.

Decree modified.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 168 OF 1919.
June 11, 1920.
Present:—Sir Norman Macleod, KT, Chief Justice, and Mr. Justice Fawcett.
RAMKRISHNA TIMMANNA BHAT—
PLAINTIFF—APPELLANT
versus
LAXMINARAYAN NARNA HEGDE—
DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Wife of lunatic, whether can adopt during his lifetime.

Under the Hindu Law an adoption by a wife to her husband, the husband being alive and a lunatic, is invalid.

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 106 of 1918, confirming the decree passed by the Subordinate Judge at Kumta, in Civil Suit No. 141 of 1917.

Mr. *G. P. Murdeshwar*, for the Appellant.

Mr. *S. V. Palekar*, for Respondent No. 1.

Mr. *Nilkant Atmaram*, for Respondent No. 3.

JUDGMENT.—The only question which has been argued in second appeal is, whether an adoption by a wife to her husband, the husband being alive and a lunatic, is a good adoption. Now, in this Presidency the wife cannot adopt to her husband while he is alive without his express consent. Such an adoption must necessarily be a very rare occurrence, but where the consent of the husband is expressly required and the husband is a lunatic he cannot possibly give his consent. In this case

it is suggested faintly that his mother could give consent on his behalf. But if we were to hold that the mother of a lunatic could give consent on his behalf to an adoption by his wife, then we should be making an addition to the Hindu Law which, we think, we are not entitled to do. We think, therefore, that the learned District Judge was right and the appeal must be dismissed with costs. One set of costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
ORDINARY ORIGINAL CIVIL JURISDICTION.
August 19, 1919.
Present :—Mr. Justice Rankin.
NOOR MAHOMED DAWOOD
versus
BELASIRAM THAKURSIDAS

Civil Procedure Code (Act V of 1908), s. 73—Execution of decree—Money paid into Court—Rateable distribution, right to, in respect of execution costs, whether permissible.

Money paid into Court in execution of a decree is assets available for rateable distribution under section 73 of the Civil Procedure Code, but such distribution is limited to the amount of the decrees and cannot be extended to the costs of the application for execution, unless, prior to the receipt of the money, there was an order made expressing in terms that such costs are to be added to the amount of the decree. [p. 459, col. 2.]

Mr. *S. N. Banerji*, for the Applicant.

JUDGMENT.—This is an application by Hariram Sitaram as assignee of a firm called Noor Mahomed Dawood which, on the 24th January 1919, obtained an award against Bilasiram Thakursidas, the execution debtors. I will refer to the assignee as the present execution-creditor. The award was for Rs. 3,229 with certain interest and it became enforceable as if it were a decree on the 10th February 1919, having been filed in Court on that date. The execution-creditor's assignment is dated 25th February 1919. In the previous year the execution-debtors had had two other awards made against them in favour of Ram Chandra Chowthmull and Gopiram Bhutica respectively. These

awards had been filed in Court and applications for execution had been made to the Court thereunder in July and August 191c. Both of these applications were for attachment of the moveable property of the execution-debtors. It does not appear that under either of these applications attachment was in fact made but in any case no attachment thereunder was subsisting, at the date of the proceedings, hereinafter mentioned, taken by the present execution-creditor. By that time the claim of Gopiram Bhutica on their award had been satisfied, but the "costs of execution" had not, and have not yet as I am informed, been paid. As regards the claim of Ramchandra Chowthmull this, it is alleged, has been satisfied only in part, the interest included in the award not having been paid.

Proceedings to enforce his award of the 24th January 1919 were taken by the present execution creditor as follows :—On the 25th March 1919 he applied for execution by attachment of moveables. The warrant of attachment was issued on the 12th April and on the 30th April a gross amount of Rs. 3,584 1 0 was paid to the Sheriff by the attorney of the execution-debtors. Sheriff's poundage and charges (Rs. 134 9 0) and Accountant General's fees or stamps (Rs. 17-0-0) reduced this sum to Rs. 3,432 8-0 and when on the 31st May the money was paid by the Sheriff into Court under the rules of the High Court, Chapter XVII, rule 24, it shrank still further by Rs. 34-5-3, the Accountant-General's commission, and the amount that lies in Court to the credit of the cause is Rs. 3,398-1-9.

The application now made by the present execution creditor is to have that sum paid out to him in full. Gopiram Bhutica and Ramchandra Chowthmull by their attorneys appear on notice and ask for rateable distribution under section 73 of the Civil Procedure Code.

I think that the claim of Gopiram Bhutica fails *in limine*. The word "thereof" in section 73 refers to the previous words "of decrees" and, at all events, unless prior to the receipt of assets there has been an order made expressing in terms that the costs of the application for execution are to be added to the amount of the decree, I do not think there can be a right to rateable distribution in respect of these, The addition to be made in the warrant under rule 17 of Chapter XVII of the High Court Rules of a sum for costs of execution over and above "the amount due and payable under the decree" does not bring that sum within the language of section 73 nor, as I think, within its spirit or intention. If an attachment is withdrawn although the terms of rule 20 are not satisfied, or if it is not proceeded with in view of a payment after application has been made for execution, the decree-holder may have a right to an order for costs of execution. But rateable distribution was never meant to be, and should not be, allowed to become a snow-ball system beyond necessity. When the decree is satisfied, the decree-holder must gather any other snow for himself, *dormientibus non vigilantibus* is not a principle and section 73 has not made it one.

The application as against Ramchandra Chowthmull has no such answer on the facts. He relies upon the Bombay case of *Sorabji Coovarji* v. *Kala Raghunath* (1) and says that the fund in Court was paid for a particular purpose under Order XXI, rule 55, *viz.*, to release his attachment and is not "assets" within the meaning of section 73. I do not find that this decision has been formally dissented from by this Court, but it is true that our rules, and, as I am informed on enquiry, our practice, are based upon a contrary assumption. Thus, the Sheriff, instead of paying such monies direct to the attaching creditor, is required to pay it into Court and commission is deducted from it accordingly.

My own view on the matter is contrary to the Bombay decision. The words of the Code have been changed from "whenever assets are realised by sale or otherwise in execution of a decree" to "where assets are held by a Court." I cannot think it sound to hold that, because the latter words "after deducting the costs of realisation" have been allowed to remain, the word "assets" must be taken to mean "assets held in the process of execution" in such a narrow sense as would be equivalent to the former words. The words "sale or otherwise" covered every case, and if "held" is to be interpreted by "realisation" in

(1) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1193.

the sense indicated in the Bombay case, the Legislature has gone out of its way to effect nothing. The word "assets" in the former Code did not import what is now contended for, as is proved by the fact that express words were added to convey the qualification. "Realisation" imports only that the Court has got the assets and got them in a distributable or payable form. That this should ever take place without some costs is a contingency too remote to require insurance even by the expenditure of the words "if any." The very language of Order XXI, rule 55 (*a*) shows that cases of the class now in question are not so noticeably free from such considerations as to ground an inference from words in section 73 which remain unaltered, that other words deliberately omitted are still intended as part of the connotation of the same word "assets" which never imported this before.

I agree, however, that the larger language of the present Code is still to be controlled by the consideration that section 73 is a section in Part II which treats of execution. It is equally true that rule 55 is one of a series of rules (41-57) dealing with attachment of property which come into Order XXI as part of this subject of "Execution of Decrees and Orders." If, for example, a defendant is made to pay into Court the amount of the plaintiff's claim as a condition of getting an adjournment it does not follow, from my reading of section 73, that other creditors could claim to share. Nor could they under Order XXI, rule 52 where funds in Court are themselves the subject matter of the exemption.

I see no support in these considerations or in the section or the rule for a theory grounded upon the "voluntariness" of the payment into Court. This is, I think, out of place as regards payments into Court under stress of execution. Such payments if made to the decree-holder may, and indeed must, be regarded as accord and satisfaction made by the parties bringing the decree to the position of a satisfied decree. But if made into Court under Order XXI they cannot without anomaly be treated otherwise than as the result of an execution would be treated. The debtor is allowed to arrive at the same result by means less distressing to him but there is no difference in the result because the debtor chooses the more convenient means. The money, paid with whatever motive, if paid to the Court, is paid upon terms of the Code whatever they may be. These terms, as I read section 73, have been laid down so that distinctions in the form in which execution has been had, in the precise extent to which execution has been allowed to run, in the exact source or genesis of the fund in Court, are now no part of the definition of the assets that are subject to distribution rateably. The object of the new Code in using larger language [*Hari Saha* v. *Faizlar Rahman* (2),] can only be to avoid anomaly. To reintroduce a distinction on the strength of the voluntariness of the payment or the purpose of the debtor is, I think, to cut down the language and intention of the Code upon a principle which is inapplicable to the subject-matter and which, if applicable; is very difficult to imply.

Rateable distribution under the Code clearly applies where one decree-holder takes out execution, and others, though they have applied for it, do not. Any warrant for execution must be limited—certainly in the first instance—to the debt and execution costs, of the particular creditor who takes it out. It must always be possible to end that particular execution for the moment by meeting that debt only *plus* its own attendant costs, just as it must always be possible to renew it if new claimants have come in-to share in time. In these respects, I see no difference in the Code and I see no difference in justice or convenience whether from debtor's or creditor's stand point between proceeds of sale and money paid to avoid sale. The debtor can get rid of the active creditor for good and for certain by paying him direct. He can stop his process by paying to the Sheriff or into Court, but with no certainty of permanent peace for later or more idle creditors can claim to share. In either case, these other creditors may proceed to execution on their own account.

Order XXI, rule 55, is addressed only to a provision that attachment shall come to an end without further order in certain plain but very different cases. It does not pretend to point to any method by which a judgment-debtor to several different people can dis-

(2) 18 Ind. Cas. 839; 40 C. 619 at p. 622; 17 C. W. N. 616; 18 C. L. J. 141; 19 C. W. N. 1125.

pose satisfactorily of all his troubles. The most that it says is that, if it is desired to terminate an attachment, this can be done in certain ways. Whether it is worth doing in any given case is another matter.

Clauses (*a*) and (*b*) are necessary on any view of the law. They are required in the class of cases under discussion to prevent any attachment going on for a single moment riderless, *i e.*, without a responsible attaching creditor, after the records of the Court no longer show the decree unsatisfied. Rule 56 of Order XXI, is only facultative and though it suggests no trouble as to rateable distribution, I cannot control the language of section 73 by inference from this. It may be that the decisions in this Court and the rules which have followed them, to the effect that payment to the Sheriff is a payment to the Court and that the Sheriff must pay the money into Court, are not contemplated by the Code. It may be that such a payment as took place in this case might come under the first part of clause (*b*) of rule 55 but the decision of Harington, J., (Execution Case No. 49 of 1908) and rule 24 of Chapter XVII of our High Court Rules require these assets to be held by the Court and in fact they are so held.

Having regard to the fact that the view which I take is the view which underlies the rules of this Court, I propose to act upon it, not out of any lack of respect for learned Judges who are much more likely to be right than I am, but to obviate a change of practice and, perhaps, some alteration in our rules which might again have to be undone.

Ramchandra Chowthmull must put the facts as to the existing balance of his claim on affidavit in a formal manner and support them with the relavant documents. If Gopiram Bhutica desire to proceed further with this matter they must do likewise. I adjourn this summons for one week for this purpose, no order to be drawn up in the meantime.

Order for payment out of Rs. 72 to Ramchandra Chowthmull—balance to applicant. Applicant to have costs against execution-debtor added to his claim. Counsel certified.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 188 OF 1918.

June 16, 1919.

Present :—Sir Henry Drake-Brockman, KT., J. C.

SURATSINGH—DEFENDANT—APPELLANT

versus

Musammat RANI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Document, lost—Loss, proof of—Omission to prove loss, effect of—Irregularity—Civil Procedure Code (Act V of 1908), s. 99—C. P. Tenancy Act (XI of 1898), s. 60—Lease by occupancy tenant for term exceeding one year, validity of—Ejectment of sub-lessee—Notice to quit, necessity for—Tenancy, manner of proving.

Where the explanation for the non-production of a document is that it is lost, the regular course to adopt is to prove the loss before tendering secondary evidence, but the omission to do this is not any worse than an irregularity such as section 99 of the Civil Procedure Code precludes an Appellate Court from treating as a ground for reversing the decree or remanding the case. [p. 463, col. 1.]

Under section 60 of the C. P. Tenancy Act a lease for a period exceeding one year granted to a sub-tenant by an occupancy or ordinary tenant is absolutely invalid, irrespective of whether the sub-tenancy was consented to by or on behalf of the landlord or not, and a lessee under such a lease cannot plead absence of notice to quit prior to being ejected. [p. 463, col. 1.]

A tenancy may be proved without proving any written lease that may exist. [p. 464, col. 2.]

Appeal against the decree of the Additional District Judge, Jubbulpore, dated the 22nd January 1918, in Civil Appeal No. 148 of 1917.

Mr. *W. R. Puranik*, for the Appellant.

Mr. *V. Bose*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit filed by the present respondents on the 6th March 1917 with the object of recovering possession of a field (No. 44) in Mouza Chapod from the present appellant Suratsingh. This field was originally the occupancy holding of one Sukhai and the basis laid for the claim in the plaint is that Sukhai surrendered it to the landlord on the 4th January 1916 by a registered deed, of which Exhibit P-4 is a duly certified copy, and that the plaintiffs took it on lease from the landlord the following day, obtaining possession and paying rent in due course.

Suratsingh was sued when the landlord gave the plaintiffs possession but was

reinstated as the result of a suit brought under section 9, Specific Relief Act, and consequently figures as the defendant in the present case. His case, as put in the pleadings, was that in or about the year 1907 he was placed in possession of the field by Sukhai in return for a payment of Rs. 250, the arrangement being that he should remain in occupation for 12 years. He further alleged that the landlord recognized him as Sukhai's sub-tenant by accepting rent from him in that capacity and, further, that in Kartik Sambat 1972 (24th October to 21st November 1915) the landlord through his agent, Gopalrao, in consideration of a payment of Rs. 45, of which Rs. 2 had already been paid and Rs. 43 were handed over on the 16th January 1916, undertook to make him an ordinary tenant of the land and to execute a formal lease. The surrender was described as a fraudulent transaction designed by Sukhai to defeat the sub-lease and, therefore, to afford no basis for the plaintiffs' claim. The following issues were framed:—

1. Did Sukhai Badai, original tenant of the field in suit, surrender the field in dispute to the *malguzar* under a deed of surrender, dated the 4th January 1916 ?

2. Has the *malguzar* leased the field in dispute to the plaintiffs ?

3. Are these two transactions surrender and lease fraudulent and not enforceable against the defendant as alleged ? Did *malguzar's* agent collude with the plaintiffs as alleged ?

4. (*a*) Is the defendant an ordinary tenant of the field in dispute ? Has he been so recognised by the *malguzar* ?

(*b*) Are the plaintiffs tenants of the field in dispute as alleged ?

5. To what relief are the plaintiffs entitled ?

Exhibit P 4, as already stated, is a copy of the deed of surrender relied on by the plaintiffs. Both sides were represented by Pleaders when the landlord's agent, Gopalrao (P. W. No. 1), was examined on the 3rd September 1917 to prove the surrender and the witness was examined and cross-examined as if Exhibit P 4 had been the original deed. The plaintiffs' Pleader then obtained permission to question Gopalrao about the non-production of the original and elicited a statement to the effect that he had searched for the document without success. Gopalrao was cross-examined upon this statement at some length and, later on, Khubchand, father of the male plaintiff Amirchand, as the plaintiffs' 6th witness, deposed that he had endeavoured to obtain the original from Gopalrao who professed inability to comply as the document was lost. Upon the evidence thus elicited, the Trial Judge held the original to have been lost and found that the surrender took place. He also found that the field was let to the plaintiffs on the 6th January 1916 and that no collusion or fraud on the part of Sukhai or the plaintiffs was made out. The Judge disbelieved the story that the defendant paid Rs. 45 as *nazrana* and was promised a lease of the field by Gopalrao or had in any way been constituted an ordinary tenant of the field. He also found that the defendant had failed to establish any recognition of his status as sub tenant of Sukhai on the part of the landlord. The plaintiffs were accordingly given a decree for possession.

The defendant appealed without success to the District Court. Additional District Judge considered it unnecessary to decide whether the defendant's possession as sub-tenant of Sukhai had ever been recognized by or on behalf of the landlord and agreed generally with the conclusions of the Trial Judge.

It is contended, in the first place, that Gopal Rao should have been questioned, to begin with, regarding the loss of the original surrender deed and that the delay in this respect vitiated the proof of loss adduced later. No authority in support of this proposition is cited. The appellant's Pleader raised no objection when Gopalrao was testifying about the execution of the surrender by Sukhai and, if the plaintiffs' Pleader had not sought at the later stage already mentioned to elicit an explanation for non production of the original document, the omission would doubtless have passed unnoticed and, on the principle laid down in *Dalchand* v. *Ganga Singh* (1), *Kishori Lal* v. *Rakhal Das* (2) *Inugunti Prakasa Rajaningaru* v. *Yeranki Peda Venkat*

(1) 15 C. P. L. R. 123.
(2) 31 C. 155.

Rao (3), non production of the original could not have been successfully relied on in appeal. No doubt the regular course to adopt in such cases is to prove the loss of the original document before secondary evidence is tendered. But departure from this course is not, in my opinion, any worse than an irregularity such as section 99, Civil Procedure Code, precludes me from treating as a ground for reversing or remanding the case.

The next point pressed is that the lower Appellate Court should have decided whether the appellant's sub lease was consented to by the landlord. In this connection *Maharajsha* v. *Abheram* (4) is relied upon as authority for the position that a sub lease legally granted cannot be defeated by a voluntary surrender on the part of the lessor. That case was decided before the present Tenancy Act came into force, and the appellant's possession is now governed by section 60 of that Act, which lays down that, notwithstanding any agreement to the contrary, a lease granted to a sub-tenant by an occupancy tenant shall not be valid for a period exceeding one year. In *Vishwanath* v. *Sitaram* (5) it was held that this provision renders absolutely invalid a lease for a period exceeding one year granted to a sub-tenant by an occupancy or an ordinary tenant. In that case invalidity of the sub-lease was relied upon by the tenant against whom the lease was set up, but I can see no reason why the landlord, who has taken a surrender from the tenant, or an assignee of the landlord should any more than the tenant himself be debarred from taking advantage of the express enactment. The object of the Legislature evidently was to make a sub-lease null and void and the appellant should consider himself fortunate in having retained possession for ten years out of the twelve which, according to his oral pleading of the 18th April 1917, was the period fixed by the sub-lease. I agree then with the lower Appellate Court in thinking it unnecessary to decide whether the sub-tenancy was consented to by or on behalf of the landlord or not.

The third ground of appeal impeaches the finding of the Courts below that the sum of Rs. 45 paid by the appellant to Gopalrao did not constitute *nazarana* for the promise of the lease in dispute. It is urged that the lower Appellate Court has overlooked the *jamabandi* entries which form Exhibits D 6 and D 7. These are said to indicate that there were no arrears due at the end of 1915 or the beginning of 1916 on account of the agricultural year 1914 15. I have examined the *jamabandis* filed for the Sambat years 1968, 1969, 1970, 1971, and 1972 (Exhibits D-3—D-7) to which correspond the agricultural years beginning with 1911 12 A. D. and ending with 1915-16 A, D. From them I find that in Sambat 1968 only Rs. 23 were paid on account of the rent of that year, the balance (Rs. 25) being paid in Sambat 1969 when no payment was made in respect of the year then current. Further, no payment at all was made in Sambat 1970, Rs. 32 on account of that year being paid in the following year in addition to Rs. 48 for Sambat 1971. Thus, from the *jamabandis*, it does not appear that the rent for Sambat 1969 was paid at all and that in Sambat 1972 a balance of Rs. 16 was due on account of Sambat 1970. Further, the *jamabandi* for the last mentioned year shows Rs. 45 paid for that year by Suratsingh in addition to Rs. 6 only on account of Sambat 1971. Judging, then, from the *jamabandis* taken together, it seems clear that Sukhai was in arrears with his rent when he surrendered to the landlord and this explains why neither of the Courts below regarded the *jamabandis* as assisting the appellant. It is not suggested that the appellant paid Rs. 45 in the agricultural year 1915-16 (Sambat 1972) as the rent of that year in addition to Rs. 45 as *nazrana*. Moreover, his learned Pleader in this Court argued that the appellant could not have to pay rent for Sambat 1972 inasmuch as he was dispossessed on the 6th January 1916, that is, before the first instalment for the year fell due. He also referred me to Exhibit D 9, a receipt for Rs. 28, given by Gopalrao on the 12th June 1915 in which the money is described as paid towards the *khata* of Sukhai, and stress is laid upon the fact that in Exhibit D-9,

(3) 21 Ind. Cas. 319; 38 M. 160, 25 M. L. J. 360; (1913) M. W. N. 800.
(4) 11 C. P. L. R. 5.
(5) 26 Ind. Cas. 708, 10 N. L. R. 159.

a receipt for Rs. 43 paid in January 1916, no reference to any *khata* is made. I find, however, on comparing Exhibit D 9 and a stamped receipt (Exhibit D-10) for Rs. 12 with the *rasid bahi* (Exhibit P 7), that the money referred to in the receipts was treated as part of the rent. The difference in the wording, therefore, has not the significance contended for. In these circumstances, I am not prepared to interfere with the concurrent finding of the Courts below that the sum of Rs. 45 was not paid as *nazrana* and that there was no creation of an ordinary tenancy in the appellant's favour in Sambat 1972.

The fourth ground of appeal needs no consideration in view of the conclusion last reached.

The fifth ground contends that the appellant cannot be ejected in the absence of a notice to quit. This plea was not taken in either of the Courts below and must fail, for the simple reason that the appellant had no sub-lease from Sukhai which can be recognized.

The last contention to be noticed is that the registered lease, Exhibit P-6, under which the plaintiffs ostensibly held the field, was not executed till the 9th July 1917, that is, four months after the institution of the suit. On the 6th January 1916 Gopalrao executed a lease in the plaintiffs' favour, which forms Exhibit P-5 of the Trial Judge's record. For some reason which has not been ascertained registration of this document was refused on the 25th May 1916, although Gopalrao holds a power-of-attorney which authorizes him to let out lands. The Trial Judge treated the second lease as relating back to the date of the earlier one, while the lower Appellate Court has found that there was a valid letting by Gopalrao which was merely confined by Exhibit P-6 which the landlord himself executed. I understand the lower Appellate Court to mean that the evidence establishes the relation of landlord and tenant apart from the leases and there is a basis for such a finding in the evidence of Gopalrao (P. W. No. 1), Mathole (P. W. No. 2), Kasiram (P. W. No. 3) and Khubchand (P. W. No. 6). Exhibits P-9, 10 and 11 are receipts for rent paid by the plaintiffs after Sukhai's surrender and so support the conclusion that the alleged relation of landlord and tenant existed. There is no question of proving the terms of the lease and it is well settled that a tenancy can be proved without proving any written lease that may exist: see *Narayan Bisnoi* v. *Yaswant Singh* (6) and *Ameer Ali* v. *Yakub Ali Khan* (7). The appeal fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

(6) 1 N. L. R. 147 at p. 149.
(7) 25 Ind. Cas. 509; 41 C. 347; 19 C. L J. 428.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 275 OF 1919.

July 20, 1920.

Present :—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar

MEENAKSHI ACHI AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

SOMASUNDARAM PILLAI—PLAINTIFF—RESPONDENT.

Hindu Law—Religious endowment—Management vested in family of founder—Right of one member of family to joint possession and management—Possession of one member of family, nature of.

The fact that the persons entitled to the office of trustee of a charitable endowment are unable to work harmoniously together is not a ground for dismissing a suit by one of the heirs of the founder for a declaration of his right to share in the management and for joint possession of the trust properties with the heir in possession and management, and, in the absence of a scheme of management settled by the heirs themselves or by resort to the Court, the plaintiff is entitled to the rights of joint possession and management. [p. 468, col. 2.]

MEENAKSHI ACHI v. SOMASUNDARAM PILLAI.

Where the management of a religious institution vests in the family of the founder, the management of one member of the family must be regarded as being on behalf of all the members, including females, and not adversely to them, and such member has no right to make a testamentary disposition of that right. [p. 467, col 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 24 of 1916.

JUDGMENT.—The plaintiff sues for a declaration that he is solely entitled to the management of 'Periabai Kattalai' in the Amirthagateswaraswami temple at Thirukkadaiyur and to the possession of the lands attached to the said Kattalai in the alternative, he claims that he should be given joint possession and management with the defendant. His first claim is based on the plea that, as he is the senior-most male among the descendants of the original founder Chidambaram Pillai, he alone is entitled to the sole management and possession of the Kattalai. Incidentally, he contends that the female members of the family of Chidambaram Pillai have no right. His second claim is based on the ground that, as he and the defendant are the only surviving male members of the junior branch of the original founder's family, they should both be declared trustees entitled to joint possession and management of the Kattalai and its emoluments. This claim also involves the contention that female members have no right.

Originally, there was only one defendant, Parameswara. During the course of the suit he died, and his widow is the 2nd defendant, and the son in-law who is alleged to be in sole possession of the lands is the 3rd defendant. The Subordinate Judge, in a judgment which both sides have attacked as being inconsistent with itself and as being inconclusive as regards the findings, held that the plaintiff was solely entitled to the management of the Kattalai and to the enjoyment of the lands appertaining thereto. The defendants have appealed.

Before dealing with the contentions raised on either side, it is desirable to state some facts.

The original founder, Chidambaram Pillai No 1, is said to have endowed the properties in the beginning of the nineteenth century. After some years, the Board of Revenue took up the management of the Kattalai; but in 1857, they restored to two members of the family, Namasivaya and Ambalavana, representing respectively the senior and the junior branches, the management of the Kattalai and the enjoyment of the lands. Disputes soon arose as regards the rights of the other members to a share in the management, Original Suit No. 19 of 1866 was filed by three persons representing both the senior and the junior branches against Namasivaya and Ambalavana and others belonging to both the branches for the purpose of defining the respective rights of the members of the family. Exhibit A is the judgment in the case and it shows that the rights of the various parties to the suit were adjusted by giving them definite shares. It may be pointed out that the shares fixed do not exactly correspond with what would have been obtained under the Hindu Law had the Kattalai been regarded as private property.

The next litigation was in 1876 by Ambalavana, Chidambaram Pillai No. 2, and others against some of the tenants. A decree was obtained for possession and it is clear that that decree was executed not only by Ambalavana but also by the other plaintiffs to whom shares were allotted in the suit of 1866. It is true that after the execution of the decree against the tenants, *muchilikas* were taken for the number of the years by Ambalavana alone. This is not sufficient evidence to show that Ambalavana (*vide* Exhibit VI series) had ousted the other members of the family from possession or management. The previous suits and the course of events suggest that, as a matter of convenience, Ambalavana was permitted to manage the Kattalai without prejudice to the rights of the other members of the family.

In 1878, one Muthuswami, son of Kattalai Pillai, one of the plaintiffs in the suit of 1866, transferred his share of management to the Pandarasannidhi of Dharmapuram (Exhibit B). In 1883, Namasivaya's son, Kankasabai, transferred his right

to the same Pandarasannadhi (Exhibit B). On the strength of these two documents the Pandarasannidhi instituted a suit in 1891 for a share in the management of the Kattalai. Arunachella Pillai who belonged to the second branch was the 1st defendant, Somasundaram Pillai, the present plaintiff, was the 2nd defendant, Parameswara Pillai, the original defendant in this suit, was the 3rd defendant. The 4th defendant was the widow of Ambalavana Pillai. It may be mentioned that at this time Arunachella Pillai was in sole management of the Kattalai under a Will left by Ambalavana in his favour. The allegation of the Pandarasannidhi was that the defendants were unlawfully excluding him and his transferors from the management of the Kattalai, that an attempt made by his transferors to obtain possession of the lands under Chapter XII of the Criminal Procedure Code had failed inasmuch as the Magistrate *maintained the possession of the defendants*, and that by virtue of the rights possessed by his transferors, he was entitled to a share in the management of the Kattalai and the enjoyment of the properties. (*Vide* Exhibit C, paragraph 6). The plea of Arunachella in this suit was that the senior branch, from whose members the Pandarasannidhi had obtained the transfer, had been totally excluded for over the statutory period and that, therefore, the plaintiff had no subsisting right which he could enforce. He pleaded that the management should be in the family of the founder and that a stranger was not entitled to acquire any rights in it. He accepted the statement that the Magistrate maintained him and his co-defendants in possession of the property as correct. (*Vide* Exhibit C1, paragraph 6). He further stated that he was exclusively managing the Kattalai. The other defendants, including the plaintiff and the original defendant in the present suit, stated that they adopted the contentions of Arunachella (Exhibit C2). The suit was ultimately compromised by the Pandarasannidhi receiving back the consideration paid by him to his two transferors and executing a release in favour of Arunachella of all his rights (Exhibit C5). Arunachella continued in management till 1902. *Muchilikas* were executed by tenants to him alone (Exhibit VI series). His son Vythilinga succeeded him and died in 1912. He left a Will in favour of Parameswara, the original defendant in this case. This suit was instituted in 1913.

We have thus far traced the history of this litigation up to the date of the suit. Now, we shall deal with the contentions put forward on either side. The learned Advocate-General for the appellant contended that Ambalavana was in sole management when he willed away his right of management to Arunachella, that Arunachella became solely entitled to it under the Will as well as by adverse possession for over 12 years, that Vythilinga inherited this right, and that the defendant who claimed under the Will of Vythilinga was, therefore, entitled to the exclusive right of trusteeship and to the possession of the property. We are unable to agree with this contention. So far as Ambalavana is concerned, it is clear that by joining the other members of the family in instituting the suit against the tenants and in taking possession jointly with them of the property from which the tenants were evicted he never intended to set up any right adversely to the members of the family. His management must be taken to have been on behalf of all the members of the founder's family. It is the commonest thing in this part of India for one of the members of a family who happens to be more intelligent than the others to manage charities like the present one. It stands to reason that such management should be regarded as being held on behalf of all the members and not adversely to them. Therefore, we must hold that Ambalavana had not become the sole manager and that he had no right to will away that right in favour of Arunachella. In our opinion, Arunachella also took up the management on behalf of the other members of the family because he was considered to be better fitted than others to conduct the affairs. Arunachella in his own statement in the suit of the Pandarasannidhi (Exhibit C1) says that he assisted Ambalavana during his lifetime. It was, therefore, natural that he should have

been selected to continue the management.

As regards the contention that Arunachella himself by exclusive management became solely entitled to it, the facts are against it. In 1883, immediately on the death of Ambalavana, the transferors of the Pandarasannidhi complained to the Magistrate and asked that Arunachella, the present plaintiff, and the defendant should be restrained from interfering with their possession. The Magistrate held that Arunachella, the plaintiff, and the defendant should be restrained in possession. This fact is alleged in the plaint of the Pandarasannadhi (Exhibit C) and is accepted in the written statement of Arunachella (Exhibit C1). As we stated already, the fact that he was solely looking after the affairs of the Kattalai is not, without more, evidence of ouster of the others, in view, especially of the fact that these were also maintained in their possession by the order of the Magistrate. We must, therefore, negative the contention that Arunachella had acquired a prescriptive right against the other members of his family. Vythilinga managed only for ten years, and we are not prepared to say that his management was adverse to the others. On his death disputes at once arose. In our opinion, it has not been proved that any of the active trustees acquired by prescription the right to exclude the other members of the family through whom the plaintiff claims.

We must now deal with the contention of Mr. Ramchandrier for the respondent. He argued that the plaintiff, as the senior-most male member in the family of Chidambaram, was entitled to the sole trusteeship. The first answer to this suggestion by the learned Advocate General was that there is one Kanakasabai who belongs to the senior branch and who is older than the defendant. If the contention of the respondent that the senior-most male member is entitled to manage to the exclusion of the other members is well founded, it would have to be considered whether the existence of Kanakasabai is any bar to such a right, because we find that Kanakasabai had not only parted with his rights in favour of the Pandarasannidhi by Exhibit B1, but, after the suit of the Pandarasannadhi, by a document dated the 7th September 1891, Exhibit C6, he and the other members of the senior branch of the family in terms relinquished their rights in favour of Arunachella. But, in our opinion, the contention of the learned Vakil for the respondent that the senior-most male is entitled to sole management has not been made out. As pointed out by the Subordinate Judge, during the lifetime of Arunachella and Vythilinga there were senior members who did not assert their rights to sole management as against the active trustee. The custom or tradition in the family in this behalf has not been established by any cogent evidence. We must overrule this contention.

It was next argued by Mr. Ramachandrier that, as the plaintiff is now only the male member in the junior branch he is entitled to the right to the exclusion of the females. He relied upon *Purappavanalingam Chetti* v. *Nullasivan Chetti* (1) and on *Manally Chenna Kesavaraya* v. *Mangadu Vaidelinga* (2) for the proposition that the office of a trustee in a public institution is indivisible and that succession to it must be regulated as in the case of impartible estates. However much one may wish that such a rule of law should obtain in regard to the management of trusts, we are of opinion that the course of the decisions in this Presidency, which has the sanction of the Judicial Committee, is opposed to this principle. In *Ramanathan Chetty* v. *Murugappa Chetty* (3) Sir Bashyam Aiyangar, J., pointed out that the right of trusteeship in a public institution possessed by the members of a family, where hereditary, descends in the same manner as the right to the enjoyment of ordinary family property. In that case, the founder, as the last trustee, had two wives. Both the wives had a number of sons. The dispute was as regards the right of management among the sons. The Madras High Court, holding that the senior branch had lost its right owing to adverse possession, decided

(1) 1 M. H. C. R. 415.
(2) 1 M. 343; 2 Ind. Jur. 249; 1 Ind. Dec. (N. S.) 229.
(3) 27 M. 192; 13 M. L. J. 341.

that the arrangement among the members of the junior branch to manage the trust by rotation must be upheld. The matter was taken up to the Privy Council and, in the very opening sentence of the judgment delivered by Lord Macnaghten in *Ramanathan Chetti* v. *Murugappa Chetti* (4), it is pointed out that it was a public trust and that the right of management has devolved upon all the members of the family. This decision of the Judicial Committee has been applied to public trusts in a very large number of cases in this Presidency, and the decisions in *Manally Chenna Kesavaraya* v. *Mangadu Vaidelinga* (2) and *Purappravanalingam Chetti* v. *Nullasivan Chetti* (1), quoted by the learned Vakil, have never been regarded as binding authorities. Mr. Ramchandra Aiyar laid stress on certain observations contained in *Sethuramaswamiar* v. *Meruswamiar* (5), in the course of which Sir Walter Phillimore, who delivered the judgment of the Judicial Committee, referred to the decision in *Ramanathan Chetti* v. *Murugappa Chetti* (4) as relating to a private trust. These observations, which were purely *obiter*, appear to have proceeded on some misconception as to the facts of that case, as it cannot be contended that the trusteeship of a public temple is a private trust. The decision of the Judicial Committee in *Ramanathan Chetti* v. *Murugappa Chetti* (4) proceeded on the view that such a trust was a public trust, and, applying that decision to the present case, we must hold that in this case also the trusteeship devolved on the general body of the founder's heirs of whom the plaintiff is one. The learned Vakil for the plaintiff-respondent also contended that the 2nd defendant, the widow of the 1st defendant, Parameswara, who is now in possession and management through her son-in-law the 3rd defendant, is disqualified by reason of her sex. He relied upon the judgments of the suits of 1866, 1871, etc., which speaks of the descendants of the founders as being entitled to the management. We have looked into the original, and the language is "Vamsasta" which is not accurately translated as "descendants." Even, otherwise, we fail to see, except when it is established by cogent evidence that there is a custom to that effect, how the widows and daughters of a divided member can be excluded from the management of charity property. Even in regard to religious offices, this Court has held in a Full Bench decision that the widows of divided members cannot be superseded by the reversioners. *A fortiori* in the case of a secular office like the present, there is absolutely no justification for the contention that they are not entitled to manage. The evidence as to usage has been fully discussed by the Subordinate Judge, and we agree with his conclusion that it has been shown that females are not entitled to manage this Kattalai.

The result of the above discussion is, that the plaintiff is one of the persons entitled to manage the Kattalai along with 2nd defendant and any other members of the family who have not lost their right. One of them who has not been made a party to the suit is the widow of Vythilingam. There may be others about whom the record is silent.

The question on these facts is, whether the plaintiff is entitled to any relief, and if so, to what. The learned Advocate-General contended that as the plaintiff had not brought a suit for settling a scheme of management, his suit should be dismissed. We are unable to see the force of this contention. The fact that the persons entitled to the office of the trustee may not be able to work harmoniously together is not a ground for dismissing a suit by one of the heirs of the founder for a declaration of his right to share in the management and for joint possession of the trust properties with the heir who is now in possession and management. If it is found that a scheme of management is necessary in the interests of the institution, such a scheme may be settled either by the heirs themselves, or by resort to the Court. In the absence of such a scheme, the plaintiff is entitled to the rights of the joint management and possession

(4) 29 M. 283; 10 C. W. N. 825 (P. C.); 33 I. A. 139; 1 M. L. T. 327; 3 A. L. J. 707; 4 C. L. J. 189; 16 M. L. J. 265; 8 Bom. L. R. 498.

(5) 43 Ind. Cas. 806; 41 M. 296; 7 L. W. 22; 4 P. L. W. 91; 34 M. L. J. 130; 16 A. L. J. 113; 27 C. L. J. 231, 22 C. W. N. 457, 20 Bom. L. R. 514; 45 I. A. 1 (P. C.).

claimed in the plaint. We must, therefore, in modification of the decree of the Court below, declare that the plaintiff is entitled to manage the trust along with the 2nd defendant who is now in possession. It is unnecessary to decide anything as to the rights of Vythilingam's widow or other members of the family to share in the management of the Kattalai.

In the circumstances of the case, each party must bear his own costs. No portion of the costs should come out of the charity property.

M. C. P.

Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1136 OF 1918.

June 2, 1919.

Present :—Justice Sir Asutosh Chaudhuri Kt., and Mr. Justice Cuming.

JOYNATH SARKAR—DEFENDANT No. 3—APPELLANT

versus

HARI MOHAN DAS—PLAINTIFF—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Temple lands—Grant in favour of menial servant, nature of—Servant, whether trustee—Resumption of lands—Suit by manager in his own name, maintainability of.

Where a menial servant of a temple holds no office of a hereditary character and is remunerated for the performance of his duties by the use of certain lands on payment of an annual cess the lands are not burdened with any service in connection with the temple, nor is the holder a trustee, and, upon cessation of his service the land is liable to immediate resumption. [p. 471 col 2.]

A suit by the manager of a temple or the *shebait* of *debutter* property in his own name is not bad, there being nothing which requires such suit to be brought in a representative capacity. [p. 470, col. 1.]

Appeal against the decree of the Subordinate Judge, Jalpaiguri, dated the 13th of March 1918, affirming that of the Munsif, first Court, at Jalpaiguri, dated the 31st of March 1917.

FACTS appear from the judgment.

Babu *Mohendranath Roy*, (with him Babu *Atul Chandra Gupta*), for the Appellant.—Defendants Nos. 1 and 2 were the *shebaits* and they sued the plaintiff for cesses due and got a decree. In execution of that decree the land in possession of the plaintiff was put up to sale and purchased by the defendant who is the appellant before your Lordships. The main point in dispute is, whether the sale in execution of the decree really passed the land. Is such a tenancy saleable? Section 60, Civil Procedure Code, describes the interests which are not saleable. The proviso under section 60, Civil Procedure Code, does not cover a case like this.

The plaintiff cannot be regarded as a trustee. He did not hold a hereditary office of any kind in connection with the *sheba* or under the deity. His father and he were mere menial servants. The land was not burdened with any service in connection with the *sheba*. Refers to *Radha Pershad Singh* v. *Budhu Doshad* (1). Refers to *Mokbul Hossain* v. *Ameer Sheikh* (2) in which case there was resumption. There is no substance in the argument that as the first suit was instituted by defendants Nos. 1 and 2 not as *shebaits*, the decree is inoperative. The plaintiff is not entitled to claim possession of the land.

Babu *Bhupendra Chandra Guha*, for the plaintiff respondent.—My service right subsists. he has purchased a *chakrani* right which does not exist. My right has not been interfered with in any way. I wanted a declaration that my right subsists. My right is inalienable. No service tenure is alienable by transfer or sale under a decree. Refers to *Sri Raja Venkata Narasinha Appa Rao* v. *Sri Raja Sobhanadri Appa Rao* (3). Land cannot be attached for a

(1) 22 C. 938; 11 Ind. Dec. (N. S.) 622.
(2) 25 C. 131; 13 Ind. Dec. (N. S.) 89.
(3) 10 C. W. N. 16; 8 Bom. L. R. 1; 29 M. 52; 3 A. L. J. 55; 3 C. L. J. 1; 1 M. L. T. 3; 16 M. L. J. 1; 33 I. A. 46; 8 Sar. P. C. J. 897 (P. C.).

cess as it is a personal debt. This is a suit for cess, the right of plaintiff—the service tenure—cannot be sold in execution of the decree.

Babu *Atul Chandra Gupta* replied.

JUDGMENT.—The plaintiff claims to be a service tenure-holder of the land in suit, which is the *debutter* property of an idol, under defendants Nos. 1 and 2, the *shebaits*. He made preparations for the worship and *sheba* of the idol and his father did similar service before him. He held this land in lieu of remuneration for the service he rendered and paid Rs. 12 a year to the *shebaits* as cesses. This amount used to be Rs. 7 but it was enhanced to Rs. 12. He made default in payment of this amount on account of which a Suit (No. 899 of 1911) was instituted against him by defendants Nos. 1 and 2. It was decreed and in execution of that decree the *jote* was put up for sale and was purchased by defendant No. 3 on the 4th October 1912. The plaintiff then instituted this suit on the 20th April 1916 to recover possession of the *jote* alleging that the former suit was fraudulent; that he knew nothing about it; that in fact a wrong person, a name-sake of his, had been served, and that he knew nothing about the suit and decree. His case was that his right in the disputed land was a *chakran* right and that such right could not be attached or sold; the attachment and sale of such a right was prohibited by law and the sale was, therefore, void and fraudulent and so defendant No. 3 by his purchase had acquired no right in the land and he prayed that the decree and sale might be declared void and fraudulent and not binding on him and possession should be restored to him.

The Trial Court held that no summons had been served on the plaintiff in that Suit No. 898 of 1911 and so he was not bound by the decree in that suit. He further held that the right which the plaintiff had was the right of a service-holder but that the sale certificate showed that a *chakrani* right had been sold. He found that there had been irregularities in the sale and so the plaintiff's title had not passed. He did not decide whether the right of a service-holder was saleable. On these findings he gave the plaintiff a decree for possession. On appeal the learned Subordinate Judge held that the decree in Suit No. 898 had been properly obtained and the execution proceedings under it properly conducted. The plaintiff had appeared in the execution proceedings. He, however, held that the right which the plaintiff held in the land was that of a service holder, that the position of the plaintiff was that of a trustee, and that being so, the service-tenure was not liable to be sold. He held that section 47, Civil Procedure Code, was not a bar to the suit. On these findings he dismissed the appeal.

It seems to us the learned Subordinate Judge has erroneously held that the plaintiff was a trustee of this land. The plaintiff did not hold a hereditary office of any kind in connection with the *sheba* or under the deity. His father and he were menial servants. Instead of remuneration for the work they did, they were allowed to take the profits of some land, possession of which had been made over to them. They had to pay Rs. 12 a year to the *shebaits* for the land as cess. The land was not burdened with any service in connection with *sheba*. Hereditary character does not attach to it or the service, nor has it been shown to be service *jote*, or *debutter chakran* land. The learned Subordinate Judge has overlooked the distinction between the grant of an estate burdened with *debsheba* service and that of an office the performance of the duties of which is remunerated by the use of certain lands. See *Radha Pershad Singh* v. *Budhu Dashad* (1). There is a still greater distinction when the use is of a permissive character so far as the servant is concerned, when the land is not burdened with any service. The plaintiff held under a special arrangement. He was liable to dismissal and the land could be resumed at once upon cessation of his service. He had not paid the annual cess and that was a breach of the arrangement between him and his employers. The plaintiff alleged in his plaint that he had "enjoyed the land in lieu of rent for upwards of 12 years in succession to predecessors" by which we think he meant "in lieu of service." It is not shown he had an occupancy right. If the plaintiff held the land as a service-tenure he could not acquire a right of occupancy in it. See *Hurrogobind Raha* v. *Ramrutno Dey* (4). The sale certificate speaks of a *chakrani jote*. The learned Munsif understood by it a right of

(4) 4 C. 67; 2 Ind. Dec. (N. s.) 44.

occupancy which is incorrect. Neither Court has found that a *chukanidar* has any kind of permanent right attaching to his *jote*. From the nature of the employment it is altogether unlikely that any permanency is attached to it. A *chakrani jote* is a subordinate *jote* under a *jotedar*. It is a *korfa* under tenancy, in the District of Rungpore, (Tagore Law Lectures) (see Phillips' Land Tenures). It is, so far as we know, the same in Jalpaiguri. The plaintiff was aware of the execution proceedings and knew what had been advertised for sale. He made a part payment to stop the sale. He did not then suggest that the tenure was not saleable. It was open to him to have the matter then determined but he refrained from taking any steps and now he has put forward false allegations before the Court and challenged the decree on the ground of fraud without any justification. Service tenures are exempted from the operation of section 89, Bengal Tenancy Act. See *Mokbul Hossain* v. *Ameer Sheikh* (2). In that case the plaintiff held the land in lieu of wages. He was dismissed and the land was held to have been rightly resumed.

It has also been argued that as the first suit was instituted by defendants Nos. 1 and 2 not as *shebaits* the decree is inoperative. There is nothing which requires the manager of a temple or the *shebait* of *debutter* properties to bring such suits in a representative capacity. The relationship in this case was that of master and servant.

In *Juggodumba Dasses* v. *Paddomoney Dassee* (5), Markby, J., held that, although the ownership of *debutter* property is vested in the idols, the *shebaits*, strictly speaking, were not trustees for the idols, but managers, and, having regard to *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (6), he said that there was this peculiarity that in all transactions including even litigation the managers carried them on in their own names. It has been held by the Privy Council that the possession and management of property dedicated to an idol belongs to the *shebait*, and that carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait* and in the idol and that such right is a personal right. But no such question as has been raised before us can arise in matters connected with the employment or dismissal of or the recovery of claims against menial servants of a temple, persons who hold no office of a hereditary character. In the case of land admittedly belonging to the office of "Gurav" and attached to it the Bombay High Court held in *Lotlikar* v. *Wagle* (7) that, although the property of the temple could not be sold away from the temple, there was no objection to the sale of the right, title and interest of such a servant of the temple in the land which he held as remuneration for his services, the interest sold being subject in the hands of the alienee to determination by the death of the original holder or his removal from office on account of his failure to perform the service. But in this case the land is not even burdened with any service. We are of opinion that, whatever right the plaintiff had as *chukanidar* or otherwise in lieu of his services, has been sold and he is not entitled to claim possession of the land. The plaintiff in this case went to the extent of filing a suit against the purchaser defendant No. 3 for a declaration that the auction purchase by the latter was a *benami* one. That itself is an admission that something passed by such purchase. What precisely is the right that defendant No. 3 has purchased is between him and defendants Nos. 1 and 2 but they are estopped from questioning the right of defendant No. 3 to hold the land as a *chukanidar* as he purchased in the execution of the decree they had obtained against the plaintiff. We also doubt whether this suit is maintainable having regard to section 47, Civil Procedure Code, but having regard to our decision on the other points it is unnecessary to consider it.

The appeal is decreed with costs of all the Courts.

Appeal decreed.

(5) 15 B. L. R. 318.

(6) 13 M. I. A. 270; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

(7) 6 B. 596; 3 Ind. Dec. (N. S.) 853.

MADRAS HIGH COURT.

CIVIL APPEAL No. 80 OF 1919.

July 14, 1920.

Present :—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

MUTHUVEERAPPA CHETTY *alias* VELLAYAPPA CHETTY—DEFENDANT No. 1—APPELLANT

versus

ADIKAPPA CHETTY (DEAD) AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 3 TO 10—RESPONDENTS.

Limitation—Settlement of claim—Settlement annulled—Cause of action on original claim, whether accrues—Limitation, commencement of.

Where a claim is satisfied without resort to Court, and that settlement is subsequently annulled by decree of Court, the party claiming has a fresh cause of action on his original claim, limitation to enforce which commences from the date of the annulment. [p. 473, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 74 of 19.6.

Mr. *R. Kuppusawy Aiyar*, (with him Mr. *V. Pattabhiram Aiyar*), for the Appellants :—The suit is barred as more than three years have elapsed from the original claim. It is not shown how limitation is suspended or postponed. No exemption can be claimed which is not expressly provided by the Limitation Act.

Mr. *K. Balasubramanya Aiyar* for Mr. *A. Krishnaswmi Aiyar*, for the Respondents.—The suit is not barred. The satisfaction of the original claim having been annulled by the defendant's decree, a new cause of action arose. The plaintiff could not have sued so long as he held the money decreed to him by the award and if he had sued his claim would have been resisted on the ground of satisfaction. The claim revives on the annulment of the satisfaction. See *Musammat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1), *Rangayya Appa Rao* v. *Bobba Sriramulu* (2), *Muthu Korakki Chetty* v. *Mahamad Mador Ammal* (3), *Baijnath Sahai* v. *Ramgut Singh* (4), *Surjiram Marwari* v. *Barhamdeo Persad* (5), *Doraisami Padayachi* v. *Vaithilinga Padayachi* (6), *Huro Pershad Roy* v. *Gopal Das Dutt* (7).

Mr. *R. Kuppusawmi Aiyar* in reply :—There was no satisfaction when the debtor did not consent to it. No fresh cause of action arose when the remedy by which satisfaction was obtained was not lawfully open to the party. *Musammat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1).

JUDGMENT.

WALLIS, C. J.—The plaintiff in this case is a principal and the defendant an agent. The plaintiff having a claim against the defendant preferred a complaint against him for misappopriating bangles and had him arrested, and he was afterwards bailed. Then the defendant was induced to appoint an arbitrator and the plaintiff appointed another arbitrator to settle their differences, and the award of the arbitrators was that the defendant should pay the plaintiff Rs. 10,000 in full satisfaction of all the plaintiff's claims and that the prosecution should be dropped. The defendant paid Rs. 7,000 and gave a *hundi* for Rs. 3,000 at the time. Then he refused to pay the balance of Rs. 3,000 and successfully sued to recover the Rs. 7,000 which he had paid on the ground that it was obtained by coercion. It was held by this Court, reversing the decision of the Subordinate Judge, that he had been induced to consent to this arbitration by coercion and that the money so obtained from him in the circumstances which I have mentioned must be refunded. Now, the plaintiff-principal accepting that state of things brings this suit and alleges that the agreement evidencing the settlement of the 1st defendant's agency accounts having been annulled the cause of action with respect to delivery by the 1st defendant of accounts after due adjustment and verification has accrued to the plaintiff afresh. That is the plaintiff's case.

The defendant pleaded that there had been no arbitration and no award at all.

(1) 12 M. I. A. 244; 2 B. L R. P. C. 10; 11 W. R. P. C. 5; 2 Sar. P. C. J. 424; 2 Suth. P. C. J. 174; 20 E. R. 331.

(2) 27 M. 143 (P. C.); 9 C. W. N. 162; 14 M. L J. 1; 6 Bom L. R. 241; 31 I. A. 17; 8 Sar. P. C. J. 617.

(3) 54 Ind. Cas. 66; 43 M. 185; 26 M. L. T. 459; 38 M. L. J. 1; 11 L. W. 487; (1920) M. W. N. 42,

(4) 23 C. 775 (P. C.); 23 I. A. 45; 7 Sar. P. C. J. 1; 12 Ind. Dec (N. S.) 514.

(5) 1 C. L. J 337.

(6) 41 Ind. Cas. 581; 33 M. L. J. 46.

(7) 9 C. 255 at p. 269; 12 C. L. R. 129; 9 I. A. 82; 4 Sar. P. C. J. 363; 9 Ind. Jur. 543; 4 Ind. Dec. (N. S.) 820,

The Subordinate Judge finds that there was no binding agreement to refer to arbitration which is not questioned but he mentions that the findings of fact of this Court in the other suit were accepted by both the parties, and included findings that there had in fact been an arbitration and a payment by defendant pursuant to it. The result of the previous suit was that the present plaintiff had to pay back the sum which he had accepted pursuant to the arbitration from the defendant in full satisfaction of all his claims against the defendant. The question then is, whether, as the result of the previous suit, he has not acquired a fresh cause of action, in the nature of his original cause of action, for an account which was satisfied so long as the adjustment to which I have referred stood. In my opinion he has.

It is unnecessary to refer to all the cases which were cited before us. There is a case in *Musammat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1), a decision of the Privy Council which has been explained by their Lordships in *Huro Pershad Roy* v. *Gopal Das Dutt* (7). The latter case contains a clear statement of the principle which is applicable to this case, at page 259. Their Lordships say :—"The effect of that case in *Musammat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1), may be very shortly stated. The *Zemindar* brought a certain *patni taluq* to sale, and sold it to a purchaser who was put in possession of it, and out of the purchase-money the arrears of rent were paid. Subsequently this sale was set aside for irregularity. The *Zemindar* had to refund the purchase money received by her, and the *patnidar*, who succeeded in setting it aside, obtained also the mesne profits for the time during which he was ousted. Under those circumstances, this Committee, whose judgment was delivered by Sir James Colvile, observe :— 'It is clear that until the sale had been finally set aside, she'—that is, the plaintiff—'was in the position of a person whose claim had been satisfied and that her suit might have been successfully met by a plea to that effect.' In other words, the effect of the judgment of this Board is, that under the peculiar circumstances, the *patnidar* having recovered possession, together with mesne profits, it was equitable that he should pay the amount of rent which was in arrear ; but that amount of rent did not accrue until the sale of the *patni* had been set aside, and, therefore, until that time that Statute could not run." Applying those observations to the present case, it is equitable that the plaintiff should be allowed to prefer a fresh claim seeing that he has been deprived of the satisfaction which he had originally obtained. The fact that satisfaction was obtained by coercion was good reason for ordering the money to be refunded, but is no reason for depriving the plaintiff of all remedy on his original claim. In the case cited, the Privy Council say that a fresh claim for the arrears of rent accrued when the *patni* sale was set aside, and that until the *patni* sale had been set aside the Statute could not run. That, in my opinion, amounts to saying that a fresh cause of action arose. Both in that case and in this the Statute ran as against the original claim. But when the original claim was satisfied there was an end of the Statute running in respect of that cause of action, and on the annulment of that satisfaction a fresh cause of action arose and the Statute began to run again. If there was a fresh cause of action this suit is in time, whatever Article is applicable. The appeal, therefore, fails and is dismissed with costs.

SESHAGIRI AIYAR, J.—I agree.

M. C. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 18-B OF 1918.

February 27, 1919.

Present :—Mr. Hallifax, A. J. C.

MAMOMED SIRAJ-UD DIN AND ANOTHER —DEFENDANTS—APPELLANTS

versus

Kazi FAYAZ UD DIN—PLAINTIFF—RESPONDENT.

Inamdars *in Berar—Alienation by* inamdar, *rule as to—Limitation Act (IX of* 1908), *Sch I, Art.* 144, *applicability of—Suit to recover* inam *lands Adverse possession, plea of—Burden of proof.*

MAHOMED SIRAJ-UD-DIN *v.* FAYAZ-UD-DIN.

The law in Berar in respect of alienations by *inamdars* is that, if an *inamdar* alienates an *inam* held under rule 5 of the Berar *Inam* Rules, he having only a life-interest, such an alienation cannot affect his successor, or the next holder of an *inam* certificate, and in the case of such an alienation the plea of adverse possession cannot be successfully raised against the successor of the alienor. [p. 475, col. 1]

Where in a suit by an *inam* certificate-holder to recover possession of lands alienated by his predecessor, the defendant admits the title of the plaintiff's predecessors, but seeks to show that that title was extinguished by adverse possession, Article 144 of Schedule I to the Limitation Act is applicable, and it is for the defendant to show when his alleged possession under the Article became adverse. [p. 475, col. 2.]

Appeal against the judgment of the Additional District Judge, W. B., Akola, in Civil Appeal No. 215 of 1917, decided on 28th February 1918.

Mr. *M. Y. Sherief*, for the Appellants.

Mr. *G. L. Subhedar*, for the Respondent.

JUDGMENT.—This judgment will also dispose of Miscellaneous Appeal Nos. 19-B to 24-B of 1918. The point on which the seven cases have been dealt with is the same. The plaintiff in all cases is the same, though the defendants are different. In 1904 and 1908 the plaintiff was made the *inamdar* of certain *inam* lands held under rule 5 of the Berar *Inam* Rules, that is, as a personal or subsistent grant. He sued for possession of certain portions of the *inam* lands. The principal defendants in each case are the members of the joint family to which the grant was originally made, and in each case the plaintiff sues for possession. The plaintiff's grandfather died in 1878 and his father in 1904. The defence *inter alia* was that neither the plaintiff nor his predecessors in-title had been in possession of these lands within 12 years of suit, and thus his claim in each case was barred by limitation. The cases were tried on the preliminary issue "whether the plaintiff's claim is within time". It was admitted for defendants that plaintiff is the *inam* certificate-holder though there are other persons who have rights in the *inam*. At a partition these lands came to the predecessors-in title from the contesting defendants.

The first Court came to the conclusion that the plaintiff's argument that this case comes under Article 140 of the Limitation Act was untenable as plaintiff was not a remainderman within the meaning of that Article. It was futher held that there can be adverse possession against *inam* certificate-holders holding merely a life-interest in the *inam*. Dealing with the question whether the cases are governed by Article 142 or 144 of the Limitation Act the Judge found that it was admitted by the plaintiff that, though his grandfather was in possession till his death in 1874, neither he nor his father had held possession since. The Court found that Article 142 governed the case and that all the cases were, therefore, barred by time. They were dismissed.

On appeal the learned Additional District Judge finds that as the defendants have admitted the title of the plaintiff's land in suit and having set up a plea of adverse possession for more than 12 years were bound to prove the same. He finds that plaintiff was not a remainderman nor yet a reversioner, the right of reversion being reserved to Government. It confirmed the finding of the first Court that Article 140, Limitation Act, was not applicable. The Judge thinks that unless the possession of defendants, who are members of the family, was proved to amount to an ouster in view of the alleged partition it could not avail them. If they were co-tenants under the law the possession of one co-tenant would not imply an ouster of the other. It held that the suits fell under Article 144 of the Limitation Act, and that the facts of the cases require to be further investigated before the plaintiff can be said to be barred from maintaining the suits. The appeals were allowed and the cases were remanded under Order XLI, rule 23, of the Code of Civil Procedure.

It is here argued for the appellant-defendants that the finding of the lower Appellate Court is wrong, that Article 142 of the Limitation Act applies and as the date of the discontinuance of possession by the plaintiff and his predecessors-in-title is more than 12 years the suits were barred by limitation. In *Krishnaji* v. *Manwar Ali* (1), Sir Henry Stanyon, A. J. C., held "An *inam* granted under rule 5 (2) of the Berar *Inam* Rules, to a grantee and his direct lineal heirs and undivided brothers, confers upon such grantee, and each of his successors, respectively, an estate for life only. Such an *inam* cannot be alienated, by any holder for

(1) 6 Ind. Cas. 821; 6 N. L. R. 72.

the time being, so as to take it out of the family for whose perpetual maintenance it was made, or so as to defeat, delay, or encumber, the enjoyment thereof by any successor of the alienor." In that case it is further held that the grant conferred upon each successive *inamdar* must be an estate for life and the prohibition against alienation was absolute. In a later case, *Aman Ali* v. *Imambi* (2), an alienation in favour of a member of the family holding an *inam* granted under rule 5 (2) of the Berar Inam Rules was held to be void after the death of the alienor, and *Krishnaji* v. *Nilkanth* (3) is an authority for the proposition that unless and until an *inam* estate has been converted into an estate of full ownership, its devolution is governed by the Inam Rules, supplemented, as far as necessary and permissible, by the personal law of the *inamdar*. The law in Berar is that if an *inamdar* alienates an *inam* held under rule 5, he having only a life-interest, such an alienation cannot affect his successor, or the next holder of an *inam* certificate. It seems to me that adverse possession based on the alienation could not be successfully pleaded against the successor of alienor. *Trimbak Ramchandra Pandit* v. *Sheikh Ghulam Zilani Waikar* (4), is relied on by the appellants to support the argument that in cases of hereditary or impartible estates not governed by the ordinary rules of inheritance but subject to the condition that Government shall approve of the heir, the rights of successive holders may be barred by adverse possession. Under the *inam* rules it is not merely a case of Government approving of the heir, but, subject to certain limitations as to succession, Government appoints an *inamdar*. The case of *Radhabai* v. *Anantrav* (5) is distinguishable. It is contended for the respondents that as the plaintiff's right to sue arose when he was given his certificate and as the present suits are all brought within 12 years of that date the defendants' adverse possession as against the plaintiff can only arise from the date of granting the certificate and that Article 144 of the Limitation Act applied *Seetaram Brahman* v. *Rambhaoo Patwari* (6). As in the present case the defendants having admitted plaintiff's possession up to 1874 it rested on them to show when the alleged adverse possession under Article 144 commenced : *Talshibhai Naranbhai* v. *Ranchhod Gobar* (7), *Tarubai* v. *Venkatrao* (8), *Secretary of State for India* v. *Ohelikani Rama Rao* (9), and *Ganno* v. *Beni* (10). It seems to me that in the present case the title of plaintiff's predecessors being admitted and as defendants seek to show that that title has been extinguished by adverse possession founded on an alleged partition or family arrangement, Article 144 of the Limitation Act is applicable and that the cases have been rightly remanded by the Additional District Judge. I would invite the attention of the first Court to the observations of Sir Henry Stanyon in *Krishnaji* v. *Nilkanth* (3), specially those to be found on page 160 of the report.

The result is that the seven appeals governed by this judgment fail and are dismissed with costs. The appellants will pay the respondents' costs in each appeal.

Appeals dismissed.

(2) 22 Ind. Cas. 89; 9 N. L. R. 188
(3) 36 Ind. Cas. 518; 12 N. L. R. 150.
(4) 5 Ind. Cas. 965; 34 B. 329; 12 Bom. L. R. 203.
(5) 9 B. 198 (F. B.); 5 Ind. Dec. (N. S.) 133.
(6) 10 C. P. L. R. 78.
(7) 26 B. 442; 4 Bom. L. R. 99.
(8) 27 B. 43; 4 Bom. L. R. 721.
(9) 35 Ind. Cas. 902; 39 M. 617 at pp. 631, 633; 31 M. L. J. 324; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192; 20 C. W. N. 1311; (1916) 2 M. W. N. 224 (P. C.).
(10) 43 Ind. Cas. 943; 14 N. L. R. 82.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 63 OF 1919.

April 14, 1920.

Present :—Sir John Wallis, KT., Chief Justice, and Mr. Justice Moore.

THE OFFICIAL ASSIGNEE OF MADRAS —APPELLANT

versus

S. R. M. M. R. M. RAMASWAMI CHETTY —RESPONDENT.

Contract Act (IX of 1872), s. 171—Banker— Natukkotai Chetty, *whether banker, and entitled to banker's lien—Presidency Towns Insolvency Act (III of 1909), s. 115—Official Assignee, attorney of, whether exempt from payment of stamp duty on copies furnished for appeal.*

OFFICIAL ASSIGNEE OF MADRAS *v.* RAMASWAMI CHETTY.

A Natukkottai Chetty in the Madras Presidency is a "banker" within the meaning of section 171 of the Contract Act, and is, therefore, entitled to a banker's lien on goods bailed to him as security for a general balance of account, unless it is shown that there is a contract to the contrary.

An Attorney of the Official Assignee is entitled to the same privileges as to stamp duty as the Official Assignee has by virtue of section 115 of the Presidency Towns Insolvency Act, and is entitled to obtain copies of orders for purposes of appeal without the payment of any stamp-duty.

An appeal from the order and the judgment of the Hon'ble Mr. Justice Coutts-Trotter, dated the 2nd September 1919, passed in the Insolvency Jurisdiction in Insolvency Petition No. 115 of 1917.

Messrs. *Short Bewes and Co.*, for the Appellant.

Messrs. *A. Krishnaswami Aiyar* and *M. Subbaraya Aiyar*, for the Respondent.

JUDGMENT.—This is an appeal by the Official Assignee from the order of Coutts-Trotter, J., on a garnishee summons. The first objection taken is that the appeal is filed out of time. The Official Assignee was represented by an Attorney who claimed the same privileges as to stamp-duty as the Official Assignee has by virtue of section 115 of the Presidency Towns Insolvency Act. This was apparently disputed in the insolvency office and a claim was made upon the Official Assignee's Attorney for stamp duty for a copy of the order appealed against and the Attorney ultimately paid it to save time. But the question before us is whether the Attorney, as representing the Official Assignee, has any stamp duty to pay. If not, the appeal is in time. As pointed out by Mr. A. Krishnaswami Iyer, the wording of section 115 is taken from the English practice. But, at the same time, it has to be applied to the practice obtaining in this Court. Now, section 115 says: "No stamp duty or fee shall be chargeable for any application made by the Official Assignee to the Court under this Act, or for the drawing and issuing of any order made by the Court on such application." The application for a copy appears to be either an application made to the Court or an application for the issue of an order made by the Court on his application because the only method of issuing orders which is known to us here is the issue of a copy. Therefore, we are of opinion that the appeal is within time.

The question in the appeal is, whether the garnishee was entitled to a banker's lien in respect of advance made by him on various packets of diamonds desposited with him. The first question is whether he was a banker. Mr. A. Krishnaswami Aiyar has called our attention to an Irish case *Shield's Estate In re* (1), in which the question was whether the party there was a banker. In this case, we have evidence that this garnishee, who is a Nattukottai Chetty, does banking business and money lending business; that he has customers who *deposit* money with him and who keep pass books and some with those pass books and draw money; that he pays interest on their deposits, and that he buys and sells *hundies* and lends money on securities. There is abundant evidence that, in this particular case, the garnishee did carry on banking business, and, further than that, it is perfectly general knowledge, and we have recognised it in *Vellayappa Chettiar* v. *Unnamalai Achi* (2) and *Annamalai Chetti* v. *Annamalai Chetti* (3), that these Nattukottai Chetties are really the Indian bankers of this part of the country. There is, therefore, no reason why the garnishee in this case should not be entitled to a banker's lien. Under section 171 of the Indian Contract Act, bankers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; and we agree with the learned Judge that the Official Assignee in this case has failed to show any contract to the contrary, what he has shown is that various advances were made from time to time on the security of deposits of diamonds, and that the diamonds so deposited were redeemed from time to time. But it also appears that loans were made without any deposit of diamonds at all which are included in the same account. The garnishee's affidavit also shows that all the diamonds were the subject of a sort of second pledge to another creditor. There is no reason for differing from the learned Judge in his conclusion that a contract to the contrary has not been proved.

(1) (1901) 1 Ir. Rep. 172; 35 Ir. L. T. R. 3; 5 Ir. L. R. 668.
(2) 42 Ind. Cas. 573; 6 L. W. 687; (1917) M. W. N. 858.
(3) 52 Ind. Cas. 456; 10 L. W. 67.

In the result, the appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 107 OF 1920.

April 20, 1920.

Present:—Mr. Mittra, Offg. J. C.

SITARAM—PLAINTIFF—APPLICANT

versus

DONGER SINGH—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 47—Decree-holder depositary of property attached—Detention of property—Suit for damages for wrongful detention, whether maintainable.

In execution of a decree against *P.* his property was attached and placed in charge of the decree-holder *D* as *sapurdar* or depositary. *P.* applied to the Court for an order directing *D.* to produce the property. *D.* alleged that under an oral order of release the property was made over to *S*, the brother of *P.* The present suit was brought by *P.* to recover from *D.* damages for wrongful detention, but the suit was dismissed on the ground that the matter being within the purview of section 47 of the Civil Procedure Code the suit was not maintainable:

Held, that the suit not having been brought against the decree-holder as such, or against a party to the suit, but being a suit against a depositary, who set up no right to the property deposited, did not fall within the scope of section 47 of the Civil Procedure Code, and was maintainable. [p. 478, col.).]

Civil revision against the decree of the District Judge, Nimar, in Appeal No. 93 of 1918, decided on the 11th April 1919, arising out of Civil Suit No. 41 of 1918, decided by the Munsif, Seoni Malwa, on the 4th April 1918.

Mr. *W. R. Puranik*, for the Applicant.

Mr. *S. O. Dutta Chaudhary*, for the Non-Applicant.

ORDER.—In Civil Suit No. 283 of 1915 in the Court of the Munsif Seoni Malwa, the present defendant, Dongersingh, obtained an attachment before judgment, and two bullocks and a cart belonging to the present plaintiff Sitaram, were attached and placed in Dongersingh's custody as *sapurdar*. A decree for Rs. 65 and costs was eventually passed in the latter's favour. In 1916 the decree-holder applied for a warrant of arrest which was transferred for execution to the Munsif of Hoshangabad. The judgment-debtor complained that as the property attached had not been sold, he was not liable to be arrested. The decree holder replied that he had made over the attached property to the judgment-debtor's brother under an oral order for release of the same. The order passed was that the decree-holder should proceed against the property attached before applying for a warrant of arrest. In 1917 the judgment-debtor applied to the Munsif at Seoni Malwa praying that the decree-holder be ordered to produce the attached property for delivery to him and that the decree-holder may take what is due under the decree: The Munsif's order dated the 17th December 1917 recites that "The D file of this record which contained the list of attached property and the order of release (for the register of attached property shows that the property was released) is not available. Under the circumstances, the applicant is referred to a regular suit."

In the present suit Sitaram claims Rs. 150 as compensation for the wrongful detention of his property. His suit was decreed in the first Court, but on appeal an objection was taken that this was a matter coming within the purview of section 47 of the Civil Procedure Code. The District Judge upon this objection has dismissed the suit.

It is conceded before me that no second appeal lies in the case as the suit was cognizable by a Small Cause Court and the amount claimed did not exceed Rs. 500. The case would be registered as a petition under section 115 of the Civil Procedure Code.

I think the applicant's contention that the District Judge has failed to exercise a jurisdiction vested in him by law is well founded. Even assuming that the remedy lay in an application for execution, the Court in which the suit was instituted being the

Court which passed the decree, the plaint should have been treated as an application for execution. The attention of the learned District Judge does not seem to have been drawn to sub-section (2) of section 47 of the Civil Procedure Code.

Dongarsingh happened to be the decree-holder, but he was entrusted with the property as *sapurdar* or depositary in accordance with the Civil Circular I-31. In *Joshi Powar* v. *Jiwraj Hazarimal* (1) it was held that the security given by a depositary for the safe custoday of livestock which has been attached cannot be realized by summary process in execution, a view which was followed in *Khetsidas Radhakishan* v. *Harba Marathe* (2) (Civil Revision No. 5 B of 1918). It so happens that the decree-holder was the *sapurdar*, but the claim of the plaintiff is not against him in his character as decree-holder, nor can it be said that the question raised in this suit is one relating to the execution, discharge or satisfaction of the decree. The defendant does not claim to hold the property for satisfaction of his decree. His plea is that it has been duly returned to the plaintiff's brother who, he says, is joint with the plaintiff. The plaintiff also does not allege that the decree has been satisfied, but simply denies that the property was returned to his brother, and that the defendant as *sapurdar* is absolved thereby from all further liability. The claim is, therefore, not against the decree-holder as such or against a party to the suit, but against a depositary who does not set up any right to the property deposited for the purpose of satisfaction of the decree. Such a claim is, in my opinion, outside the scope of section 47, Civil Procedure Code. The lower Appellate Court in refusing to enter into the merits of the case has thus failed to exercise a jurisdiction vested in it by law. The suit as framed, therefore, did lie.

It has been argued before me on behalf of the non-applicant that, until there is an order releasing the property from attachment, the plaintiff has no right to maintain a suit for wrongful detention by the *sapurdar*. It is true that the Munsif at Hoshangabad held that the property has not been released from attachment, but a fuller inquiry made by the Munsif at Seoni Malwa shows that, though no formal order releasing the property from attachment has been traced, an entry to this effect has been found in the register of property attached. In view of the plea taken by the defendant in the execution proceedings and of the order passed on the 17th December 1917, it must be taken that the Executing Court no longer holds the property as still under attachment. Whether there was an oral order for the release of the property as alleged by the decree-holder, or whether the property has been duly returned to the applicant's joint brother, I see no bar to the institution of the suit on the ground that it is premature.

The result is, that the application for revision succeeds. The decree of the lower Appellate Court is reversed and the appeal is ordered to be retried by that Court on the merits. Costs incurred in this Court will follow the result. I fix Rs. 10 as Pleader's fee in this Court.

Application allowed.

(1) 13 C. P. L. R. 104.
(2) 47 Ind. Cas. 956; 16 N. L. R. 178.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2578 OF 1916.

June 4, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

SHAH NAWAZ—PLAINTIFF—APPELLANT

versus

SHEIKH AHMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagee in possession—Equity of redemption—Adverse possession of right to redeem, whether permissible—Revenue records, entry in, effect of.

SHAH NAWAZ v. SHEIKH AHMAD.

A person cannot be said to be in adverse possession of the right to redeem immoveable property where the right to possession and actual possession is all the time in the hands of the mortgagee. The fact that he succeeds in getting his name recorded in the revenue register does not confer a title on him. [p. 479, col. 1.]

Second appeal from the decree of the District Judge, at Jullundur, dated the 16th May 1916, affrming that of the Senior Subordinate Judge, Jullundur, dated the 30th August 1915.

Mr. *Abdul Rashid*, for the Appellant.

Mr. *Faqir Chand*, for the Respondent.

JUDGMENT.—The facts giving rise to this appeal are simple and are fully stated in the judgment of the first Court. One *Musammat* Tajo, wife of Kasam Shah, mortgaged the land in suit on the 11th of March 1868 to Mehr Ilahi and Aziz-ul-Rahman. The defendants Nos. 1 to 3 are the representatives of the mortgagees and the plaintiff, Shah Nawaz, who claims to be a collateral of Kasam Shah, the husband of *Musammat* Tajo, has brought this suit for the redemption of the mortgage. Defendant No 4, *Musammat* Umri, is the daughter of Kasam Shah by another wife, *Musammat* Bhuri. Defendants Nos. 5 to 8 are said to be among the collaterals of Kasam Shah. *Musammat* Umri and the latter defendants Nos. 5 to 8 were not originally made party to the suit, but the matter having come up to the Chief Court at a previous stage the case was remanded for trial on the merits with the direction that the suit should be tried after impleading *Musammat* Umri and defendants Nos. 5 to 8 as defendants in the case. The case has now been tried with the result that the suit has been dismissed by both the Courts below. The plaintiff has preferred this second appeal to this Court.

The plaintiff claimed to be the adopted son of Amir Shah and a collateral of Kasam Shah, the husband of *Musammat* Tajo, and as such entitled to claim redemption. He also claimed to have acquired ownership of the equity of redemption by adverse possession against *Musammat* Umri on the ground that his name was mutated in the year 1888 on the death of *Musammat* Bhuri, the second wife of Kasam Shah. Both these points have been decided against the plaintiff.

In the memorandum of appeal, although exception is taken to the decision of the lower Appellate Court on both these points, yet the question of adverse possession only has been pressed before us. It has been contended that, according to the authorities, it is possible to acquire ownership of the right of redemption by adverse possession. In support of this contention reliance has been placed on the case of *Lalla Kanhoo Lal* v. *Musammat Manki Bibi* (1). On the facts of that case it was held that the equity of redemption claimed by the plaintiff was extinguished by adverse possession, inasmuch as the person claiming adverse possession had been receiving rent from the mortgagee as owner. In the present case, beyond the fact that the name of the plaintiff was entered in the revenue register, no manner of possession whether actual or constructive has been established by him. One mode of acquiring and keeping possession is by receipt of rent. In the Calcutta case possession was acquired and retained by receipt of rent. The ruling is, therefore, clearly distinguishable and cannot help the case of the plaintiff. Reliance was also placed on the case of *Hubdar Khan* v. *Gajadhar Chaube* (2), Judicial Commissioner's Court, Oudh. In that case the right of ownership was exercised by effecting a transfer of the equity of redemption and it was held, under the special circumstances of the case, that the claimant had acquired full ownership of the equity of redemption by adverse possession. This was a decision by a Single Judge and the facts were quite different from those of the present case. There is, however, a decision of the Allahabad Hight Court which fully applies to the present case [see *Kunwar Sen* v. *Darbari Lal* (3)]. On facts almost similar to the facts of the present case it was held that a person cannot be said to be in adverse possession of the right to redeem immoveable property where the right to possession and actual possession is all the time in the hands of the mortgagee. The fact that he succeeds in getting his name recorded in the revenue register does not confer a title on him. The decision in

(1) 6 C. W. N. 601.
(2) 25 Ind. Cas. 600; 17 O. C. 294.
(3) 34 Ind. Cas. 171; 38 A. 411.

Lala Kanhoo Lal v. *Musammat Manki Bibi* (1) above referred to was relied upon in that case also and the learned Judges made the following observations about it in their judgment:—

"This case no doubt is to some extent in favour of the plaintiffs. A number of authorities were referred to including the case of *Casborne* v. *Scarfe* (4) and the judgment of Lord Hardwicke is quoted. Lord Hardwicke no doubt pointed out in that case that an equitable estate might be barred by time just as much as a legal estate, and then he refers to and describes an equity of redemption. It must be borne in mind, however, that the equity of redemption where the possession remains with the mortgagor is quite different from the equity of redemption where the possession is with the mortgagee. There can be no doubt that an equitable estate as distinguished from a legal estate can be barred by time but it seems to us impossible that any person can be in possession of the right to redeem a mortgage where, under the terms of the mortgage, the mortgagee is entitled to the actual possession and is in fact in possession thereunder."

We entirely agree with the learned Judges of the Allahabad High Court and hold that the plaintiff could not and did not acquire ownership of the equity of redemption by merly having his name entered in the revenue register. In our opinion the view taken by the Court below was correct and we accordingly dismiss the appeal with costs.

Appeal dismissed.

(4) (1737) 1 Atk. 603; 2 Wh. & T. L. C. (7th Ed.) 6; 26 E. R. 377.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 576 OF 1918.

March 10, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

SITARAM RAVAJI BHOSLE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KHANDU MAIRALA SHINDE—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Alienation by widow, nature of—Transferee, whether entitled to redeem mortgage.

An alienation by a Hindu widow is only voidable, not void, it is perfectly valid, until it is set aside, and the only persons entitled to dispute the validity of the alienation are the reversioners. [p. 480, col. 2]

Therefore, a mortgagee has no *locus standi* to resist the claim for redemption of a person who, on the face of it, has a perfectly good title to the equity of redemption granted by a Hindu widow. [p. 481, col. 1.]

Appeal from the decision of First Class Subordinate Judge, A. P., at Satara, in Appeal No. 443 of 1916, confirming the decree passed by the Second Class Subordinate Judge at Wai, in Civil Suit No. 469 of 1915.

Mr. *B. J. Desai* (with him Mr. *K. N. Kovajee*), for the Appellant.

Mr. *D. A. Tuljapurkar*, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued to redeem the plaint land. They claimed as the heirs of the donees of one Gopai. She purported to make a deed of gift, Exhibit 40, in favour of one Laxman and others of the equity of redemption in 1863. The defendant claims under a mortgage from one Krishnai. The plaintiffs' suit has been dismissed on the ground that Gopai could not convey to any one more than the right to redeem the mortgage during her lifetime. But it appears to me that the decision of the Privy Council in the case of *Raja Modhu Sudan Singh* v. *Rooke* (1) concludes the question regarding the nature of the widow's alienation. It is perfectly valid until it is set aside. In other words, it is only voidable, not void. The question is, who are the persons who are entitled to dispute the validity of such a grant. Clearly the reversioners. In this case the defendant mortgagee resists the attempt of Gopai's

(1) 24 I. A. 164; 25 C. 1 (P. C.); 1 C. W. N. 433; 7 M. L. J. 127; 7 Sar P. C. J. 191; 13 Ind. Dec. (N. S.) 1.

representatives to redeem the mortgage, on the ground that the gift of the equity of redemption was void. In my opinion, the mortgagee in a case like this has no *locus standi* to resist the claim of the person who, on the face of it, has a perfectly good title to the equity of redemption granted by a Hindu widow, and the only person who can dispute the validity of such a grant is the reversioner. It does not matter to the mortgagee who pays him off. Of course, in this case it has been found in the Trial Court that the mortgagee had been paid off long before the date of this suit on taking accounts under the Dekkhan Agriculturists' Relief Act, and, therefore, naturally the defendants are anxious to resist the plaintiffs' claim. In my opinion they are not the persons who could do so, and, therefore, the appeal succeeds, and the plaintiffs are entitled to the relief they sought. As it has been found that the mortgage has long been paid off, the plaintiffs would then be entitled to recover possession of the plaint land. The appellants to have the costs in this Court and the Court below. In the Trial Court they must pay the mortgagee's costs.

HEATON, J.—I agree. The Subordinate Judge who heard the first appeal founded his decision on the case of *Jagannath Vithal* v. *Apaji Vishnu* (2). I am not quite sure what the Subordinate Judge supposed was the effect of the decision on which he relied. If he supposed the effect of that decision to be that a gift by a widow is absolutely inoperative, that it is a thing forbidden by law, and, therefore, a thing which can have no legal effect, then I think either he misunderstood the judgment in *Jagannath Vithal's case* (2) or else that judgment is no longer in accordance with what is well understood to be the law in this part of India. The law, as now understood, is that a widow who takes a life-interest in her husband's property has an interest which she can dispose of. She can bargain with it She can sell it, mortgage it, or give it away. But it is only a life-interest and she cannot do more than finally give or sell or convey her life-interest except in special circumstances. But a life interest she can dispose of, and it follows from this fact, supplemented by what was said by the Privy Council in the case of *Raja Mothu Sudan Singh* v. *Rooke* (1), that not only does a widow convey her life interest, but she conveys something that may become a permanent interest, unless it is claimed by somebody competent to claim it. The next reversioner, for example, on the widow's death can get an alienation declared to be no longer of any validity. But any one dealing with a widow, and taking her interest in the property does acquire an interest in that property, and acquires an interest that does not automatically cease to exist merely because the widow dies. It may come to an end as the result of proceedings taken by the reversioner, or possibly in other ways, but it does not automatically cease. Indeed, it continues until it is put an end to in some regular and legal way.

In this case the plaintiffs acquired such an interest, or, rather, their predecessors acquired such an interest. It was in fact a right to redeem a mortgage. Now that right did not automatically cease to exist on the death of the widow, and it has never been put an end to in a legal and regular way, and, therefore, it still exists, and, therefore, I agree in the order proposed by my Lord the Chief Justice.

Appeal allowed.

(2) 5 B. H. C. R. (A. C. J.) 217.

MADRAS HIGH COURT.

FULL BENCH.

REFERRED CASE No. 2 OF 1920.

October 6, 1920.

Present:—Sir John Wallis, KT., Chief Justice, Justice Sir William Ayling, KT., Mr. Justice Sadasiva Aiyar, Mr. Justice Napier and Mr. Justice Krishnan.

THE SECRETARY TO THE BOARD OF REVENUE, INCOME-TAX, MADRAS —PETITIONER

versus

MESSRS. AL. AR. RM. ARUNACHALAM CHETTIAR AND BROTHERS—RESPONDENTS.

Income Tax Act (VII of 1918), ss 3, 9—Interest accruing due but not realized, whether assessable to income-tax.

Money which becomes due to a money-lending firm in the course of its business by way of interest, in the year of account, or the year on the income of which income-tax is to be assessed for the current year, and is not recovered or realized by the firm in that year either in cash or by adjustment in the accounts, does not form part of the assessable income for the year of account, and is consequently not liable to assessment under the Income Tax Act. [p. 485, col. 2; p. 488, col. 2; p. 489, col. 1; p. 495, col. 1; p. 498, col. 2; p. 499, col. 1.]

Case stated under section 51 of the Income Tax Act, VII of 1918, by the Secretary to the Board of Revenue, Income Tax, Madras.

This case came on for hearing on the 7th and 8th of September 1920.

FACTS appear from the judgment.

The Hon'ble the Advocate-General, for the referring authority, the Board of Revenue:—What is taxable as income is the profits accruing, arising or received in British India. That is wide enough to cover claims for interest which have fallen due. To restrict it to income actually realized would lead to subtle evasions of the Income Tax Act. The word 'profits' must not be narrowly construed. The words 'accrues or arises' in section 3 denotes that what is taxable is the income which has fallen due. Cases of exchange or set-off of the income actually earned would otherwise be excluded from the scope of the section. It is not actual receipts in cash that are alone taxable. Income on fixed deposits which are carried in the banker's new accounts, would be excluded from taxation if the section should be read as applying only to cash receipts. In *Colquhoun* v. *Brooks* (1) and *Spanish Prospecting Co*, *In re* (2) the question as to what is 'profits' is discussed. The words 'accuring or arising' are descriptive of a right to receive profits. An income is liable to taxation as soon as it has accured in British India and to create the liability for income-tax it is not necessary that it should have been actually received by the assesee.

Mr. *K. V. Krishnasawmi Aiyar*, for the Respondents:—What is taxable under the Act is income. Until a sum of money becomes an income the Income Tax Act can have no application. A fiscal provision must be construed in favour of the subject. Interest may accrue due, but until it is actually received by the assessee it cannot be said to be income or profits. It may turn out to be a bad debt and may have to be written off. It will be hard to tax all unrealized income. What is expected cannot be said to be 'income.' The fact that under section 9 deductions are allowed to be made from profits and the fact that the D. form prescribes for return of 'income received from business' indicate that what is taxable is only realized income. The cases cited by the Advocate-General do no strictly apply. In *Colquhoun* v. *Brooks* (3) the profits of a partner had been ascertained and fixed and entered in the firm's books to his credit. The judgment does not lay down that unrealized amounts could be taxed. *Spanish Prospecting Co., In re* (2) was not an income-tax case at all but was the case of a company in liquidation.

JUDGMENT.

WALLIS, C. J.—The only question argued before us was, whether money which became due to a money-lending firm in the course of its business by way of interest in the year of account, or year on the income of which the tax is to be assessed for the current year, is to be treated as part of the assessable income for that year of account, although it was not recovered or realised by the firm in that year either in cash or by adjustment in the accounts. Income is defined in the "Concise Oxford Dictionary of Current English," adapted from the great Oxford

(1) (1888) 21 Q. B. D. 52 at p. 65; 57 L. J. Q. B. 429; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645.

(2) (1911) 1 Ch. D. 92; 80 L. J. Ch. 210; 103 L. T. 609; 18 Manson 191; 55 S. J. 63; 27 T. L. R. 76.

(3) (1859) 14 A. C. 493 at pp. 495, 502; 59 L. J. Q. B. 53; 61 L. T. 518; 38 W. R. 289; 154 J. P. 277.

Dictionary, and published at the Clarendon Press, as "Periodical (usually annual) receipts from one's business, lands, work, investments etc; *income tax* (levied on this)." This is also the legal acceptation of the term, as appears from Stroud's Judicial Dictionary, and numerous definitions, some of which are there cited; while others have been referred to by Mr. K. V. Krishnaswamy in his argument for the petitioners. Lord Selborne's, "income signifies what comes in" is the interest, and, at the same time, sufficiently indicates that the taxation of interest which has not come in is not within the scope of an Income Tax Act. The use of the word 'income' in section 3 of the present Act, on which some reliance is placed in the reference, also seems to me to be entirely in accordance with this view. That section, which appears under the head of "Taxable income" provides in effect that the income which is to be taxed under the Act is income from whatever source derived if it accrues or arises or if it is received in British India; that is to say, income which accrues or arises in British India is taxable even if it is received elsewhere, as, in England; while income which is received in India is taxable even if it accrued or arose out of British India. With this may be compared the more stringent provisions of Schedule D of the English Income Tax Act, 1918, which make residents in the United Kingdom liable in respect of annual profits or gains accruing or arising from any trade or business whether the same be carried on in the United Kingdom or elsewhere. What we are concerned with in the present case is, not the liability of the petitioners to pay income tax which is admitted, but the way in which the income they derive from their business is to be arrived at. That, of course, is to be ascertained by reference to the provisions of the Act regarding the particular class of income, which in this case is "Income derived from business," but, in construing these provisions, and the uniform interpretation which has been put upon the corresponding provisions of the English Acts, it must always be borne in mind that, in its natural and legal meaning, income means periodical receipts, that an income-tax is, therefore, presumably a tax on annual receipts, and that, while it is open to the Legislature, for good and sufficient reason, to enact that debts which have not been paid but are still outstanding, shall be treated as income for the purposes of the Act, the Court would not be justified in attributing such an intention to the Legislature, in the absence of the clearest and most express language. As observed by Warrington, L. J., in *Inland Revenue Commissioners* v. *Blott* (4) with reference both to the Super Tax Act and the Income Tax Acts: "It is income and income only which is brought into charge."

The tax on income derived from business, which is the class of income with which we are dealing, has never been charged on the actual receipts of the year, which would involve postponing the levy of the tax to the following year, but has been charged in England on [the average income for the three previous years. The language of rule 1 of Schedule D of the English Income Tax Act, 1918, which has superseded all the earlier enactments dealing with this class of income, requires the tax in respect of trade not otherwise provided for to be "computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending, etc."

In *Coltness Iron Company* v. *Black* (5) Lord Blackburn traces this provision back to the Income Tax Act of 1803, (43 Geo. III, c. 122,) and observes: "Instead of saying that the duty should be imposed on a fair and just average of the amount of the profits for three years, it is imposed 'on the balance' of such profits. I have not been able to discover any difference in the meaning of the two phrases." Now, as I shall show, the uniform construction placed on this provision by the Courts, occurring as it does in an Act the general scope of which is to impose a tax on annual income, which, as already pointed out, means annual receipts, has been that, it refers to the difference between the amount of the receipts of the business for three years and the expenditure incurred in earning them. This interpretation has been accepted by the Legislature, which left this somewhat old fashioned phraseology unaltered for so many years with a full knowledge of the interpretation placed upon it by the Courts and has even repro-

(4) (1920) 2 K. B. 257 at p. 267; 89 L. J. K. B. 677.

(5) (1881) 6 A. C. 315; 51 L. J. Q. B. 626; 45 L. 145; 29 W. R. 717; 46 J. P. 20.

duced it without material alteration in the new Consolidating Act of 19.8. Fully accepting the view that the tax is to be assessed on the basis of the receipts for three years, the Legislature has confined itself to legislating as to the deductions which are allowable on the other side of the account in order to arrive at the taxable income, and, as will be seen, the Indian Legislature, in the corresponding section 9 of the present Act, has followed exactly the same course.

It would be endless to cite all the cases in which the profits and gains on which the tax is computed under the Schedule have been held to be receipts. In *Rhymney Iron Company* v. *Fowler* (6) the Revenue Authorities observed in the case submitted for the opinion of the Court that, "the balance of profits and gains had repeatedly been held in the Exchequer Courts to be the difference between the receipts and the expenditure necessarily incurred in obtaining those receipts." In *Gresham Life Assurance Society* v. *Styles* (7) Lord Esher described this balance as, "the difference between what was received in any three years and what it cost to obtain those receipts." The rule was again laid down practically in the same terms by Lords Atkinson, Parker and Parmoor in *Inland Revenue Commissioners* v. *Southendon Sea Estates Co, Ld.* (8).

Something has been said about commercial balance sheets, but in *Gresham Life Assurance Society* v. *Styles* (7) Lindley, L. J., observed that, 'the rules in Schedule D were very different from the rules ordinarily employed in trade in ascertaining the net profits divisible among those carrying it on". Even so, as pointed out by Sir Francis Gore, the learned Author of the article 'Income Tax' in Volume 16 of Halsbury's Laws of England, who left his practise at the Bar to become Solicitor to the Inland Revenue, and writes with much experience of the subject, the difference between the commercial and the income tax balance sheet is not as to the receipts side but as to the deduction side of the account. He says, at page 650, paragraph 1310: 'The profits of a trade or business would for commercial purposes seem to be the difference between the receipts and the expenses necessary to earn them. In estimating profits, however, for the purpose of income tax the rules specifically prohibit a variety of deductions some of which would probably form proper subjects of deduction in a commercial balance sheet". The same view is taken by Kekewich, J., in *Badham* v. *Williams* (9), dealing with the case of two Solicitors going into partnership and getting a good deal of business in the first year for all of which they would only be paid later. In such a case the learned Judge points out there would be no profit or income for the first year for the purpose of income tax or otherwise, though there might be a good prospect of profit or income in furture years against which the partners might be justified in borrowing. Lord Moulton's method of calculating profit or loss for a particular period in *Spanish Prospecting Co., In re* (2), as the difference between the valuation of the total assets at the beginning and end of the particular period was not made with reference to the Income Tax Acts and could not be applied to them consistently with the authorities to which I have referred. The learned Advocate-General relied upon the decision of the House of Lords in *Colquhoun* v. *Brooks* (3) but the only question in that case was, whether a resident in Great Britain was liable, under the language of the English Income-Tax Acts, to be assessed on the profits of a business which arose or accrued in Australia and were not received by him in the United Kingdom. It was held that he was not liable to pay any income-tax on such profits, and no question arose as to the amount at which they were to be assessed. The respondent was apparently willing to pay, if liable, upon a sum of £ 9,000, odd, which probably was not very different from the sum which he would have been liable to pay if assessed regularly under the Schedule on the average profits for the three preceding years.

Coming now to the Indian Statutes, under the Indian Income Tax Act, 1886, trade profits were chargeable under "Class D other sources of income," and, under section 15 (1), the assessment was to be made on the income accruing during the preceding year.

(6) (1896) 2 Q. B. 79 at p. 80; 65 L. J. Q. B 524; 44 W. R. 651.

(7) (1890) 25 Q. B. D. 351 at pp. 354, 355; 38 W. R. 696; 59 L. J. Q. B 586.

(8) (1915) A. C. 428; 84 L. J. K. B. 154; 112 L. T. 89; 59 S. J. 24; 31 T. L. R. 30.

(9) (1902) 86 L. T. 191.

This was admittedly interpreted in practice, and I think rightly, as meaning the receipts of the previous year less the cost of earning them. In the Indian Income Tax Act, 1918 'Income derived from business" forms the fourth of the six classes of income specified in section 5. By section 9 "the tax", that is income-tax, "shall be payable by an assessee under the head 'Income derived from business' in respect of the profits of any business carried on by him". This means, on the amount of the profits, and is, therefore, identical in scope and meaning with the provision in Schedule D of the English Acts as interpreted by Lord Blackburn in the passage to which I have referred. Section 9, which is clearly modelled on Schedule D of the English Act, also follows the Schedule in regulating the deductions which are allowable on the other side of the account, the main difference being that, under section 18 (5) of the Indian Act, the assessment is to be on the aggregate of the assessee's income in the previous year chargeable under the head, and not, as in Schedule D, to be computed upon the average profits for the previous three years. Unpaid debts, whether consisting of principal sums or interest, in so far as they are bad are allowed as deductions under the Statute and do not otherwise come into an income-tax balance-sheet. Having regard to the uniform interpretation placed by the Courts on the corresponding language of Schedule D and accepted by the Legislature, it is not, in my opinion, open to this Court to place a different interpretation on the word "profits" occurring in section 9 of the present Act and to hold, as contended, that they include not only receipts but also claims for interest which have fallen due but have not been paid within the year of account and, therefore, form no part of the income of the year in its natural and legal sense. Such interest when it is paid will necessarily form part of the profits or receipts of the year in which it is paid and I can see no reason for including it in the profits or receipts of an earlier year. If the present Act is found to admit of extensive evasion in India, the remedy, in my opinion, is to be found in an alteration of the law.

Since this judgment was written, the report of the recent decision of the Court of Appeal in *National Provident Institution* v. *Brown* (10) has become available. It was there held that the words in Schedule D "profits on discounts" and "profits on interest," in the Income Tax Act must mean profits arising from discounts received on discounting transactions and profits arising from interest received on securities bearing interest, and Lord Sterndale, M. R., observed: "The amount received is, in my opinion, to be taxed in the year in which it is received. Although it may be accruing over several years it only becomes taxable income in the year in which it is received." These words, in my opinion, supply an answer to the reference.

AYLING, J.—The question referred to us is, whether interest which became due to a money lending firm in the year of account but was not realised in cash or by adjustment in the accounts is liable to income-tax under Act VII of 1918.

I think the answer must be in the negative. I find it impossible to hold that, the mere fact that the assessee has become legally entitled to a sum of money as interest justified the inclusion of that sum either as "income" or "profits of the business" within the meaning of section 9 of the Act. It may be found impossible to recover the amount due, and I observe that section 9 contains no proviso for deduction of bad debts, nor is there any provision, as in the English Act, referred to by my brother Napier, for the valuation of doubtful debts. On the other hand, I would emphasize the word "adjustment" which I take to mean a constructive receipt. I agree with Napier, J., that, if a person entitled to receive interest agrees with his debtor to let the money stand in the hands of the debtor either by way of deposit or as a fresh loan or investment that would amount to a constructive receipt or "adjustment," and would justify the inclusion of the sum in question as profits or income, just as much as if it had been received in cash. Such an agreement might be express or implied, but should not, in my opinion, be inferred solely from the failure to take any steps for realisation.

This seems to me the reasonable construction of the Act as it stands. If it involves practical difficulties in working, the only remedy seems to be in amendment of the Act.

(10) (1920) 3 K. B. 35; 89 L. J. K. B 866.

I think it unnecessary to add to the exhaustive discussion of the authorities by my Lord the Chief Justice and my learned brothers.

SADASIVA AIYAR, J.—The question referred to us by the Board of Revenue under section 51 of the Income Tax Act VII of 1918, is formulated vaguely, thus, in paragraph 3 of the letter: whether the interest in question accrued or arose in British India within the meaning of the Act. In paragraph 1 of the letter, "the interest in question" is described as "interest which became due in the year of account but which was not realized in cash or by adjustment in the account." One other sentence in the Board's letter refers to "interest accrued but not realized." Thus, taking the letter as a whole, the question referred to us might be expanded thus: whether the interest which became due in the year of account to a firm of Nattukottai Chettis in British India but which was not realized in cash or by adjustment in the accounts is income which accrued or arose in British India within the meaning of section 3 (1) of the Income Tax Act VII of 1918.

Section 3 (1) uses four verbs in the clause "to all income from whatever source it is (1) derived, if it (2) accrues or (3) arises or (4) is received in British India". The Board of Revenue assumes in its letter that, because in its opinion, the income in question was not "realized" (a fifth verb) the income was not "received" within the meaning of the 4th verb "is received". As regards the verbs "accrues" and "arises," they are both interpreted in the Board's letter as meaning "becomes the subject of a right to receive". (The word "accrues" seems to be the more appropriate word to be used in connection with a periodically recurring right to receive an income which is usually definite in amount while "arises" seems to be used more appropriately and frequently in connection with a business in which rights arise to receive income of a more fluctuating kind and at more uncertain intervals).

Very learned and subtle arguments were advanced before us on both sides based on the various shades of meaning in which the six verbs "derive," "accrue," "arise," "receive", "earn", and "realize," and the two nouns "income" and "profits" (with the grammatical variations of some of these words) have been used in the several English and Indian Income Tax Acts and in the numerous English decisions dealing with the provisions of certain English Acts. It must be admitted that large numbers of words are not used (either in the English language, or in any other language) with such precise and exclusive meanings as to give no room for doubt as to their exact meanings in particular contexts. I may add, with profound respect, that the language used in the English decisions quoted to us is not free in many cases from the ambiguity involved in the use of several of the above words each with different shades of meaning. I was, therefore, not much impressed with arguments based upon the root meanings of such words as "income," "received", etc. In *Colquhoun* v. *Brooks* (3) Lord Fitzgerald says: "The case stated further finds 'the amount standing to the credit of Mr. Henry Brooks in the books of the Australian firm, as representing the *estimated profits* due to him for the year ending April 5, 1885 would, if *realized*, amount to the sum of £9,219. This sum of £9,219 was arrived at by an estimate and valuation on taking of stock on a certain fixed day, after deducting therefrom the estimate and valuation of the preceding year but, as a matter of fact, only a portion of the amount had been actually realized." After thus stating the case, the learned Lord proceeds: "At first sight, it struck me very strongly that the respondent was chargeable here "(that is, in England) "for income-tax in respect of this sum of £9,219, though not actually received in this country, but as being income *arising* out of trade carried on in Melbourne, his share of the profits having been actually ascertained and fixed and accruing to him in this sense, *that it was so completely under his control that by an act of his will he could have it actually transferred to his bankers here.* There would be no hardship, and nothing dangerous or to be deprecated in charging the respondent on his share of profits so ascertained, but the facts of the case do not warrant our doing so. On looking critically at the findings in the case it will be perceived that there is no sufficient

finding to warrant us in coming to the conclusion that the profits of the Australian firm have been so ascertained for the year 1885 as to be legitimately the subject of taxation here. It is only put that the profits due to him would *if realized* amount to £9,219 a sum 'arrived at by an estimate and valuation' on stock taking on some particular day (not stated) and 'deducting therefrom the estimate and valuation of the preceding year' (also made on a day not stated), 'but, as a matter of fact, only a portion of the amount had been actually realized' ——*what the meaning of the word 'realized' there is I do not know.*" Lord Herschell and Lord Macnaghten and Lord Halsbury, (Lord Chancellor) have not in their judgments in this case expressed dissent from the above observations of Lord Fitzgerald. The decision itself depended on the answer to the question, whether the profits or gains arising from the Melbourne business of Brooks fell under the fifth clause of Schedule D of the English Income Tax Act, (5 and 6 Vict , c. 35), section 100, whose language is somewhat peculiar and special and which speaks of sums *actually received in Great Britain*. It was held by all the Law Lords that mere "arising" or "accruing" of the profits in England will not do, that they must also be received *in England*, and that the words "arising" and "accruing" do not mean the same thing when used in connection with profits or gains as the word "received". No doubt, the words "accrues" and "arises", in section 3 of the Indian Income Tax Act, cannot have (except in the very special circumstances referred to by Lord Fitzgerald) the same meaning and legal effect as the words "is received". Section 9 (1) of the Income Tax Act uses the words "income derived from business" by an assessee as synonymous with "profits of any business carried on by him". In *Colquhoun* v. *Brooks* (1), which is the case which went up from the Court of Appeal to the House of Lords in *Colquhoun* v. *Brooks* (3), Fry, L. J., says : "I cannot read the words arising or accruing" as meaning "received by". In *Spanish Prospecting Co., In re* (2) Fletcher-Moulton, L. J., goes elaborately into the question of what is income from profits of a business and comes to the conclusion (as I understand him) that what is treated as profits by a reasonable auditor auditing the accounts of a business for a particular year might be reasonably treated as "income or profits" accruing or arising or received from the business for the purpose of income tax. The learned Lord Justice deals at length with the meaning of the word "profits" in pages 98* to 101*. He says that the word has a "fundamental meaning" but, in mercantile phraseology, the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification". Then, he says, "the fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a *comparison of the assets of the business at the two dates*," and then the learned Lord Justice proceeds to show how the net assets must be valued in money and "how difficult in practice" it may be "to follow out the strict consequences of the legal conception".

The small hand-book relied on by the Advocate-General, namely, Snelling's Income-tax Practice (see page 15) also takes the same view. I do not intend to refer to the other authorities quoted on both sides. I am not prepared, with the greatest respect, to go as far as Fletcher-Moulton, L. J., and to hold that the income derived from profits (whether the derivation is by way of accruing, arising or being received) should be calculated on the basis of the usual annual "profit and loss" account (subject, of course, to the special provisions of the Income Tax Acts which usually impose limitations on the deductions allowable for repairs of business premises and damage or destruction of building, machinery and plant, depreciation, and so on) and that such income is liable to tax as "received" in the commercial sense. If the opinion of Fletcher-Moulton, L. J., is to be followed, a business might have made no "profits" at all in the popular sense in a particular year (or might have even incurred loss), but because the commercial value of some items on the "assets" side, say, consisting of the business premises and the plant, had risen in price, income-tax might become leviable on "profits" shown on paper in the "Profit and Loss" account. I do not think, having

*Pages of (1911) 1 Ch. D.—*Ed.*

regard to the rule that fiscal Statutes should be construed strictly in favour of the subject, that the Legislature should be held to have intended to levy income-tax even in such a case in the absence of unequivocal language to that effect.

However, even having regard to this canon of strict construction, I am of opinion that profits which were received in a year include not only money actully received but money which (in the language of Lord Fitzgerald) had accrued or arisen, in the sense that it was so completely under the assessee's control, "that by an act of his will he could have it actually transferred to his bankers." (The words "accrue" and "arise" are no doubt usually confined to moneys which are due but not received, and hence are used as alternatives to "received" in section (3). See also *Secretary to the Commissioner, Salt, Abkri and Separate Revenue, Madras* v. *Ramanathan Chetty* (11). While moneys accrued which cannot be immediately, in a business sense, received at the will and pleasure of the assessee ought not to be said to have accrued in such a manner as to have the same legal effect as moneys received, I think that an assessee should not be allowed to evade payment of income tax on interest and other moneys which have become due to him in such a manner that he could at pleasure receive them for reinvestment or otherwise or could get into his hands at once or within the reasonable time usually necessary to cash a cheque on a banker or which he knows will be treated according to the usual course of business by his banker-debtor as reinvested by him (the assessee). Whether any such profits in the shape of interest or other moneys had become due to the assessee in this immediately available manner and whether his omission to show them in his accounts as profits was consequently attributable to his intention to commit a fraud upon the intome-tax revenue, are questions of fact which must be decided in each case on the facts of that case and on the custom and practice of the assessee's and his debtor's business arrangements. The argument of Mr. K. V. Krishnaswami Aiyar that only those interest moneys which have become entered as cash receipts in the assessee's accounts or which have actually been placed in his hands, can be considered in arriving at his income for purposes of taxation goes, in my opinion, to the other extreme. If an assessee chooses to leave his interest income with his customer who is also a banker and does not bring it into his accounts as income on the date it falls due but he knows that his banker-customer would credit the money in his accounts in favour of the assessee and allow him interest thereon from the date of its accrual or if the assessee could at any time draw upon the customer for that money and obtain actual receipt of that sum in due course of business, I think that such interest-income has accrued and arisen of that year in such a manner that the legal effect is the same as if it had been "received" by him and that it is liable to be charged income tax thereon. It is well-known that deposits of moneys carrying interest are made with a Nattukottai Chetty firm not only by other Nattukottai Chetty firms but by gentlemen earning rich incomes in other professions. Take a case, where Rs. 10,000 a year is the year's interest-income from such an investment with *A.*, a Nattukottai Chetty firm, by *B.*, another Nattukottai Chetty firm, or a rich professional gentleman who has retired from his profession. *A.* at the end of that year adds Rs. 10,000, to the credit of *B.* in his accounts but *B.* makes no entry in his accounts of the receipt of that money, *B.* has some lands which yield him sufficient for the maintenance of his family and allows the interest to accumulate with the *A.* Chetty, drawing only Rs. 500 or Rs. 1,000 out of the interest annually either for expenses or in order that no question of limitation might arise (assuming that there is any risk of that question arising in such cases.) Is *B.* to escape taxation on the Rs. 10,000 income, though that income is being credited in his favour and he knows that he *could* receive it in cash at any time he wishes?

My answer to the question, therefore, is that the interest which became due to a firm of Nattukottai Chetties in British India which was not realized in cash or by adjustment of accounts would be such income as would be liable to be taxed under the Income Tax Act VII of 1918 if such interest-money had become due to the assessee in the manner and in the sense that it was so completely

(11) 53 Ind. Cas. 976; 43 M. 75; (1919) M. W. N. 826; 10 L. W. 670; 37 M. L. J. 663; 26 M. L. T. 447.

under his control that, by an act of his will, he could receive it in cash without greater trouble than is involved in drawing money from his bankers. If it has not become due in that sense, it is not such an income as would be liable to payment of tax.

Of course, I agree with my Lord that it is advisable that the Legislature should periodically try to remove anomalies and difficulties of interpretation by amendments of the Act expressed in clear and definite language.

NAPIER, J.—This is a reference under section 51 of the Income Tax Act VII of 1918 which empowers the Chief Revenue Authority if, in the course of any assessment, a question has arisen with reference to the interpretation of any of the provisions of this Act or any rule thereunder, to draw up a statement of the case and refer it, with its own opinion thereon, to the High Court. The question referred to us is as to the liability to tax under the Act of interest which became due on the year of account, but which was not realised in cash or by adjustment in the accounts. The statement further sets out that Messrs. A A. R. Arunachella Chetty and Brothers, a Nattukottai Chetty firm, carry on business in money-lending and other trade in several places in British India; that they were assessed for the year 1918-19 by the Collector of Ramnad on the amount of their net income in British India which, according to the assessing authority, should include interest which had accrued to them during the year of account, but had not actually been realised.

The relevant sections of the Act, for the purpose of this reference, are as follows:—section 3 (1) provides that "this Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India," etc. Section 5 is the next section: "The following classes of income shall be chargeable to income tax in the manner hereinafter appearing:" subsection (4) "Income derived from business," The next section in section 9: "The tax shall be payable by an assessee under the head of, 'Income derived from business' in respect of the profits of any business carried on by him." Clause (2) "such profits shall be computed after making the following allowances in respect of sums paid or, in the case of depreciation, debited, namely," and the payments and debits allowed are set out in nine sub-paragraphs. Then comes section 14: "The aggregate amount of an assessee's income chargeable under each (of the heads mentioned in sections 6 to 11 shall be the taxable income of the assessee." Reading these sections together, it is, to my mind, clear that the form in which the reference is made is incorrect. It seems to me that we are not really asked any question about income as defined in the Act. What the reference requires is, a ruling from us as to whether a certain sum should have been entered in the account on which the profits, within the meaning of section 9, should be computed. This mistake has led to a misapprehension of a decision of the English Court which I shall refer to later. Nor have we to consider any question arising under section 3, for, we are not asked to say whether the income derived from business has accrued or arisen or been received within the meaning of section 3. It is, therefore, to my mind, not strictly necessary for us to consider the meaning of the word (income), *as used in the Act*, for income for the purpose of section 3, is income derived from business as defined under section 9, to be ascertained under that section.

The question is, how are the profits of the business carried on by the firm in question to be computed so as to make the resultant income derived from business chargeable under the Act? It is first necessary to see what assistance we get from section 9 itself; and it is to be noted that no part of the section lays down what is to be put on the credit side. The whole of clauses 1 to 9 are concerned with amounts on the debit side. Of those clauses, clauses 1 to 5 are payments which are allowed; clause 6 is depreciation which may be debited; clause 7 is a resultant of depreciation and sale price of buildings, machinery and plant; clause 8 is land revenue and local or municipal taxes paid; and clause 9 is, what may be described as, an omnibus clause for other expenditure incurred solely for the purpose of earning such profits which is in fact the main expenditure. For the credit side, as I have said, there are no statutory instructions, and it is with reference to the credit side item that we are asked to advise the Board. So far for the Act.

Then, as to the rules made under the Act, section 43 gives power to the Governor.

General-in-Council, and by delegation to the Local Government, to make rules for the ascertainment and determination of any class of income. I have examined them and find that there is no assistance to be procured from the rules.

Further, there are no decisions of any Courts in India to which our attention has been drawn which could throw any light on this subject, and we are driven to English decisions under the English Income Tax Acts. These Acts are in *pari materia*, but as their provisions are somewhat different, it is necessary, before examining the decisions, to see what the Acts provide. The Acts are the Income Tax Act of 1842, as amended by the Income Tax Act of 1853. The relevant sections of these Acts are section 2 and Schedule D of (16 and 17 Vict., c. 35) which has been substituted for the corresponding section and Schedule (5 and 6 Vict., c. 35). One curious feature of the Acts is that though they are called Income Tax Acts, the phrase "Income-tax" is never used in any part of the Act, nor is the word "income" applied to the resultant to be charged though in the Customs and Inland Revenue Act, 1888, the tax payable under Schedule D is called income-tax. What is granted to Her Majesty under these Acts are "duties on profits arising from property, professions, trades and offices. Section 2 of the later Act provides that, "for the purpose of classifying and distinguishing the several properties, profits and gains for and in respect of which the said duties are by this Act granted, and for purposes of the provisions for assessing, raising, levying and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits and gains respectively described or comprissed in the several Schedules contained in the Act"; and the Schedules are set forth. Schedule D is the relevant Schedule. It applies to trade and professional profits, which correspond to clauses 4 and 5 of section 5 of the Indian Act, namely, income derived from business and professional earnings. The language of Schedule D is as follows: For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment or vocation, etc." What is chargeable here, therefore, is "annual profits or gains" just as under section 9 of the Indian Act, "profits of any business." The further provisions of the Income Tax Act of 1853, with respect to Schedule D, are sections 48, 49 and 50, of which section 50 is alone of importance. This section provides that "In ascertaining, estimating, or assessing the profits of any person chargeable under Schedule (D) of this Act, either upon appeal or otherwise, it shall be lawful to estimate the value of all doubtful debts due or owing to such person; and, in the case of bankruptcy or insolvency of the debtor, the amount of the dividend which may reasonably be expected to be received on any such debt shall be deemed to be the value thereof and the duty chargeable under the said Schedule shall be assessed and charged upon the estimated value of all such doubtful debts accordingly." I can find nothing in the Indian Act which at all corresponds to this section, but it is one to be borne in mind in considering what are "profits" under Schedule D of the English Act, for it seems to presume that debts due and owing shall be items in an account for the purpose of arriving at profits and gains and permits the assessee to value them in his account at a figure lower than the face value where they are doubtful debts. Returning to the principal Act, section 100 contains the rules for assessing and charging duties under Schedule D. Section 100 provides that, "the duties hereby granted, contained in the Schedule marked (D), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last mentioned duties" Under this section, the duties are provided for in respect of trade, in what is called 'First case,' and in respect of professions, in what is called 'Second case'. The first rule in the first case is as follows:—"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profit or gains of such trade on an average of three years." The third rule is: "In estimating the balance of profits and gains chargeable under Schedule (D), or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from or allowed to be set against

or deducted from, such profits or gains, on account of any sum expended for various purposes set out, nor on account of any capital withdrawn, nor on account or under pretence of any interest which might have been made on sums if laid out for interest, nor for any debts except bad debts nor for certain other matters set out in the rule." It is to be noted that the method of computing profits here is the exact opposite of that employed in the Indian Act. Section 9 of the latter, as already pointed out, provides what may be debited for the purpose of computing profits, whereas this rule under section 100 of the English Act provides what *may not* be debited. But the material for assessment after the proper deductions is the same in both cases. It is "the balance of profits" or gains in the English Act; "the profits of any business" in the Indian Act. And, as we are not asked to advise on any question of a debit item it is unnecessary to examine the differences between the English and the Indian Act on this point. Apart, too, from section 50, there is no instruction in the English Act as to what must be put on the credit side of the account.

Turning now to the cases, I will first deal with the decisions under the Income Tax Acts. The first relevant case is the *Mersey Docks* v. *Lucas* (12). This was a reference by the Commissioners, under powers analogous to those under which the reference in our case is made. The particular point under consideration need not be considered but in his judgment the Lord Chancellor, at page 903, states that the question arises under Schedule A of the Act, and enters into a discussion as to what are profits received from certain properties. He lays down that the manner in which those profits were to be disposed of under the Private Act was not a matter for consideration but that profits of the concern must be "all the net profits of the concern after deducting the necessary outgoings without which those proceeds could not be earned or received." Again, on the same page, he says that the word "profits" as here used, means the "incomings of the concern after deducting the expenses of earning and obtaining them." Again, at page 906, he uses the same phrase. Lord Blackburn, who concurred, states that the same result will arise from the construction of Schedule D. We have, therefore, here a definition of "profits" for income-tax purposes, "the net proceeds of the concern or the incomings of the concern after deducting the outgoings necessary for earning them or the expenses of earning and obtaining them." It is obvious that this definition of 'profits' will apply, whatever be the method under which the proper debts are to be ascertained.

The next case I wish to refer to is *Colquhoun* v. *Brooks* (1) and I do so not because I think it has any bearing on the question of profits but because it has been referred to by the Boad of Revenue, and, in my opinion, a wrong inference drawn from the language used in it. The Board of Revenue, in their reference, say: "The question to be decided is, whether the interest in question accrued or arose in British India," and go on, "the words 'accrued or arose' have nowhere been defined in the Act but in the judgment of Fry, L. J., reported in *Colquhoun* v. *Brooks* (1) these words were interpreted as general words descriptive of a right to receive." It is true that the decision in this case, which eventually went to the House of Lords, did turn on the question as to whether a certain income "accrued or arose in the United Kingdom." But that is not the point in this case at all, as I have already said, and the view of Fry, L. J., on the construction of the words 'accrued or arose' has no bearing whatever on this question. The words which the Court was construing were words of Schedule D, "arising or accruing to any person", etc., and, with reference these words, Fry, L. J. said "the tax is in respect of 'profits' or 'gains' or 'arising,' or 'accruing'. I cannot read those words as meaning 'received by'. I think that the words 'arising or accruing' are general words descriptive of a right to receive profits." That is the sole question decided by Fry, L. J., and it is obvious that it has nothing to do with the question of profits. The case has really no bearing on the question before us.

The next case is *Russell* v. *Town and County*

(12) (1882) 8 A. C. 891; 53 L. J. Q. B. 4; 49 L T. 781; 32 W. R. 24; 48 J. P. 212.

Bank (13). That was a decision as to the propriety of a certain debit for rent of business premises which contained dwelling accommodation for the Bank agent. The only point of importance in this case is the definition of 'profits'. Lord Herschell, at page 424, says, "The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts". Lord Fitzgerald says: "Profits, I read on authority, to be the whole of the incomings of a concern after deducting the whole of the expenses of earning them that is, what is, gained by the trade". The learned Lord is here obviously referring to the language of Lord Selborne in *Mersey Docks* v. *Lucas* (12).

The next case is *Gresham Life Assurance Society* v. *Styles* (14). In that case the learned Lord Chancellor stated that, "the word 'profits' is to be understood in its natural and proper sense, in a sense which no commercial man would misunderstand, and that the framers of the Act could never have assumed that the cost of the articles sold to the trader should not be taken into account before you arrive at what was intended to be the taxable profits". Lord Herschell said that the words 'profits and gains' should be construed according to their ordinary significance and says, in another passage, "the only thing to be regarded is the fact of expenditure and the purpose for which it had been incurred".

Another case referred to in argument was the *Gresham Life Assurance Society* v. *Bishop* (15). This turned on the construction of the words, "Received in the United Kingdom" within the meaning of the Income Tax Act of 1842, Schedule D. (4th case) which allows duty to be charged in respect of interest arising from foreign securities on the full amount of the sums which have been or will be received in Great Britain. It is not a decision on profits, but it is of value on the meaning to be given to the word 'receipts' and I will deal with it later.

So far, therefore, we have nothing but receipts or incomings to be put on the credit side. So far, then, for the Income-tax cases. The decisions appear to me to be all based on the assumption that an assessee should prepare a statement of receipts or incomings setting against them the outgoings necessary for earning receipts including also depreciation to the extent permitted by the Act and that this account should be annually prepared and be the basis on which the taxable income should be ascertained.

It was suggested, however, by the learned Advocate-General that such an account was not the proper method of ascertaining the profits and he has very strongly relied on the judgment of Fletcher-Moulton, L. J., in *Spanish Prospecting Co., In re* (2). In this case two persons agreed to serve the Company at a fixed salary which they were not to be entitled to draw except out of the profits. The question was, what were the profits. It arose in liquidation and the dispute was with regard to certain debentures which had been included in the yearly balance sheets of the Company as unvalued assets. In liquidation, the debentures realised a sum of over three thousand pounds and the claimants contended that these were undrawn profits arising from the business of the Company out of which they were entitled to be paid. In the course of his judgment, the learned Lord Justice discussed the meaning of word 'profits,' and says that, "the word 'profits' implies a comparison between the state of a business at two specified dates usually separated by an interval of a year." The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates and the increase of the assets at the later date represents in strictness the profits of the business during the year in question. "To render the ascertainment of profits of a business of practical use, it is evident that the assets, of whatever nature they may be, must be represented by their money value. But, as a rule, those assets exist in the shape of things or rights and not in the shape of money. The debts owed to the Company may be good, bad, or doubtful, and

(13) (1888) 13 A. C. 418; 58 L. J. P. C. 8; 59 L. T. 481; 53 J. P. 244.
(14) (1892) A. C. 309 at p. 315; 62 L. J. Q. B. 41; 67 L. T. 479; 41 W. R. 270; 56 J. P. 709.
(15) (1902) A. C. 287; 71 L. J. K. B. 618; 66 J. P. 755; 50 W. R. 593; 86 L. T. 693; 18 T. L. R. 626.

profits may exist in kind as well as in cash." The learned Advocate General now relies on these statements as indicating that the debts good, bad or doubtful, must be shown on the credit side of an account. Now, the first observation, I would make about this case is, that the learned Lord Justice states, on page 101, that "the actual profit and loss of accounts of the Company do not in any way bind the Crown in arriving at the tax to be paid" and, therefore, clearly he was not considering the profits as meant in an income-tax sense. This method of computing profits is, in the language of the learned Lord Justice, totally unsuited for computation for income-tax purposes. The balance-sheet must, of course, contain a valuation of the whole of the property of the undertaking including, as stated by the learned Lord Justice, debts owing to the Company good, bad or doubtful. It must also include debts accruing due, and on the debit side must be placed debts considered bad or doubtful. One may venture to doubt whether many of the trading companies do in fact prepare their statements of profits for the year in the manner suggested by the learned Lord Justice. It is admittedly not the method contemplated by the Companies Acts. Article 106 of the Standing Articles of Association provided in table A of the First Schedule of the Companies Consolidation Act (1908) provides that, "once at least in every year the Directors shall lay before the Company in general meeting a profit and loss account for the period since the preceding account" and it is common knowledge that this account is an account of the actual transactions of the Company during the preceding year. Article 7 provides that, "no dividend shall be paid otherwise than out of profits;" and the learned author of Buckley's Law and Practice under the Companies Acts states the law to be as follows:—'The profits of a business' "are the excess of revenue receipts over expenses properly chargeable to revenue account."... "For the purpose of ascertaining profit available for the dividend, capital account and revenue account are to be treated as separate accounts. The credit balance of a revenue account is applicable for dividend." This language very nearly reproduces the words used by the learned Lords in the Income-Tax cases above referred to, and the learned Author relies strongly on the case of *Lee* v. *Neuchatel Asphalte Co* (16) That was a decision of the Court of Appeal, and the Court held there that there was nothing in the Companies Acts to prohibit a Company from calculating its profits and paying a dividend out of them without providing a sinking fund to meet depreciation in the value of wasting property, such as a mine. Lindley, L. J., draws a clear distinction between a capital account and a revenue account, and, speaking of the latter, says: "If your earnings are less than your current expenses, you must not cook your accounts so as to make it appear that you are earning a profit, and you must not lay your hands on your capital to pay dividend. But it is, I think, a misapprehension to say that, dividing the surplus after payment of expenses of the produce of your wasting property is a return of capital in any such sense as is forbidden by the Act." It is clear, therefore, that both Lindley, L. J, and the very eminent editor of Buckley's Law and Practice under the Companies Act, regard a revenue account as the proper basis for the ascertainment of profits under the Companies Acts.

The same view was expressed in the case of *Badham* v. *Williams* (9) by Kekwich, J. There the question arose on a partnership and the learned Judge points out the difference between the balance-sheet and the profit and loss account with regard to money accruing due but not actually received. He takes the case of six months' bills in payment for goods not maturing until the year after that for which the account was being made up and asks: "Are such bills to be considered so much cash for the purpose of the business of the year?" and answers: "For the purposes of the balance sheet, no doubt, they would estimate that there is an outstanding asset which they hope to realise; but for the purpose of ascertaining the profit and loss it seems to me that they must consider only what they have received, because those

(16) (1889) 41 Ch. D. 1; 58 L. J. Ch. 409; 61 L. T. 41; 37 W. R. 321; 1 Meg. 140.

bills will only come in when met at maturity" in the next year. It is to be noted that in this case the learned Judge refers specifically to the profit and loss for the purposes of Income-Tax returns and says that "the Income-Tax return is a return of the actual receipts less such expenditure as is chargeable against those receipts." It seems to me that "profit" in a commercial sense differs very little from the meaning given to it in the Income-Tax cases quoted above, though there may be debits which are not permissible under the provisions of Income Tax Acts. I can see no practical difference between "the receipts or incomings after deducting the necessary outgoings without which profits could not be earned or received or after deducting the expenses of earning and obtaining them" and "the excess of revenue receipts over expenses properly chargeable to revenue account", as stated by the learned author, to be the profits of a business under the Companies Acts.

The net result of all these cases is that, on the credit side must be put receipts or incomings, and it only remains to consider what these words cover.

That actual cash need not be received is, of course, obvious. The receipt of any form of negotiable security would, of course, be receipt but the more difficult question is whether any, and if so, what form of constructive receipt is a receipt for the purposes of the Act? In *Gresham Life Assurance Society* v. *Bishop* (15) this very question was dealt with by Lord Lindley. He states as follows, at page 296, "First, let us consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, *e. g.*, by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the Statute which your Lordships have to interpret" (*i. e.*, Income Tax Act). Then, referring to the Scottish case of *New Mexico Co.* (17), the same learned Lord states, on page 298, that "that case was very peculiar. Money received by the Company's agents abroad was clearly and unmistakably treated by the Company as remitted to and received by it here, and money here was treated by the Company as remitted abroad in exchange for it. The exchange was effected by a book entry; but that entry was the business mode of carrying out cross-remittances which it would have been unbusinesslike and really childish to have effected in any other way." Applying this last observation, apart from the complication introduced by the word 'abroad', it seems to me to come to this, that, as between two parties, where money has to be paid and received by both, an exchange effected by a book entry would amount to payment and receipt. In *Larocque* v. *Beauchemin* (18) their Lordships had to construe the words, "paid in cash", and in the judgment of the Board their Lordships relied on and applied the decision in *Spargo's case, Harmony and Montague Tin and Copper Mining Company, In re* (19). That was a decision in liquidation of the *Spargo's case Harmony and Montague Tin and Copper Mining Company, In re* (19) and turned on the meaning of the phrase "payment in cash" within section 25 of the Companies Act, 1867. Spargo subscribed for 31 shares in the Company and, instead of paying in full in cash, was credited in the books of the Company with a sum of £ 2,176 for the purchase of the lease of the mine in respect of the amount of £ 2,176, part of the amount due by him for his purchase of shares. James, L. J., laid down as follows: "Anything which amounted to what would be in law sufficient evidence to support a plea of payment, would be a payment in cash within the meaning of this provision": and Mellish, L. J., reiterated what he had stated in *Pen Allt Silver Lead Mining Co., In re Fothergill's case* (20): "If the circumstances relied on would in an

(17) 14 R. 98.
(18) (1897) A. C. 358; 66 L. J. P. C. 59; 76 L. T. 473; 45 W. R. 689; 4 Manson 263.
(19) (1873) 8 Ch. 407; 42 L. J. Ch. 483; 28 L. T. 153; 21 W. R. 306.
(20) (1873) 8 Ch. 270; 42 L. J. Ch. 481; 27 L. T. 124; 21 W. R. 301.

action for the money due upon shares be evidence only in support of a plea of accord and satisfaction, this section would prevent their being a good defence; but that if they would support a plea of payment, then the 25th section did not prevent their being a good defence". He then continues, "nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account and those accounts are settled by both parties, it is exactly the same thing as if the sum due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by *A.* to *B.* and then handing it back again by *B.* to *A.*, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards." This form of constructive receipt is, therefore, clearly permissible. So, if a person entitled to receive money agrees with his debtor to let the money stand in the hands of the debtor, either by way of deposit or as a fresh loan of investment, that would, in my opinion, amount to receipt. No transaction of this character is indicated in the case submitted to us and I am, therefore, of opinion that the amount in question need not be taken into account by the assessee for the purposes of his statement of profits and gains and is not, therefore, chargeable under the Act.

KRISHNAN, J.—The question referred to us for our decision by the Revenue Board, under section 51 of the Income Tax Act VII of 1918, is, whether a person carrying on a money-lending business is liable to be assessed to income-tax on interest which has accrued due to him in the year of account but which has not been realised by him by payment or adjustment in the accounts or otherwise. In other words the question is, whether such interest becomes liable to taxation on accrual as the learned Advocate-General contends for the Government or only on its realization as the learned Vakil for the assessee contends.

The decision turns upon the construction to be placed on the relevant sections of the Act. The first section on which the learned Advocate-General insisted on is section 3, clause (1), and it is an important provision to consider, as it defines the scope and applicability of the Act. That clause says: "Save as hereinafter provided, this Act shall apply to all *income* from whatever source it is derived if it accrues or arises or is received in British India or is, under the provisions of this Act deemed to accrue or arise or to be received in British India" This clause defines the scope of the Act, and unless a sum of money can be brought within the words of the clause, I think it cannot be taken into consideration for purposes of taxation under the Act. A lengthy argument was addressed to us by the learned Advcoate General about the meaning of this clause but to my mind its meaning is perfectly plain. It makes the Act applicable to all incomes which would fall under one or the other of the heads mentioned in the latter part of the clause. Not only incomes which accrue and are received in British India, which form the bulk of taxable incomes, but also incomes which accrue in British India but are received outside British India and incomes which though accrued outside are received here are all brought by it within the purview of the Act and become taxable under the taxing sections. Sections 31 and 33 are examples of the former class of incomes. The Advocate-General tried to persuade us to read the clause as implying that an income becomes liable to taxation as soon as it has accrued in British India, and contends that it is not necessary that it should be received by the assessee at all to create the liability, I think his argument is untenable as it entirely ignores the governing word in the clause "income". Till a sum of money can be said to have become an "income" it is clear to me that the Act will not apply to it.

I fully agree that the words "accrues or arises" do not imply a receipt at all but only a right to receive, as pointed out by Fry, L. J., in *Colquhoun* v. *Brooks* (1). The two words seem to denote the same idea but one is, perhaps, more appropriate than the other in particular cases. Their meaning is, as observed by the Full Bench in *Secretary to the Commissioner, Salt, Abkari and Separa Revenue, Madras* v. *Ramanathan*

Chetty (11) "to become a present or enforceable right to demand". In fact, the words are used in contradistinction to the words "is received" in the clause itself. Though this is so, it is clear from the section that, before the Act can apply, what has so accrued or arisen must have become an income. The section cannot be read as applying the Act to a sum of money which has become payable to a person but which has not become his "income" yet. That the Act applies only to "incomes" is made further clear by the heading of the Chapter, which says "Taxable income" and by section 5, which says "the following classes of *income* shall be chargeable to income-tax" and also by the taxing section, section 14, which also speaks of taxable income

The question then is, what really is the meaning of the term "income" as used in the Act, and whether it involves the idea of receipt in some form or other or not. The word is not defined in the present Act, though the expressions "agricultural income" and "total income" are defined in section 2. Those definitions, however, throw no light on the exact connotation of the term "income". In the absence of a statutory definition, we must take its ordinary meaning in the English language as its proper legal meaning as well for construing the Act. The learned Chief Justice has adopted the meaning given to it in the concise Oxford Dictionary, *viz.*, "periodical (usually annual) receipts from one's business, lands, work, investments, etc." I think that definition is correct and I adopt it. That this is also its legal acceptation is clear from Stroud's Judicial Dictionary. I think the word clearly implies the idea of receipt, actual or constructive. We cannot speak of a sum of money which is expected to be paid as an income; however well founded the expectation may be, it is still only an expectation. There is nothing in section 3, or anywhere else in the Act, inconsistent with this meaning of the term. In the case of incomes taxable at the source under the Act, the taxation is made simultaneously with the payment of receipt of the amount due by the payee when it becomes his income; the case is thus not against the view I am taking of the meaning of "income". What exactly would amount to a receipt to make a sum due to a person his income, is a different question and I shall deal with it later. The present case, however, refers to a particular kind of income from a money-lending business; section 5, clause (4), which makes income derived from business chargeable to income-tax and section 9, clause (1), which says that "the tax shall be payable by an assessee under the head of 'income derived from business' in respect of profits of any business carried on by him" apply to it. The Advocate-General argued that, whatever implication there might be in the term income, the term "profits" as used in section 9 included earned or estimated, but unrealised, profits as well and, in the case of a money-lending business, it included interest accrued due but unrealised; and he relied strongly on the case of *Colquhoun* v. *Brooks* (3), and the case in *Spanish Prospecting Co. In re* (2), in support of his argument.

Before considering the cases cited I may observe that as, by section 3, the Act is made applicable only to incomes and as that term implies, as I think, a realisation of the sum due, it is difficult to hold that by the use of the expression "profits" in section 9 the Legislature has extended the scope of the Act to unrealised sums as well in the case of business ventures, which would be the result of accepting the Advocate-General's argument. No doubt, the term "profits" is not a term of very precise and definite significance. It is used in different meanings in different connections. The profits of a business are ascertained in various ways for various purposes. But, as the learned Chief Justice has shown in his judgment, the word has always been understood in England for income-tax purposes to mean the difference between the receipts of a business and the expenditure incurred in earning them. I need not refer to the authorities as he has done so. This meaning is consistent with our Act and will avoid the difficulty I have pointed out at the beginning of this paragraph and I think it should be accepted by us. The ordinary meaning of the term as used for commercial purposes in ascertaining profits as on a revenue account is also much the same, the difference in ascertainment of profits for income-tax

and commercial purposes being only in the ascertainment of the net profits, and not the total profits. The deductions allowable for income tax purposees to arrive at net taxable profits are only those allowed by the Act and are not the same as would ordinarily be allowed in a commercial account; but the credit side is the same in both.

The term "profits," as used in section 9, does not, in my opinion, properly apply to unrealised amounts at all. The fact that some firms include estimated profits in their balance-sheets for payment of dividends to share-holders is of no importance in this connection; when they so deal with unrealised profits they are really substituting for such a purpose the capital in their hands for profits hoping to recoup it from profits when they are realised. Such practice cannot affect the proper meaning of the term "profits," particularly in connection with income-tax purposes.

Our attention has not been drawn to any provision of the Act to show that the term "profit" as used in it is intended to include earned but unrealised profits. The deductions allowed to be made under section 9 from profits lend no support to the Advocate-General's contention. On the other hand, the *D.* form prescribed under the Act for returns to be submitted by assessees refers to "income *received* from business" and the use of the word 'received' supports the view I am taking.

I shall now turn to the case of *Colquhoun* v. *Brooks* (1) cited by the Advocate-General. Admittedly, the decision in the case has no bearing on the present case, but certain observations of Lord Fitzgerald are relied on which are no doubt not dissented from by the other learned Lords. The facts of the case are set out by Napier, J., and the relevant passages by Sadasiva Aiyar, J., and I need not repeat them. Lord Fitzgerald was dealing with the income of Mr. Brooks and not with that of his firm. Though the firm had not apparently realized the profits, it would appear from the judgment that it had taken such profits into consideration in ascertaining the profits due to each partner and, so far as Mr. Brooks was concerned, his share of the profits had been actually ascertained and fixed at £ 9,219, and that amount was apparently entered in the books of the firm to his credit so that, as his Lordship observes, "it was completely under his control that by an act of his will he could have it actually transferred to his bankers here (in England)." Apparently, his Lordship treated the money as received in Melbourne and was, at first sight, inclined to treat it as received in England also, as Mr. Brooks could have it transferred to England at his will and pleasure, but ultimately his Lordship held, with the other learned Lords, that the sum could not be treated as received in England. That I understand to be the effect of his judgment; I do not understand his Lordship to have laid down that a person was liable to pay income-tax on a sum not realised by him. His Lordship does not say so, and there is nothing in what His Lordship says that even implies it. The case, therefore, does not support the Advocate-General in any way.

Much reliance was also placed by the learned Advocate-General on the judgment of Moulton, L. J., in *Spanish Prospecting Co., In re* (2), and his observations on what constituted profits of a business. That facts of this case are set out by Napier, J., and I need not repeat them. The learned Lord Justice, it will be observed, was not dealing with an Income-Tax case at all nor even with a case of a Company which was a going concern, but with the case of a Company which was in liquidation. The ascertainment of profits of such a Company is clearly different from their ascertainment in the case of a going concern for revenue purposes, or for income tax purposes. In the former case one would no doubt take the total value of the property of the Company when wound-up, including the increased value of the stock in trade and other properties belonging to the Company and all the realisable outstandings, and deduct therefrom the capital invested to ascertain the total profits of the venture. As the Company had come to a stop the calculation of profits had to be made on the footing that all its assets and outstandings had been realised. Manifestly, such a method cannot apply in making

up a revenue account of a going concern to ascertain profits. In such an account the unearned increment resulting from a rise in prices in the market never forms a proper item at all ; it is never entered as an item by any auditor in a revenue account of a going concern though it may no doubt be a proper item in a capital account made up to ascertain the financial position of the business. When a Company is wound-up the account made up is really much the same as a capital account, as the whole of its assets are taken as realised. His Lordship's observations cannot, in my view, be applied at all to a going concern or to an Income-Tax case and do not thus apply to the present case.

I have referred to these two cases, as they are the cases which the learned Advocate General relied on most strongly. I do not propose to refer to the other cases cited and the analogous English law of Income Tax as they have all been referred to by the learned Chief Justice and I think it unnecessary for me to refer to them again.

In the course of the argument I put to the Advocate-General an extreme case to test his contention and to see how far he was prepared to go. It was this : *A.* invested a lakh of rupees in a money-lending business and lent out the whole amount in the first year at 12 per cent. interest. At the end of the year Rs. 12,000 accrued to him as interest but none of his debtors paid him anything. The next year he, unfortunately, lost the whole of the capital and his interest by his debtors becoming unable to pay. Is *A.* liable to pay income-tax to the Government on Rs. 12,000 or not ? The Advocate General had to contend and did contend that *A.* was liable to pay, even though he had not realised any profit at all from his venture but had actually lost the whole of his capital. It seems to me that very clear and definite language in a taxing Act is necessary to make us hold that a person is liable under such circumstances. The Income Tax Act being a fiscal enactment has to be construed strictly against the Crown and I can see no provision in our Act to make a person liable to pay tax on unrealised incomes or profits. On the other hand, all its provisions indicate to my mind that it is only realised income or profits that is taxable.

The question what would amount to receipt or realisation of an income for the purpose is not one that properly arises on this reference, for, in the case stated by the Board, it is expressly mentioned that the interest in the present case was neither received by the assessee nor realised by adjustment of accounts or otherwise. But, as my learned brothers have dealt with the point, I shall briefly state my opinion on it. Actual payment of cash by the payer to the payee is of course not necessary to constitute a receipt or realisation. Generally speaking, I think it may be said that, whenever the payer deals with a sum of money due to the payee in any manner according to the directions or instructions of the payee so as to obtain a valid discharge for himself and the payee obtains the benefit thereof, there would be a case of realisation by the payee. The payment by a firm of the share of the profits due to a partner into a Bank or to his credit in the firm's own books according to his instructions would amount, in my view, to a realisation by him and that, I think, was apparently the case of Mr. Brooks in *Colquhoun* v. *Brooks* (3) already referred to with reference to the money in Melbourne. Payment by a Bank of interest earned by a fixed deposit to a person's current account in the Bank itself would also amount to a receipt by him as held in *Matthews* v. *Cork County Council* (21). Again, in the case put by the Board, of a Nattukotta Chetty not drawing the interest that has accrued to him but leaving it with the payer to be added to the capital and to carry interest itself, would also be a case of realisation in the view I am taking. Reference may also be made to the judgment of Lindley, L. J., in *Gresham Life Assurance Society* v. *Bishop* (15) on the point. In each case when the question arises it will have to be decided on its facts whether there has been a receipt or not.

Although actual receipt of cash is not required to constitute a realisation of the income or profit in my view, I am clearly of opinion that a sum of money unrealised

(21) (1910) 2 Ir. R. 521; 11 Ir. L. R. 794.

in any manner by the assessee is not liable to be included in the amount for which he is taxable under the Income Tax Act, VII of 1918. The tax can be levied during the year when the income or profit is realised and the Crown, therefore, loses nothing in having to wait. I, therefore, agree that our answer to the reference must be in the negative.

THE COURT:—Respondents' costs will be paid by Government within three months from this date.

Pleader's fee will be Rs. 250.

M. C. P.

Answered in the negative.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 165 OF 1919.

April 22, 1920.

Present :—Mr. Kotval, A. J. C.

Musammat SUA—DEFENDANT—APPELLANT

versus

DUKALU—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Presumption as to jointness—Separation of some members—Burden of proof.

Although the ordinary presumption of Hindu Law is that a family is joint, yet that presumption is displaced by the presumption arising from the admitted separation of certain members of the family, and a person alleging jointness must prove it by other means. The mere fact that two brothers were living and messing separately would not necessarily indicate separation in estate, especially where it is shown that their cultivation was joint, and that they divided only so much of the produce as was necessary for household purposes, and kept the rest for purposes of *lena dena*. [p. 499, col. 2; p. 500, col. 1.]

Appeal against the decree of the District Judge, Raipur, dated the 6th January 1919, in Civil Appeal No. 32 of 1918.

Dr. *H. S. Gour*, for the Appellant.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—The plaintiff, Dukalu, sued the defendant, Suwa, the widow of his deceased brother Ghasia, for a three-anna four-pies share of a village and some tenancy land. The lower Appellate Court has decreed the village share. This appeal is by Suwa.

The question to be decided in this suit was whether the plaintiff was separate from or joint with Ghasia and Ghasia's deceased minor son, Puran. If he was, his suit is rightly decreed against Suwa, who claims to hold for her life Puran's property as his mother.

The lower Appellate Court's finding is in favour of the plaintiff. In this Court it is argued that the burden of proving jointness should have been laid on the plaintiff, since it is admitted that, during the lifetime of Dhansingh, the father of the plaintiff, and Ghasia, the latter's three step-brothers had separated from the family. The position with regard to the burden of proof stands thus: plaintiff, as the party claiming possession, has to prove his right. He has, therefore, to establish that he and Ghasia were joint in estate. For this purpose he can rely, in the first instance, on the ordinary presumption of Hindu Law as to jointness: but this presumption is cancelled by the presumption arising under the ruling in *Balabux* v. *Rukhmabai* (1) from the admitted separation of the three step brothers. Plaintiff, therefore, has still to prove the jointness. He has produced evidence which the lower Appellate Court has considered in its two paragraphs numbered three and has held that the jointness has been proved. The burden of proof appears to have been correctly laid. The lower Appellate Court's finding, however, is attacked by the learned Counsel for the appellant. He urges that Exhibits P-17 and P-18 on which the lower Appellate Court has relied do not help the plaintiff, but if anything go against his contention of jointness. These Exhibits contain the statements of Suwa herself. The lower Appellate Court has relied upon the admission therein of joint cultivation by Ghasia and Dukalu, but, it is pointed out, that Suwa in the same statement also speaks of the employment of *saunjhias* by herself and Dukalu for the cultivation and of a division of the produce between Dukalu and Ghasia or herself. It is argued that the inference to be drawn from these statements is that the joint cultivation was a joint cultivation of partners rather than of members of a joint family. It is in evidence (See D. W.

(1) 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.).

No. 5) that Dukalu and Ghasia divided only so much of the produce as was necessary for house hold purposes and kept the rest joint for the purposes of *len den*. The brothers were living and messing separately and this division was, therefore, natural and does not necessarily indicate separation in estate. As to the employment of separate *soun hias* it is clear that this was after Ghasia's death when disputes had arisen between the plaintiff and the defendant.

It seems to me that each piece of documentary evidence referred to by the lower Appellate Court is of itself insufficient to establish jointness, but, taken together as a whole, the documentary and oral evidence afford a sufficient basis for the lower Appellate Court's finding that Dukalu and Ghasia were joint in estate till Ghasia's death in 1915. The circumstances relied on by the appellant as indicating a partition or separate residence, separate dealings and separation of interests are said to be evidenced by Exhibit P-13. The former two circumstances have been considered and weighed by the lower Appellate Court in paragraph 3 (2). Great stress is laid upon Exhibit P 13 which is a report and order in mutation proceedings in 1896. It is said that the arrangement referred to therein indicates a partition or recasting of the shares of each of the five sons of Dhansingh: but it seems to me that the arrangement referred to is not one between all the five brothers individually but between the two sets of Dhansingh's sons. The share of each of the five brothers out of the eight-annas of Dhansingh as originally recorded was one-anna seven pies, except Ghasia's which was one-anna eight pies, so that Ghasia and Dukalu had between them three-annas three pies and the other three brothers had four-annas nine-pies. This re-arrangement referred to in Exhibit P-13 apparently equalised the shares of the two sets, Ghasia and Dukalu getting four-annas and the other three brothers four-annas. Exhibit P-13, in my opinion, does not necessarily prove any division of interest between Dukalu and Ghasia. On the whole, I consider that the lower Appellate Court's finding as to Dukalu and Ghasia being joint till the death of Ghasia in 1915 is not open to any legal objection.

The next point urged is the one dealt with by the lower Appellate Court in paragraph 6 of its judgment. It is contended that as Suwa had, during Puran's lifetime, demanded the separation of Puran's share, the latter became divided from Dukalu according to the ruling in *Girja Bai* v. *Sadashiv* (2). The lower Appellate Court's finding on this point is this:—"In the first place, we have only the corroborated testimony of D. W No. 4 that Suwa had, during Puran's lifetime, asked for the separation of his share. But even if she did so, this would not have the effect suggested. Puran was a minor and a suit cannot be brought by or on behalf of a minor to enforce partition unless on the ground of malversation or some other circumstances which made it for his interest that his share should be set aside and secured for him. It was open to Suwa to bring a suit for partition as next friend of Puran, but, unless she satisfied the Court that a severance of Puran's share was in his interest, no disruption of the co-parcenary would take place. Mere declaration of Suwa of a desire to enjoy Puran's share separately would not effect a severance."

It seems to me unnecessary in the present case to go into the legal question as to the effect of a demand by the guardian of a minor of a separation of the minor's share (although I am inclined to hold that the conclusion of the lower Appellate Court on the point is correct), for it is not held by that Court that the demand is proved. The learned Counsel for the appellant has been unable to point out any other evidence of the demand than that of D. W. No. 4 on whose uncorroborated testimony the lower Appellate Court has apparently declined to rely. No doubt, the lower Appellate Court has not in so many words said that the demand is not proved, but this I take to be its finding. In any case, proceeding under section 103 of the Civil Procedure Code, and having given the parties an opportunity of putting their case on the point of the demand before me, I find that the demand is not proved. No other point is pressed. The appeal fails and is dismissed with costs.

Appeal dismissed.

(2) 37 Ind. Cas. 321; 12 N. L. R. 113; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; (1916) 2 M. W. N. 66; 18 Bom. L. R 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031; 43 I. A. 151 (P. C.).

MADRAS HIGH COURT.

CIVIL APPEAL No. 305 OF 1918.

March 9, 1920.

Present :—Sir Abdur Rahim, KT., Officiating Chief Justice, and Mr. Justice Moore.

V. E. N. K. R. M. A. VENKATACHELLAM CHETTY AND ANOTHER—PLAINTIFFS NOS. 2 AND 4—APPELLANTS

versus

V. E. N. K. R M. A. RAMANATHAN CHETTY AND OTHERS—DEFENDANTS NOS. 1, 3, 5, 6 AND 7 AND DEFENDANTS NOS. 2 TO 8—RESPONDENTS.

Partnership—Suit against partnership by third party—Submission to arbitration by partner sued—Award—Liability of other partners—Payment under award—Contribution, whether can be claimed—Nattukottai Chetties, *transaction between—Interest, rate of.*

Where one of several partners submits a dispute which is the subject of a suit to arbitration, the award passed on such submission will not bind the other partners at the instance of a third party. [p. 502, col. 1.]

Stead v. *Salt*, (1825) 3 Bing. 101; 130 E. R. 452; 10 Moore 389; 3 L. J. (o s.) C. P. 175; 28 R. R. 602, *Ram Bharose* v. *Kallu Mal*, 22 A. 135; A. W. N. (1900) 12; 9 Ind. Dec. (N. s.) 1120 and *Datoobhoy* v. *Vallu*, 1 Bom. L. R. 828, followed.

Where, however, a partner in good faith submits the claim of a third party against the firm to arbitration and that partner has to make payments in accordance with the award passed on the submission in good faith then, in the absence of anything to show that the award is vitiated by illegality, he is entitled to claim contribution from his partners on the basis of that award. [p. 502, col 2.]

Dwarka Nath Sarkar v. *Haji Mahomed Akbar*, 24 Ind. Cas. 307; 27 M. L. J. 192; 18 C. W. N. 1025; 1 L. W. 697; (1914) M. W. N. 876; 16 M. L. T. 521; 21 C. L. J. 1; 17 Bom. L. R. 5 (P. C.), explained.

Appeal against the decree, dated 17th September 1917 of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 151 of 1912.

FACTS appear from the judgment.

Mr. *K. V. Krishnaswami Aiyar*, for the Appellants.—The lower Court should have decreed the claim for contribution. A partner has the power to bind his co partner by a *bona fide* submission to arbitration. The award passed on such submission is equally binding on the non referring partner. At any rate, where money has been *bona fide* paid on the basis of the award, the payer cannot be deprived of his right to contribution. Whatever may be the right of a third party, creditor of the firm, to enforce the award as against the partners who did not submit to arbitration, at any rate, as between the partners *inter se*, the acts of a partner honestly done in furtherance of the interests of the partnership bind the other partner. The right follows from the general incidents of the partnership relationship.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.—One partner alone cannot submit to arbitration so as to bind his co-partners at the instance of third parties. See *Stead* v. *Salt* (1), *Datoobhoy* v. *Vallu* (2), *Ram Bharose* v. *Kallu Mal* (3).

JUDGMENT.—The plaintiffs and defendants are Nattukottai Chetties carrying on business in Akyab. They had a separate money-lending business of their own. It appears that they entered into a partnership with respect to a business in paddy as commission agents. They used to buy paddy for customers on commission and send it to their customers in India. The business, however, was conducted by the plaintiffs and defendants separately with their own customers and independently of each other. It was carried on in the separate names of the plaintiffs and the defendants and, so far as we can gather, they were to conduct the business entirely in their own way, but whatever was the profit or loss in the business as conducted by either party, that was to be shared by the other party equally. There was, at first, a suit for dissolution of this partnership but it was dismissed on the ground of limitation. The present suit is instituted by the plaintiffs for contribution, with respect to certain sums paid by them in connection with the joint business in paddy and in the appeal the learned Pleader for the appellants-plaintiffs has contested the finding of the Subordinate Judge with respect to three items.

The first refers to the amount recovered in Original Suit No. 80 of 1910 by the

(1) (1825) 3 Bing. 101; 130 E. R. 452; 10 Moore 389; 3 L. J. (o. s.) C. P. 175; 28 R. R. 602.
(2) 1 Bom. L. R. 828.
(3) 22 A. 135; A. W. N. (1900) 12; 9 Ind. Dec. (N. s.) 1120.

plaintiff in the suit against the present plaintiffs Nos. 1 and 2. In that suit the present defendants (respondents in the appeal) were not made parties and the present appellants who were the only defendants agreed to the submission of the suit to arbitration. The arbitrators passed an award finding that a sum of Rs. 2,400 was due to the plaintiffs in that suit. Some small items concerned in that suit admittedly did not relate to the partnership in question. Those are a sum of Rs. 66 9-3, a sum of Rs. 38 8 9 and a sum of Rs. 31-6-0 mentioned in the plaint, Exhibit A. The appellant's contention is that the rest of the items to which the award related formed part of the partnership transaction. The practice adopted apparently was for the plaintiffs and the defendants to adjust the rights and liabilities with respect to each transaction soon after it closed. In accordance with that practice, they adjusted their accounts with respect to the dealings with the plaintiffs in Original Suit No. 80 of 1910 on the basis that a sum of Rs. 662-9 0 was due by the partnership to the plaintiffs while, under the award in the suit which was filed afterwards, the appellants were made liable, as already stated, for a sum of Rs. 2,400, less the three items mentioned above. The amount claimed in the suit was, however, more than Rs. 5,000. The learned Judge held that the award was not binding on the present defendants as they were not parties to the suit and the reference to the arbitration. He relied on Lindley on Partnership, 8th Edition, page 164. There can be no doubt, as laid down there, and in the rulings referred to therein, *e. g.*, *Stead* v. *Salt* (1), that where a partner has submitted to arbitration, the award passed on such submission will not bind the other partner, at the instance of the third party. The ground on which this ruling is founded is obvious, that submission to arbitration ordinarily does not come within the scope of a partner's authority so as to bind the other partners. This ruling has been followed in *Ram Bharose* v. *Kallu Mal* (3) and *Datoobhoy* v. *Vallu* (2) and we may take it that the rule is well established and cannot be questioned. But the question here is not between a partner and a stranger but between the partners *inter se*. The point for determination is, whether, when a partner has in good faith submitted the claim of a third party against a firm to arbitration and that partner had to make payments in accordance with the award passed on the submission, he would not be entitled to claim contribution from his partner on the basis of that award. There is no express authority on this point. One which has been brought to our notice as being nearest to the present case is the ruling of the Privy Council in *Dwarka Nath Sarkar* v. *Haji Mahomed Akbar* (4). There the question was sought to be raised for the first time in the Appellate Court and their Lordships of the Privy Council held that it should not have been allowed to be so raised. The question whether a legal representative of the deceased partner should be bound by the reference made by a surviving partner in relation to a partnership contract was not a pure question of law to be decided without reference to the facts of the case; and it was held that the High Court was in error in permitting the question to be raised for the first time in appeal. That passage, at least, suggests that there may be circumstances in a particular case which would justify the Court in holding that the legal representative of the deceased partner was bound by a reference by the surviving partner relating to a partnership contract.

Mr. Krishnaswami Aiyar, the learned Vakil for the respondents, however, urges that the surviving partner's powers are wider than those of an ordinary partner after the dissolution. That may be so, generally speaking. But it is a well established rule relating to partnership that if one partner has the authority to settle accounts relating to partnership and to give release with respect to partnership debts he can be sued alone on a contract entered into by him, and his other partner would be bound by the decree so obtained. That being so, it is not easy to understand why, in a case where a partner is sued alone, he should not be at liberty to agree to a submission and why the award on such submission should not, as between him and his co-partner,

(4) 24 Ind. Cas. 307; 27 M. L. J. 192; 18 C. W. N. 1025; 1 L. W. 637; (1914) M. W. N. 876; 16 M. L. T. 521; 2! C. L. J. 1; 17 Bom. L. R. 5 (P. C.).

be good and conclusive evidence of the liability of the firm. It is not contended in this case that the submission was not *bona fide*. In fact, it was as much the interest of the plaintiffs as would have been that of the defendant, if he was a party to the suit, to resist an unjust claim and if the plaintiffs thought that the submission was the best way of settling the dispute, there is no good reason for holding that his partner should not contribute to the amount decreed by the award. As the submission was *bona fide*, and as it has not been shown that the award was vitiated by any illegality, we must hold that the defendants are liable on the basis of the award. On that basis the plaintiffs would be entitled to get from the defendants the sum of Rs. 800 with interest from the date of the award.

The next point taken in appeal refers to the expenses of certain litigation in Original Suit No. 80 of 1910, already referred to, and of Original Suit No. 118 of 1910. The lower Court disallowed the claim on the ground that the entries in the accounts stand in the name of one Palaniappa Chetty who was the agent of the plaintiffs. But if the money was spent through that agent there seems to be no reason why, on that account, the amount so spent should be disallowed simply because the amounts are entered in the name of the person who actually disbursed them. Mr. Krishnaswami Aiyer, however, argued that there is really no evidence that the sum claimed under this head was actually spent on account of the suits relating to the partnership transactions. We have the accounts, Exhibits S and T series, and the evidence of one of the plaintiffs that the entire expenses relating to the litigation amounted to the sum entered in the Schedule D of the plaint, that is, Rs. 865 3 0. There was no serious attempt made to show that this is incorrect. We, therefore, hold that half of this amount should have been decreed to the plaintiffs.

As regards the third point, it relates to the rate of interest. The Subordinate Judge has allowed interest at 6 per cent. but the defendant's own evidence is that the usual rate, that is the Madras rate of interest prevailing among the Chetties is $8\frac{1}{2}$ per cent. That, we think, is the rate which should be awarded. The decree will, therefore, be modified in accordance with the above findings. The appellants will have their costs from the respondents.

M. C. P.

Decree modified.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2412 OF 1916.

June 3, 1920.

Present :—Mr. Justice Chevis and Mr. Justice Dundas.

BHOLA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BABU AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Daughter versus *collaterals of seventh degree*—Birk Jats *of Tahsil Phillaur, Jullundur District.*

Among *Birk Jats* of the Phillaur Tahsil a daughter excludes collaterals of the seventh degree from succession to ancestral property. [p. 504, col. 1; p. 506, col. 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 1st June 1916, affirming that of the Subordinate Judge, First Class, Jullundur, dated the 29th February 1916.

Mr. *Oertel* (with him Mr. *Cooper*), for the Appellants.

Mr. *Saraswati Ram*, for the Respondents.

JUDGMENT.—One Sucket Singh, a *Birk Jat*, of village Birk, Tahsil Phillaur, District Jullundur, effected certain alienations of landed property and houses in favour of his step-sons, which have been from time to time declared to be ineffective, to destroy the rights of his collaterals, the present plaintiffs, after his death.

Sucket Singh is now dead and these three suits have been brought by some of his collaterals against the representatives of the alienees for possession of their shares in the property of the deceased; all three suits have been dismissed in the lower Courts by judgments proceeding on a common ground; so that the appeals preferred by the plaintiffs can conveniently be disposed of in one judgment.

The defence set up in the lower Courts is that the plaintiffs are collaterals of the deceased, Sucket Singh, only in the seventh degree, reckoning the generations commencing with, and including the deceased, upwards until the common ancestor is reached. He being also counted, and included, and being so remote are excluded by Sucket Singh's daughter, *Musammat* Basanti, from succeeding to his estate.

Both Courts have decided that, in the presence of *Musammat* Basanti, the plaintiffs have no *locus standi* to maintain the suit but the District Judge has granted the necessary certificate for a second appeal on the ground of custom. In appeal, it is first objected that the respondents failed to raise the question of *Musammat* Basanti's right to exclude her father's collaterals when they had the opportunity in the declaratory suits and that they cannot now do so.

The question, however, was not material in the previous suits as *Musammat* Basanti could not herself question the acts of her father, and it was in any case open to the reversioners to protect their own rights by obtaining declarations in respect of Sucket Singh's alienation irrespective of the possibility of their exclusion by a daughter. This objection, therefore, has no force.

Next, it is argued that Sucket Singh has definitely excluded *Musammat* Basanti from succession by the operation of his Will which is one of the alienations affected by the declaratory suits and that she cannot in any case claim to succeed to his property. We do not think that the plaintiffs can be allowed to turn round now and rely on Sucket Singh's Will seeing that they have already obtained a declaration that it is invalid in a suit against the same defendants.

The existence of a Will depriving *Musammat* Basanti does not, therefore, prevent the defendants from raising the defence that she excludes the plaintiffs in the succession, and that succession has not yet opened out to the plaintiffs.

The main question in the appeal remains, and that is, whether by custom amongst these Birk Jats of the Phillaur Tahsil a daughter excludes collaterals of the seventh degree from succession to property which must, for the purposes of this suit, be assumed to be ancestral, the issue whether the property is ancestral having apparently been decided against the present defendants in the previous litigation.

The question of onus is of some importance in the decision of the question of succession between daughter and collaterals.

In *Bholi* v. *Man Singh* (1), Chatterji, J., discussed the point at some length and concluded that, up to that time, there was no definite expression of opinion having a binding force in favour of collaterals of any degree as against the daughter to be found in the authorities of the Chief Court and that amongst Hindu Chuhan Rajputs of the Naraingarh Tahsil, Ambala District, collaterals in the sixth degree had failed to prove their right to exclude a daughter. This authority is often quoted in the judgments of original Courts and is, perhaps, regarded as laying down a much more definite presumption in favour of a daughter's rights than can be actually deduced from the very guarded wording of the judgment; but if such decisions are found to have been generally acquiesced in by the parties and accepted as finally settling the succession this fact must undoubtedly carry weight in the present case.

Now, there undoubtedly are a number of such decisions in recent years in the Jullundur District, and these seem to have the more force as they operate to limit the old view held in the Jullundur District generally and in the Phillaur Tahsil particularly, that agnates of any degree exclude daughters (Roe's Tribal Law, published 1895, page 135).

In *Khaire Khan* v. *Ghulam Ghaus* (2) it was held that, amongst Muhammadan Naru Rajputs of the Phillaur Tahsil, the onus lay on the daughter to show that she excluded collaterals in the fifth degree, and that the onus had not been discharged in that case.

On the other hand, Mr. Waring, Divisional Judge, Jullundur, has laid the onus amongst Muhammadan Rajputs of the district on collaterals of the seventh degree to show that they did exclude daughters (Judgment of 3rd November 1908).

The Munsif, Sher Ahmad Khan, decided that, amongst Hindu Jats of the Nawan-

(1) 86 P. R. 1908; 146 P. W. R. 1908.
(2) 10 Ind. Cas. 387; 82 P. R. 1911; 238 P. L. R. 1911; 46 P. W. R. 1911.

shahr Tahsil, collaterals of the ninth degree were excluded by daughters in succession to ancestral land (24th November 1909).

This decision as regards these same Jats was repeated in the judgment of Lala Rangi Lal, Subordinate Judge, on 15th April 1913.

On 25th January 1915 Lala Sri Ram Poplai decided that, amongst Hindu Jats of Nawanshahr, daughters exclude collaterals of the sixth degree in succession to ancestral land. The area is considerable, 113 *kanals*, and this case is deposed to in the oral evidence in this suit.

After this, Ahmad Hussain, Munsif, found on 22nd December 1915 that amongst Hindu Jats of Nawanshahr daughters excluded collaterals of the fourth degree, but the land in suit was not found to be ancestral.

In the Nakodar Tahsil Lala Rangi Lal, as District Judge, found as long ago as 30th April 1912 that amongst Hindu Jats daughters exclude collaterals of the seventh degree even though the land be ancestral and the area large (45 acres and *shamilat* in addition).

There are also two decisions of Tahsil Phillaur amongst Hindu Jats, one of Ali Muhammad, Subordinate Judge, on 26th June 1914, where daughters excluded collaterals of the tenth degree and another of Sri Ram Poplai of 17th February 1914, confirmed by Mr. Prenter, Divisional Judge, on 10th July 1914, in which daughters excluded collaterals of the seventh degree, but in neither of these two cases was it shown that the land was ancestral of the contesting collaterals.

These eight decisions have all actually governed the succession to considerable areas of land and this fact certainly renders it probable that the view formerly held in the Jullundur District is subject in practice to considerable limitation. This is recognised in the new compilation of the Customary Law of the District by Rai Bahadur Bhai Hotu Singh in 1918. He says (Q. 45 A) that daughters are only excluded by collaterals up to the fifth degree in the three Tahsils of Jullundur, Nakodar and Phillaur and up to the seventh degree in the Nawanshahr Tahsil, the only dissentients being Muhammadan Rajputs of the Phillaur Tahsil. This volume appears to be the result of detailed inquiry made directly from the tribes themselves, the answers given being independently verified by instances, and it is noticeable that the question was a new one framed by the Settlement Officer himself.

This *riwaj i-am*, therefore is, as found by the Privy Council, "admissible in evidence to prove the facts therein entered subject to rebuttal. The statements contained in it form a strong piece of evidence in support of the custom which it lay upon the plaintiffs to rebut." *Beg* v. *Allah Ditta* (3).

It is in this case directly supported by instances which give additional weight to its pronouncement, and it certainly appears to lay the burden of rebuttal heavily upon the plaintiffs and no evidence in favour of the plaintiffs has been referred to by Counsel nor does any appear upon the record.

A few reported cases from other districts have been referred to and may be briefly noticed.

In *Partapo* v. *Asa Ram* (4), after a discussion of many authorities, it was held that, amongst Hindu Rajputs of the Ludhiana District, a daughter excludes collaterals of the seventh degree in succession to ancestral property.

Jiwan Singh v. *Musammat Har Kaur* (5) was a case of Wirk Jats of the Gujranwala District. It was then remarked: "The weight of authority and certainly the more recent decisions are distinctly in favour of the contention that the onus lies on collaterals more distantly related than the fifth or, at any rate, the seventh degree to show that they are entitled to succeed in preference to a daughter of the deceased." As in that case the collateral was in fact outside the seventh degree the decision was given without hesitation in favour of the daughter.

In *Saide Khan* v. *Musammat Amir-un-nissa* (6) amongst Muhammadan Rajputs of Jagraon

(3) 38 Ind. Cas. 351; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

(4) 19 Ind. Cas. 211; 96 P. R. 1913; 208 P. L. R. 1913; 221 P. W. R. 1913.

(5) 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914.

(6) 45 Ind. Cas. 966; 94 P. R. 1918; 109 P. W. R. 1918.

GORDHANDAS VITHALDAS v. MOHANLAL MANEKLAL DOSHI.

Tahsil, Ludhiana District, the onus was laid on collaterals of the sixth degree to prove that by custom they excluded daughters in succession to ancestral land, and they failed to discharge the *onus*.

Finally, there is a case *Ishri* v *Bhola Singh* (7) in which it was held on the *riwaj-i-am* and in the absence of evidence to the contrary that amongst Hindu Jats of Jullundur District a daughter does not exclude collaterals in the fifth degree in succession to ancestral property.

This is, however, in accordance with the *riwaj-i-am* whilst in the present case the *riwaj-i-am* is against the plaintiffs-appellants.

The onus in the present case was on the collaterals to prove that by custom they excluded the daughter, and this onus they have decidedly failed to discharge, and their appeal is dismissed with costs.

Appeal dismissed.

(7) 52 Ind. Cas. 152; 67 P. W. R. 1919.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 249 OF 1919.

March 11, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

GORDHANDAS VITHALDAS—DEFENDANT—APPELLANT

versus

MOHANLAL MANEKLAL DOSHI—PLAINTIFF—RESPONDENT.

Covenant restricting user of land, whether runs with land—Registration, whether notice.

A covenant by which the covenantor restricts the ordinary user of his property does not run with the land, and is not binding on a purchaser without notice. [p. 508, col. 2.]

Registration does not necessarily give notice to anybody of anything. But if a registered document is so indexed that an inquirer anxious to ascertain whether there are documents relating to a property which he proposes, for instance, to buy, can find from the index documents relating to that property, then it will be held that he has notice of those documents, because if he made the inquiry, which as a prudent man he ought to make, then they would come to his notice. [p. 507, col. 1.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 503 of 1917, confirming the decree passed by the Subordinate Judge at Nadiad, in Civil Suit No. 272 of 1916.

Mr. *G. N. Thakor*, for the Appellant.

Mr. H. *V. Divatia*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to obtain certain reliefs by way of injunction against the defendants. He had obtained a decree in the Trial Court which was upheld in first appeal. The defendants now appeal to this Court, and the real question is, whether they had notice of the agreement which was made between the plaintiff and their vendor. It seems to have been assumed by both the lower Courts that, because that document was registered, therefore, the defendants must have had notice of it. It has not been argued, and I do not think it can be argued, that the agreement creates an interest in the defendants' property in favour of the plaintiff or an easement therein. It is merely a restrictive covenant by which the defendants' vendor restricted the ordinary user of his property. Such a covenant would not run with the land, and would not be binding on the purchaser unless he had notice. The question of fact whether the defendants could have had notice of this particular agreement if they had inspected the register in the ordinary course has not been gone into in the Trial Court. No oral evidence was led. The defendants admitted execution of the document by their vendor, and the Judge seems to have come to the conclusion from this that the plaintiff had knowledge of the agreement when he bought the property. But, unless the defendant would have found this agreement in the register when he went to inspect the register, as he ought to have done as a prudent purchaser, it cannot be said that he had constructive notice. If the property to which this agreement refers is in the index of the register, so that on the defendant inspecting the index would have found it, then it can be said that the defendant had constructive notice of it. That is a question which can only be decided by taking evidence as to the state of the register, and where this agreement was entered into. There-

fore, the following issues must go back to the Trial Court:—(1) Whether the defendant had actual notice of the agreement in suit? (2) Whether he had constructive notice, that is to say, if he had inspected the register in the ordinary way as a prudent purchaser, would he have found this agreement? Findings to be returned in four months after the record reaches the Trial Court. Otherwise, as the appeal has succeeded, the suit will be dismissed. As the plaintiff has been in fault, he must pay the costs in this Court and the Court below. The costs in the Trial Court will be costs in the cause. Same order in Second Appeal No. 250 of 1919.

HEATON, J.—I agree. There seems to be a good deal of misapprehension about registration and its effect as notice. Registration does not necessarily give notice to anybody of anything. But if a registered document is so indexed that an inquirer anxious to ascertain whether there are documents relating to a property which he proposes, for instance, to buy, can find from the index documents relating to that property, then it will be held that he has notice of those documents, because if he made the inquiry, which as a prudent man he ought to make, then they would come to his notice. The particular document we are concerned with was not a transfer of any property, but an agreement. It is an agreement entered into by two persons, the vendor to the defendant and the plaintiff, and it relates to two properties, the property belonging to the defendant's vendor and the property belonging to the plaintiff. How it is indexed in fact we do not know. The matter has never been inquired into. It is quite possible it might be indexed in various ways. It might be indexed under the names of the contracting parties. That would not give notice for the purpose of this case. It might be indexed by a reference to the property belonging to the plaintiff and that, again, would not be notice for the purpose of this case. But if it is indexed in relation to the defendant's property, then, no doubt, it would be notice.

Issues remitted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 604 OF 1918.

April 8, 1920.

Present :—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

MUTHUSAMI SWAMIAR AND ANOTHER —PLAINTIFF AND LEGAL REPRESENTATIVE OF THE DECEASED PLAINTIFF—APPELLANTS

versus

SOMOO KANDIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 2 (1) (8), 18, 52 (1) (a)—Adjudication, order by Official Receiver—Insolvent's estate, whether vests in Official Receiver.

Where, in exercise of the powers delegated to him under section 52 (1) (*a*) of the Provincial Insolvency Act, an Official Receiver makes an order of adjudication the insolvent's estate does not thereupon vest in him under section 18 of the Act, it only does so in pursuance of an order passed by the Court, and in exercising the delegated powers the Official Receiver is not a Court within the meaning of section 2 (1) (8) of the Act. [p. 507, col. 2; p. 508, col. ; p. 509, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 135 of 1917, (Appeal Suit No. 153 of 1917, District Court, Tanjore), preferred against the decree of the Court of the District Munsif, Tiruvadi, in Original Suit No. 63 of 1916.

Mr. *T. R. Venkatrama Sastri*, for the Appellants.

Messrs. *C. A. Seshagiri Sastri* and *K. R. Ringasawmy Aiyangar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—Plaintiff, here appellant, purchased the mortgage right now sued on at a sale held by the Official Receiver, Tanjore District, in the insolvency of 4th defendant and has sued 1st defendant, the mortgagor, to recover by sale of the mortgaged property. The only defence with which we are concerned at present is, that plaintiff did not obtain the mortgage right by his purchase because it had not vested in the Official Receiver and could not be sold by him. The lower Courts accepted this with reference to *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (1) in which two learned Juges held that when, as in the present case, an adjudication of insolvency is made by an Official Receiver in the exercise of the powers delegated to him under section 52 (1) (*a*), Provincial

(1) 34 Ind. Cas. 602; 30 M. L. J. 415.

Insolvency Act, the insolvent's estate does not vest in him under section 18, or any other provision, and will not do so, unless an order vesting it in him is passed by the Court. *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (1) has not been judicially noticed except by one of the learned Judges responsible for it in *Firm of Ramakrishna Iyer* v. *Official Receiver, Tinnevelly* (2). The reasoning supporting the portion of the judgment in question is very shortly stated, but the conclusion reached must affect insolvency practice throughout the Presidency. That conclusion entails the Official Receiver's inaction after passing the order of adjudication, until he has reported his doing so to the Court, which originally entertained the insolvency petition, and has obtained its order appointing him Receiver and vesting the estate in him. Any postponement of the vesting of the estate in an authority more competent to administer it than that Court is to be deprecated and may have disastrous results, if moveable property is in question. We think it necessary to satisfy ourselves that this result is inevitable by close scrutiny of the law. It is urged first, that it is not, because the Official Receiver in the exercise of his delegated powers under section 52 becomes the 'Court' for purposes ancillary to that exercise, of which the vesting of the insolvent's estate in 'the Court' under section 16 (2) is one. This can be rejected shortly. The stages of adjudication and administration are distinct under section 52. The Official Receiver does not become the 'Court' in the exercise of his delegated powers, but under section 52 (2) his orders, or acts are merely to be deemed to be those of the 'Court,' and he does not come within the definition of 'the Court' in section 2 (1) (*g*). *Allapichai* v. *Kupppai Pichai Rowther* (3).

To turn to more substantial considerations, the decision in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (1) was reached with reference to the provision in section 16 (2) (*a*), for the vesting of the estate "in the Court or in a Receiver as hereinafter provided" and the construction of the last three words as relating only to the provision in section 18 (1) for the appointment of a Receiver and the vesting in him thereupon of the estate. Reliance is placed on the absence of any provision for vesting in section 19 relating to Official Receivers, and the argument that the Act does not provide for it, except in connection with an appointment, which is, therefore, necessary in each case. The alternative contention is that, under section 19 (2), the Official Receiver becomes by operation of law the Receiver in each case and that such Receiverships also and not only those conferred by appointment under section 18, are within the purview of the words already referred to, "as hereinafter provided" in section 16 (2) (*a*).

The balance of convenience is, as I have pointed out, in favour of the second of these constructions. But a consideration of the wording of section 18 (2) and of the English Act, on which this procedure is founded, forbids its adoption. For section 18 (2) assumes, by its reference to an order of appointment of a Receiver, that such an order is to be passed, even if the Official Receiver is to act; and, although there is no separate provision for such an order, this reference cannot be disregarded. Its significance, and probably its origin, are disclosed by comparison with section 9 of the English Bankruptcy Act of 1883 under which "on the making of a receiving order an Official Receiver shall be thereby constituted Receiver of the property of the debtor", the word 'thereby' supporting no appointment by mere implication, since, as the forms of receiving order Nos. 28 and 29 show, a distinct order constituting a Receiver for the estate is to be passed. The necessity for such an order is accounted for by the fact that in England, as section 66 (3) of the Act and rule 323 A framed under it show, the contingency of the existence of more than one Official Receiver for each area is contemplated; and it is possible that, although no explicit reference is made to this contingency in the Indian Act, it was in the mind of the draftsman and is provided for in section 19 (2); the introduction of the procedure authorised by section 17 of the Presidency Act with its immediate vesting of the property in the Official Assignee being deliberately avoided. It is consistent with this that, whilst under section 77, Presidency Act, only one person

(2) 40 Ind. Cas. 170; 5 L. W. 507; 32 M. L. J. 520.
(3) 39 Ind. Cas. 429; 40 M. 752; 32 M. L. J. 449.

can be appointed to the office of Official Assignee of an insolvent's estate, for each High Court under section 19 (1) of the Provincial Act there is no restriction on the number of appointments for a particular area. It may be said, on the one hand, that this conflicts with the reference in section 19 (2) to the appointment of an Official Receiver for the local limits of any Court having jurisdiction under the Act, his designation as the Receiver to act in all cases arising in it and the omission of any direction, such as the English Act gives, regarding the method of selection of the Official Receiver to act when more than one have been appointed, and, on the other hand, that the Indian provisions cannot be explained by reference to the English, when the scheme of the latter, including the employment as matter of course of the Official Receiver as Receiver from the receiving order until the order of adjudication and the subsequent vesting in him as trustee under the English section 54, differs radically from that of the former. But the only conclusion can be that the adoption of the English procedure to Indian circumstances has been imperfect and that reason has not been shown for the rejection of an explanation of the wording of the Indian section 19 (2), for which appellant has failed to account and which must receive effect.

In these circumstances, I am constrained to hold that the law was stated correctly in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (1).

The appeal is dismissed with costs.

SESHAGIRI AIYAR, J.—While not disagreeing with my learned brother, I cannot help saying that the previous decisions of this Court and the conclusion to which he has come have the effect of unsettling the practice in the lower Courts and of making an unnecessary departure from what obtains in insolvency matters in the Presidency towns. The drafting of the Act, and especially of clause 2, section 19 of the Provincial Insolvency Act, is responsible for this state of things.

Mr. Justice Oldfield has stated the facts and the law fully. I shall only add a few sentences. The contention of Mr. Seshagiri Sastri, Vakil for the 3rd respondent, is that unless the Official Receiver is appointed in each case of insolvency as Receiver of the estate, the property of the insolvent does not vest in him. Section 16, clause (2), provides for the vesting of the property in the Court or in a Receiver as hereinafter provided. Under section 52 the High Court can by rules, invest the Official Receiver with jurisdiction to hear insolvency petitions, to examine the debtors and to make orders of adjudication. Reading these two provisions, the natural inference is that the Official Receiver—appointed by the Local Government and invested with powers to adjudicate by the High Court, would have the property of the insolvent under his control. Unfortunately, section 19, clause (2), uses this language:—"Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the Receiver *for the purpose of every order appointing a Receiver issued by any such Court*....." I do not find it easy to understand the meaning of the words underlined by me. If it was the intention of the Legislature that the property should not vest in the Official Receiver unless he was appointed Receiver in the particular insolvency, fewer words would have sufficed. It is equally open to argument, as was suggested by the learned Vakil for the 3rd respondent, that if the Legislature intended that, if in the Official Receiver by virtue of his appointment, the property of the insolvent vests, the section would have been differently worded. The real trouble arises from the difference in language between the Presidency Towns Insolvency Act, and the Provincial Insolvency Act. In section 17 of the Presidency Towns Insolvency Act, there is an express declaration that, on the making of an order of adjudication, the property shall vest in the Official Assignee. There is no reason why an Official Receiver appointed by the Local Government should not have the same authority. There is nothing in principle to suggest a distinction. In the Presidency Towns as in the *Moffasal*, in addition to the Official Assignee or the Official Receiver, there can be a special trustee or Receiver but, whereas in the Presidency Towns Insolvency Act, a special provision is inserted for vesting the property in the Official Assignee, there is no such provision in the Provincial Insolvency Act.

My learned brother has referred to the sections of the English Bankruptcy Act. I shall examine them with some care. Section 7 of IV and V George V says: "On making of a receiving order an Official Receiver shall be thereby constituted Receiver of the property of the debtor." Section 18, clauses (6) and (8), provide, for the Official Receiver assuming management and directing the proceedings, in case the debtors do not appoint a trustee. Section 53, clause (1), says "until a trustee is appointed the Official Receiver shall be the trustee for the purposes of this Act and immediately, on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee." There can be no doubt that this section makes the Official Receiver the trustee of the property, without requiring that he should be appointed specially for that purpose. The next clause is, "on the appointment of a trustee, the property shall forthwith pass to and vest in the trustee appointed." On this clause, the use of the words 'a trustee' indicated that there is but one trustee from the beginning of the adjudication and that the Official Receiver will be that trustee, until the creditors appoint a trustee, and on such appointment the latter shall step into the shoes of the Official Receiver. That this is the meaning of the sections, I have referred to, is made clear *Cohen, In re*; *Trustee, Ex parte* (4). Lord Justice Vaughan Williams, in delivering the judgment of the Court of Appeal, says, in page 710: "Section 54, sub-section (2) (the learned Lord Justice was referring to the Act of 1883) provides that on the appointment of a trustee, the property shall forthwith pass to and vest in the trustee appointed .....in my judgment contrasts the case where the property of the bankrupt vests in the Official Receiver independently of any appointment of him, as trustee, and the case where the property of the bankrupt passes to a trustee forthwith on his appointment. There can be no doubt but that in sub-section 2 of section 54, the word 'appointed' is used in the sense in which it is employed in section 21." Then the learned Lord Justice quotes two decisions containing certain dicta of Lord Selbourne and Lord Esher and proceeds: "The provisions of sub-section 1 of section 54 will necessarily in every case in which the creditors appoint the trustee, make the Official Receiver the trustee, before there is a creditors' trustee, because a creditors' trustee is appointed by a meeting called after the adjudication."

A similar view has been taken in an earlier case, *Calcott and Elvin's Contract, In re* (5). The Court of Appeal had to consider whether an order of adjudication in bankruptcy is not a conveyance and whether the title of the Official Receiver was not postponed to that of the mortgagee, until the adjudication order was registered. Lindley, L. J., the Master of the Rolls says in page 465, referring to section 54 of the old Act: "The order by which a man is adjudicated a bankrupt, and which by the rules has to be in writing and in a particular form, is simply to the effect that the debtor has been adjudged a bankrupt. Is that a deed or conveyance, within the meaning of the Statute of Anne? No doubt the effect of it is that all the property vested in the debtor becomes vested in the trustee but that does not make it a conveyance."

I may also mention that the law is stated in 2 Halsbury, section 169, in the same way. Referring to the Official Receiver, it is said, 'He is not appointed trustee under the provisions of the Bankruptcy Act, but he becomes so automatically.'

This interpretation of the English Statute is not quite consistent with forms Nos. 28 and 29 under the English Bankruptcy Act, to which my learned brother has referred in his judgment. Those forms seem to contemplate that a prospective order in every case of bankruptcy is to be made, constituting the Official Receiver the Receiver of the estate of the debtor. These forms are known as the receiving orders. By adopting similar forms in this country also, the difficulty may perhaps be got over. For that purpose it may become necessary that the High Court should prescribe.....forms for employment by the *Muffasal* Courts.

I am, therefore, not prepared to differ from the conclusion which my learned brother has reached and which has the sanction of the previous decisions of this Court. I agree with the order as to costs.

Appeal dismissed.

M. C. P.

(4) (1905) 2 K. B. 704; 74 L. J. K. B. 864; 93 L. T. 359; 54 W. R. 83; 12 Manson 358; 21 T. L. R. 725.

(5) (1898) 2 Ch. 460; 67 L. J. Ch. 553; 78 L. T. 826; 46 W. R. 673; 5 Manson 208.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 61 OF 1919.

April 7, 1920.

Present :—Sir John Heaton, KT., Acting Chief Justice, and Mr. Justice Crump.

KRISHNABAI GOVIND JOSHI—PLAINTIFF—APPELLANT

versus

KESHAV GAJANAN POTBHARE—DEFENDANT—RESPONDENT.

Hindu Law—Succession—Female heirs—Uncle's daughter, whether gotraja sapinda.

As a general rule the Hindu Law is opposed to succession of females and such female heirs as have been recognised as entitled to inherit come in as exceptions to the general rule.

A paternal uncle's daughter is not a *gotraja sapinda*.

First appeal from the decision of the First Class Subordinate Judge at Poona, in Civil Suit No. 556 of 1917.

Mr. *M. V. Bhat*, for the Appellant.

Mr. *M. V. Joshi*, for the Respondent.

JUDGMENT.

CRUMP, J.—The only question which arises for our decision in this case is, whether an uncle's daughter is or is not *gotraja sapinda*. Mr. Bhat for the appellant has sought to argue from a case of a sister that this question should be answered in the affirmative. It is almost sufficient to point out that Mr. Bhat has been forced to admit that the logical conclusion of his line of reasoning would be that all females must necessarily be counted as *gotraja sapindas*. We think that this would be contrary to the fundamental principles of the Hindu Law as hitherto interpreted by our Court. The lower Court has correctly stated that, as a general rule, the Hindu Law is opposed to succession of females and that such female heirs as have been recognized as entitled to inherit come in as exceptions to this general rule. It is, therefore, unsound to attempt to extend these exceptions by arguing that there is any principle involved in those cases where such exceptions are permitted. The special case of a sister can only be justified on the grounds which are special to herself as has been repeatedly decided in the decisions of this Court. We are not prepared to argue from the case of a sister to that of more distant relations, and to thereby extend the list of female heirs further than has already been done in this Presidency. It is admitted that there is no decision which is directly in point on this question, and such passages as have been cited to us from other decisions do not, we think, bear out the line of argument which is sought to be based upon them. In those cases the position of a sister is in question, and as is well known every case is only an authority upon its own facts. We think that the attempt to extend the list to an uncle's daughter must necessarily fail, and we, therefore, dismiss the appeal with costs.

Plaintiff to pay costs of the respondents and the Court-fees which would have been paid if she had not been allowed to appeal *in forma pauperis*.

HEATON, ACTG. C. J.—I concur.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 392-B OF 1918.

October 30, 1919.

Present :—Mr. Mittra, A. J. C.

GULAM NABI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KANHAISINGH—DEFENDANT—RESPONDENTS.

Mortgage—Foreclosure—Redemption by zur peshgi *lessee—Mortgagor, right of, whether revived.*

The right of a mortgagor who has been foreclosed is not revived by a *zur peshgi* lessee redeeming the mortgagee. Therefore, where after a mortgage has been foreclosed, a *zur peshgi* lessee from the mortgagor who was not made a party to the foreclosure suit, redeems the mortgage for his own benefit, a representative of the mortgagor is not entitled to redeem the lessee in turn. [p. 512, col. 2.]

Appeal against the decree of the Additional District Judge, Amraoti, dated the 28th September 1918, confirming the decree of the Subordinate Judge, Daryapur, dated the 22nd March 1918.

GULAM NABI v. KANHAISINGH.

Mr. *G. R. Pradhad*, for the Appellants.

Mr. *G. V. Kukday*, for the Respondents.

JUDGMENT.—On the 13th June 1899 one Laxmansa mortgaged the property in suit to Nagoji. The latter brought a suit for foreclosure on the basis of this mortgage, Suit No. 430 of 1902, and obtained a decree absolute for foreclosure on the 28th February 1903. Rukhmoddin who was a lessee of Laxmansa, under a deed, dated the 17th July 1899, for fifteen years, was not made a party to this suit. He instituted Suit No. 604 of 1905 and was allowed to redeem the mortgage. On the 7th July 1905 Nagoji sold his rights to one Mangosa. Both Nagoji and Mangosa were parties to Suit No. 604 of 1905. The present plaintiffs purchased the property from Laxmansa and his brother Raghosa by a sale-deed, dated the 26th November 1909. It has been found that Raghosa had no interest in the property in dispute. They seek to eject Rukhmoddin on the ground that the lease expired in 1913. The Courts below have held that the plaintiffs are entitled to possession upon payment of the amount paid by Rukhmoddin in Suit No. 604 of 1905. Rukhmoddin's legal representative, Golam Nubi, has filed this second appeal Both the Courts below refer to the case of *Sonba Teli* v. *Lahanoo* (1) but seek to distinguish the case on the ground that Rakhmoddin was not a puisne mortgagee but a lessee. It is not disputed that the right of a mortgagor who has been foreclosed is not revived by a puisne mortgagee redeeming the prior mortgagee. No case has been cited before me in which a view contrary to that laid down in *Sonba Teli* v. *Lahanoo* (1) has been taken. The Courts below seem to have overlooked that the person to redeem is not the representative of Laxmansa but Mangosa, who purchased the rights of Nagoji after the foreclosure. By the foreclosure decree in Suit No. 430 of 1902 Nagoji acquired the rights of the mortgagor. Rukhmoddin not having been made a party was entitled to redeem. In Suit No. 604 of 1905 Nago and his representative Mangosa could not seek in their turn to redeem the lessee. A *zur-peshgi* lease, such as the lease of Rukhmoddin was, cannot be redeemed before the expiry of the term which occurred in 1913. I do not see that there is any difference, so far as this case is concerned, whether the document was a *zur peshgi* lease or a usufructuary mortgage. In 1905 Nagoji and Mangosa, although they held the rights of the mortgagee as well as of the mortgagor, could not elect to redeem Rukhmoddin within the period of the term fixed. The effect of that decision is not to bar their right of redemption but only to postpone it. Their right is subsisting and can be now enforced, whereas Laxmansa has no interest left by reason of the foreclosure.

The lower Courts argue that the lessee is bound to deliver up possession at the expiry of the lease to the lessor, I would say, to the lessor or his representative-in-interest. If the lessor has no interest left, the possession is to be delivered to his representative; in this case Mangosa is that representative.

The question is not what rights Rukhmoddin has acquired, but whether the plaintiffs have any right in respect of the property entitling them to maintain a suit for ejectment or redemption. In my opinion they have none, as their predecessor lost all rights on the foreclosure and those rights have not been subsequently revived on the redemption by Rukhmoddin, who redeemed for his own benefit to protect his rights as a lessee and not for the benefit of Laxmansa.

The decrees of the Courts below are set aside and the suit is dismissed with costs in all Courts.

Decree set aside.

(1) 15 C. P. L. R. 188.

ASHUTOSH RAI v. BABU LAL JHUNGAR.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 316 OF 1919.

July 15, 1920.

Present:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

ASHUTOSH RAI—DECREE-HOLDER—APPELLANT

versus

BABU LAL JHUNGAR—JUDGMENT-DEBTOR—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 73—Mortgage—Mortgaged property acquired under Land Acquisition Act—Injunction, suit for, by mortgagee, restraining mortgagor from receiving compensation, maintainability of.

Section 73 of the Transfer of Property Act is applicable to a case where the mortgaged property is acquired under the provisions of the Land Acquisition Act.

Where, during the pendency of a mortgage-suit, a portion of the mortgaged property was acquired under the Land Acquisition Act and the mortgagee brought a suit for an injunction restraining the mortgagor from taking out the compensation-money in respect of the portion acquired:

Held, that the suit was maintainable and must succeed.

Appeal from an order of the Subordinate Judge, Manbhum, dated the 27th November 1919.

Mr. *Sishir Kumar Rai*, for the Appellant.

Mr. *Shiveshwar Dayal*, for the Respondent.

JUDGMENT.

COUTTS, J.—This appeal arises out of an application for injunction to restrain the judgment-debtor from taking out money which is in the hands of the Land Acquisition Deputy Collector. The application has been refused and the decree-holder has appealed.

The facts of the case are, shortly, that *Mouza* Benipur which has an area of 600 *bighas* was mortgaged to the decree-holder. He brought a suit on his mortgage and obtained a preliminary decree. Meanwhile, 100 *bighas* of the *mouza* had been acquired for the Bengal, Nagpur Railway Company and Rs. 2,000, as compensation, is now in the hands of the Land Acquisition Deputy Collector. The judgment-debtor has applied for permission to withdraw this amount in order to pay off another decree and it was in order to restrain him from doing this that the application for injunction was made.

I am unable to agree with the learned

DALIP SINGH v. BALWANT SINGH.

Subordinate Judge that the injunction should not be granted. Under section 73 of the Transfer of Property Act, "Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage," and it has been held, both in the Madras High Court in the Calcutta High Court, that this section applies where land is sold under the Land Acquisition Act. I need only refer to the cases of *Venkata Viraraghavayyangar* v. *Krishnasami Ayyangar* (1), *Jatuni Chowdhurani* v. *Amar Krishna Saha* (2) and *Debendra Nath Sen* v. *Mirza Abdul Samed Seroi* (3). An opposite view was taken by Aikman, J., in the case of *Basa Mal* v. *Tajammal Husain* (4). But this is a decision of a Single Judge and has been expressly dissented from in the case of *Jatuni Chowdhurani* v. *Amar Krishna Saha* (2). I agree with the view of the law expressed in the cases to which I have referred. I would accordingly set aside the decision of the learned Subordinate Judge and would decree this appeal with costs.

SULTAN AHMED, J.—I agree.

Appeal decreed.

(1) 6 M. 344; 7 Ind. Jur. 358; 2 Ind. Dec. (N.S.) 520.
(2) 1 Ind. Cas. 164; 6 C. L. J. 745; 13 C. W. N. 350.
(3) 1 Ind. Cas. 264; 10 C. L. J. 150.
(4) 16 A. 78; A. W. N. (1893) 223; 8 Ind. Dec. (N. S.) 52.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 332 OF 1916.

May 20, 1920.

Present:—Mr. Justice Broadway and Mr. Justice Wilberforce.

DALIP SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BALWANT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Colonisation of Government Lands Ac (V

DALIP SINGH v. BALWANT SINGH.

of 1912), s. 19—Will, construction of—Devise of land by tenant—Acquisition of proprietary rights before death, effect of.

On 5th July 1909, an occupancy tenant devised his square of land in favour of the defendant. In 1912 the Punjab Colonisation of Government Lands Act came into force and, subsequently thereto, the testator acquired proprietary rights in the devised square :

Held, that when the Will came into operation the testator's occupancy rights had ripened into proprietary ownership and that the Will was not, therefore, invalid under section 19 of the Punjab Colonisation of Government Lands Act. [p. 515, col. 1.]

Second appeal from the decree of the District Judge, Lyallpur, dated the 7th August 1915, affirming that of the Subordinate Judge, Second Class, Lyallpur, dated the 23rd February 1915.

Mr. *Nand Lal*, for the Appellants.

Mr. *Ram Chand Manchanda*, for the Respondents.

JUDGMENT.—The following pedigree table will show the relationship of the parties:—

Musammat Prem Kaur=Sham Singh=*Musammat* Kishen Kaur.

Jawala Singh, Plaintiff.		
Ishar Singh	Sharm Singh	Kesar Singh, Defendant.
	Makhan Singh, Defendant.	
Balwant Singh, Defendant.	Jaswant Singh, Defendant.	Hazur Singh, Defendant.
		Kartar Singh, Defendant.

Sham Singh held a square of land in *Chak* No. 157, R. B., in the Lyallpur District, as a tenant. On the 5th July 1909 he executed a Will, which was duly registered, by which he devised the said square to his issue by his wife, *Musammot* Kishen Kaur.

On the 6th June 1912 Act V of 1912 came into force and, subsequent to this date, Sham Singh acquired proprietary rights in the said square ceasing thereafter to be a tenant. He died some time in 19 3, and the Will was apparently given effect to by the revenue authorities who mutated the square in the names of the present defendants. On the 3rd July 1914 Jawala Singh instituted the present suit claiming to be entitled to one half of the said square alleging (1) that the land was ancestral ; (2) that Sham Singh was not competent to make a Will ; (3) that Sham Singh, when he executed the Will, was not possessed of a disposing mind ; (4) that, subsequent to the making of the Will, Sham Singh had made an oral promise to come into effect after his demise, that the plaintiff was to get one-half of this square ; (5)that the Will propunded was of no effect having regard to the provisions of Act V of 1912, and (6) that the family was governed by the *chundavand* rule of succession and, therefore, in any event, he (Jawala Singh) was entitled to the land claimed by him.

The Trial Court held that the land was not ancestral; that the oral promise or Will had not been proved ; that Sham Singh was competent to make the Will propounded by the defendants and was of sound disposing mind when he executed it; that the Will was not rendered inoperative by Act V of 1912; that though, at the date of its execution, Sham Singh only held occupancy rights in this square, at the date of his death he was a proprietor, and that the proprietary rights passed under the devise. Jawala Singh's suit was accordingly dismissed, and he preferred an appeal to the District Judge who agreed with the findings of the Trial Court. Jawala Singh has now come up to this Court in second appeal, and on his behalf we have heard Mr. Nand Lal at length.

It was contended (1) that Sham Singh was not competent to make a Will; (2) that the Will was rendered void and inoperative by Act V of 1912; (3) that under a devise of occupancy rights proprietary rights could not pass, and (4) that by custom the appellant was entitled to the land claimed by him.

As to the first contention, we have no hesitation in holding that the square being self acquired Sham Singh was competent to dispose of the same as he liked. As to the second contention, while no doubt Act V of 1912 would have rendered the devise of the occupancy rights inoperative when the succession fell in, the testator was a proprietor and, therefore, the Will was in no way rendered void or inoperative by the provisions of section 9 of Act V of 1912. As to the third contention, a perusal of the Will shows that what was devised was "my square in *Chak* No. 157," and we have no hesitation in holding that what was devised was all the testator's right, title, and interest in the said square. When the Will came into operation the occupancy rights had ripened into proprietary ownership and, in our opinion, the square passed under the Will to the devisees. In this view we are supported by *Saxton* v. *Saxton* (1), where it was held that "a bequest of all my term and interest in the lease hold dwelling-house known as B. G. will carry the fee simple if subsequent to the date of the Will the testator buys in such fee simple."

Mr. Nand Lal further contended that the Will had been revoked by Sham Singh's subsequent conduct. This conduct he described as Sham Singh's omission to execute a further Will or to say anything more about the land. We are in no way impressed with this contention which we consider has no force. It is unnecessary to discuss the further points raised, and we dismiss the appeal with costs throughout.

Appeal dismissed.

(1) (1879) 13 Ch. D. 359; 49 L. J. Ch. 123; 41 L. T. 649; 28 W. R 294.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 161 OF 1919.

June 14, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice.

RUSTAMJI A. DUBASH—PLAINTIFF

versus

HAJI HUSSEIN LARI AND OTHERS—DEFENDANTS.

Contract, breach of—Damages, suit for—Party wrongfully cancelling contract, whether can set up alternative defence—C. I. F. *contract—Property, when passes.*

If a buyer cancels the contract without any justification, he disables himself from setting up any defence which he might otherwise have done to an action for damages. [p. 516, col. 1.]

As regards a *C. I. F.* contract as between the buyer and the person importing the goods, the property in the goods passes when the goods are shipped, but when the first buyer sells to another party the property in the goods does not pass until the bills of lading are endorsed to the purchaser. [p. 516, col. 2.]

Messrs. *Campbell* and *Kanga*, for the Plaintiff.

Messrs. *Setalvad* and *Desai*, for the Defendants.

JUDGMENT.—On the 6th of September 1918 a contract was entered into between the plaintiff and the defendants for the purchase by the defendant of ten bales of Liepmanns' White Shirtings No. 1500, each bale containing 50 pieces, at Rs. 35 per piece, *C. I. F.* Bombay, shipment September 1918. Terms and conditions as per plaintiff's purchase from Messrs. Girdharidas Radhakisandas on further terms and conditions of Messrs. Volkart Bros.' contract freight in excess of 7£ Sh. per ton and war risk insurance over $5\frac{1}{2}$ per cent. to be borne by the purchaser.

It appears that, on the 21st of August, the plaintiffs had bought 30 bales of these Shirtings from Girdharidas and on the 22nd of August they bought 25 bales of similar Shirtings from Messrs. E. D. Sassoon & Co.

On the 13th of November, plaintiff received from E. D. Sassoon & Co., an invoice for ten bales of the contract goods. Notice was given to the plaintiff that the steamer had already arrived and that the goods were lying at the docks at the plaintiff's risk.

The goods were shipped on or about the

17th of September, as is shown by the bill of lading in favour of Messrs. Volkart Bros., and the steamer arrived about the 18th of October. But, as was often the case during the war, the shipping documents did not arrive till a later date, sometime in the beginning of November.

On the 25th of November the plaintiff sent an invoice for ten bales to the defendant and, immediately after that, they received a notice from the defendant which is dated 23rd of November: "We purchased from you Liepmanns' White Shirtings No. 1500, we hereby cancel the same as they were for September shipment and even now November is ending."

The defendants contend that they were entitled to cancel the contract, but there was no justification for their doing so. The obvious reason which made them cancel was the fall in the market It was their duty to demand delivery and it was only on a refusal by the plaintiffs to fulfil their part of the contract, that the defendants would be entitled to cancel it. But it has been suggested, and has now been ascertained as a fact, that the plaintiff was not in a position to deliver, in performance of his contract, goods which he had purchased from Girdharidas. He, in his turn, had a dispute with Girdharidas in October, which no doubt was due to the fact that he had only succeeded in selling ten bales out of the 55 which he had purchased in August.

That, however, would not help the defendant, as *Braithwaite* v. *Foreign Hardwood Co.* (1) is an authority for the proposition, that if a buyer, without any justification, cancels the contract, he disables himself from setting up any defence which he might otherwise have done to an action for damages. In that case, the contract was for the sale of rosewood, for shipment in 1903, to be delivered at Hull in instalments during that year, cash payable against bills of lading. When the first consignment of rosewood was on the sea, the buyers repudiated the contract and refused to accept any rosewood. Afterwards, it came to their knowledge that a portion of the rosewood in the first consignment did not answer to the description of the quality of the rosewood in the contract. It was held that as the original repudiation by the buyers was wrongful, the buyers had waived the performance of conditions precedent on the part of the sellers who were entitled to damages based upon the difference between the contract price of the rosewood and the price at which it had been sold against the contract.

I do not think, therefore, it is open to the defendants to take the point that the plaintiffs were not in a position to tender documents for ten bales of goods which they had bought from Girdharidas. I do not think, in any event, the point would be a good one, as I do not think the plaintiff guaranteed or warranted in his contract that he would deliver bales which he had purchased from Girdharidas and none other, so that the defendants would be entitled to refuse taking delivery of exactly similar bales which, as a matter of fact, had been purchased by the plaintiff from another party. All that the contract of 6th September said was, that the contract bales were sold to the defendants on the same terms as he had bought bales from Girdharidas, taken in conjunction with the conditions of the contract between Girdharidas and Messrs. Volkart Bros.

The plaintiffs have sued for the price of the goods or, in the alternative, for damages. If the property in the goods had passed to the defendants, then the plaintiffs could sue for the price. But, although as regards the *C. I. F.* contract between the buyer and the person importing the goods the property would pass when the goods were shipped, I do not think the property would again pass when the first purchaser sold to another party and again whenever a subsequent sale took place, unless the bills of lading were endorsed to each successive purchaser.

I think, therefore, the plaintiffs are entitled to damages, and it is admitted that the market rate for these goods *C. I. F.* at the date of the breach was Rs. 22. The plaintiffs are, therefore, entitled to a decree for Rs. 6,683, with costs and interest on judgment at 6 per cent.

Suit decreed.

(1) (1905) 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 10 Com. Cas. 189; 10 Asp. M. C. 52; 21 T L. R. 413.

MANMATHA NATH BOSE *v.* JAGAT RAM ROY.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 282 OF 1918.

July 8, 1919.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Duval.

MANMATHA NATH BOSE AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAGAT RAM ROY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, applicability of, to suits for immoveable property—Causes of action, joinder of all, in one suit, whether necessary.

In determining the applicability of Order II, rule 2 of the Civil Procedure Code to a suit respecting immoveable property the mere fact that the title to the property in dispute in both suits is the same and that the property is the same does not necessarily show that the cause of action is the same. Thus, in a suit by reversionary heirs for a declaration of their right and for possession after setting aside a deed of gift, and in a subsequent suit for possession as reversionary heirs of the estate, on the ground that they were in possession and were dispossessed by the defendant, the cause of action is distinct, and the mere fact that the cause of action in the latter case arose before the institution of the previous suit, did not make it obligatory on the plaintiff to include the claim in the previous suit. [p. 519, cols. 1 & 2.]

It is not necessary that all the causes of action should be joined in the same suit, but the suit should include the whole claim arising out of the same cause of action, that is, the cause of action for which the suit is brought. [p. 519, col. 1.]

Appeal against the order of the Subordinate Judge, first Court, Bardwan, dated the 0th of September 1918, reversing that of the Munsif, second Court at Katwa, dated the 21st of August 1917.

FACTS appear from the judgment.

Babu *Hemendranath Sen* (with him Babu *Dhirendranath Sen*), for the Appellants.—The defendants are the appellants. The appeal arises out of a suit for recovery of possession. The case for the plaintiff was that the land in suit originally belonged to Ganga Roy which, on the death of his sons, devolved upon their mother, Mukta Kesi, and that, after her death in 1913, the plaintiffs, as the next reversioners, inherited the same. The plaintiffs are alleged to have been dispossessed in April 1915 by the present defendants. The defendants objected to the maintainability of the suit under Order II, rule 2. The plaintiff had, in May 1915 after the alleged dispossession from the present land in dispute, sued the present defendants for establishment of title to another plot of land which the defendants claimed to hold by virtue of a deed of gift executed by Mukta Kesi of her *stridhan* property in favour of the defendants. The learned Munsif upheld the defendant's contention and dismissed the suit on that ground.

On appeal, the learned Subordinate Judge held that the plaint did disclose a sufficient cause of action and that the plaintiffs were not precluded from bringing a fresh suit though the question of title involved in the present suit was the same as that in the previous suit. In this view, the learned Subordinate Judge reversed the decision of the first Court and remanded the suit for trial on the merits. The present appeal is directed against that order of the lower Appellate Court. My submission to your Lordships would be that the present suit is barred by the provision of Order II, rule 2, Civil Procedure Code. The cause of action of the present suit is alleged by the plaintiffs to arise in April 1915. The previous suit in which the same question of title as the present was involved was instituted in May 1915. That is, a month after the arising of the cause of action of the present suit. The plaintiffs ought to have included the present cause of action in that suit. The question, therefore, to be decided is, whether the present suit is barred under Order II, rule 2, Civil Procedure Code. I would submit that it does. Refers to *Khardah Company, Limited* v. *Durga Charan Chandra* (1). The causes of action in the two suits being identical, the later suit ought to fail according to the recent ruling just cited. I would, therefore, pray that the order of remand be set aside on the grounds urged and the judgment of the learned Munsif be upheld.

Babu *S. K. Sinha*, for the Respondents.—The previous suit was on altogether a different basis. That suit was by the plaintiffs for a declaration of their right to property different from the present which the plaintiffs claimed as reversionary heirs of Mukta Kesi, and further they prayed for the setting aside of the document on which the defendants based their claim. In the present suit the cause

(1) 58 Ind. Cas. 633; 43 C. 640.

of action is different. The plaintiffs state that they, having been dispossessed from the land in dispute which they had been in possession of for three years after Mukta Kesi's death, hence the dispossession is the cause of action in present suit which is quite distinct from that in the previous suit. The mere fact that the cause of action in the present suit arose before the institution of the previous suit does not preclude the plaintiffs from bringing the present action. Order II, rule 2 does not operate as a bar to this suit. Refers to *Rajah of Pittapur* v. *Surya Row* (2), *Amanat Bibi* v. *Imdad Husain* (3). I would, therefore, submit that the order of the learned Subordinate Judge has been passed on a right view of the law.

Babu *Hemendranath Sen* replied in brief.

JUDGMENT.—The question involved in this appeal is, whether the suit is barred under Order II, rule 2, of the Civil Procedure Code.

The suit was for recovery of possession of the lands in dispute on the allegation that the plaintiff had been dispossessed by the defendants.

The plaintiff's case was, that the land originally belonged to one Ganga Das Roy, that on the death of the latter the property devolved on his sons, on their death again their mother, Mukta Keshi, obtained it by inheritance, and that the plaintiffs, as the nearest agnates of Ganga Das, had succeeded to the property on the death of Mukta Keshi, they being the reversionary heirs. It is alleged that the plaintiffs succeeded to the property on the death of Mukta Keshi in 1913, and were in possession of it until dispossessed by the defendants on the 17th April 1915.

A previous suit was instituted by the plaintiffs on the 17th May 1915 against the defendants for establishment of their right to some other property which the defendants claimed to hold under a deed of gift executed by Mukta Keshi describing it as her *stridhan* property. It is contended on behalf of the appellant that the claim in the present case ought to have been included in the previous suit inasmuch as the title upon which the previous, as well as the present, suit, were instituted, was the same, namely, that the plaintiff was the reversionary heir of Gunga Das; and, secondly, that the cause of action for the present suit, which is said to have arisen on the 17th April 1915, arose before the date of the previous suit instituted on the 17th May 1915.

Now, Order II, rule 2, says: "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court;" and sub section (2) of the section lays down; "Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

The question, therefore, is whether the present claim was in respect of the same cause of action on which the previous suit was instituted.

The mere fact that the title to the property in claim in both the suits is the same, and that the property is the same, does not necessarily show that the cause of action is the same. In the case of *Rajah of Pittapur* v. *Surya Row* (2) the plaintiff sued to recover immoveable property in consequence of having been improperly turned out of possession, and afterwards sued to recover from the same defendant moveable property in consequence of its wrongful detention, and it was held that the causes of action were distinct. In that case, although the right to the immoveable as well as to the moveable properties was based upon the same Will, it was held that the causes of action were separate. Their Lordships observed, with reference to section 7 of Act VIII of 1859: "That section does not say that every suit shall include *every* cause of action, or every claim which the party has, but, every suit shall include the whole of the claim arising out of the cause of action' —meaning the cause of action for which the suit is brought. The claim in respect of the personalty was not a claim arising out of the cause of action which existed in consequence of the defendants having improperly turned the plaintiffs out of possession of *viravarum*. It was a distinct cause of action altogether,

(2) 12 I. A. 116; 8 M. 520 (P. C.); 9 Ind. Jur. 274; 4 Sar. P. C. J. 638; 3 Ind Dec (N. S.) 356.

(3) 15 I. A. 103; 15 C. 800; 5 Sar. P. C. J. 214; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; Rafique and Jackson's P. C. No. 103; 7 Ind. Dec. (N. S.) 1117.

and did not arise at all out of the other. It is not like the case of one conversion of several things. There the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action." See also the case of *Amanat Bibi* v. *Imdad Husain* (3) and the recent case of *Saminathan Chetty* v. *Palaniappa Chetty* (4). In the last case, after referring to section 34 of the Ceylon Civil Procedure Code, which corresponds to Order II, rule 2 of the Indian Code of Civil Procedure, Lord Moulton observed: "It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies."

On behalf of the appellant stress was laid on the fact that the cause of action for the present suit arose on the 17th April 1915 and that, therefore, this claim ought to have been included in the previous suit.

But that was a suit which was instituted for establishment of right to certain property as being the property of the sons of Ganga Das and for a declaration that the deed of gift set up by the defendant was a collusive transaction and did not affect the right of the plaintiff. It was a suit, therefore, by the reversionary heirs for declaration of their right and for possession after setting aside the deed of gift. The cause of action in that suit arose on the day of Mukta Keshi's death, which occurred in Baisak 1319, corresponding to April 1913. In the present suit, on the other hand, the plaintiffs alleged that they were in possession for three years after the death of Mukhta Keshi and had been dispossessed by the defendant. The cause of action in the present case was that the plaintiff, as the reversionary heirs of Mukta Keshi, succeeded to the estate and were in actual possession for three years after her death, and that they were dispossessed on the 17th April 1915. The causes of action, therefore, were distinct and the mere fact that the cause of action for the present suit arose before the date of the institution of the previous suit, did not make it obligatory on the plaintiff to include the claim in the previous suit The Judicial Committee pointed out that all the causes of action are not to be joined in the same suit but the whole claim arising out of the same cause of action—meaning the cause of action for which the suit is brought.

We have been referred, on behalf of the appellant, to the recent case of *Khardah Company Limited* v. *Durga Charan Chandra* (1). In that case the suit to recover possession of certain immoveable property was held to have been barred by the provisions of Order II, rule 2 of the Civil Procedure Code by reason of the plaintiff not having claimed the property in a previous suit which the plaintiff instituted for recovery of damages in respect of the demolition of a building on the land. The learned Judges (Chitty and Panton, JJ.) held the causes of action to be the same in the two suits on the ground that dispossession took place before the institution of the previous suit for damages. It appears that in that case the demolition of the building took place at the same time when the defendant dispossessed the plaintiff from the land, and in fact the dispossession was effected by the demolition of the building itself. That being so, the claim for damages and the claim for possession might be considered as having arisen out of the same cause of action. We think, therefore, that that case is distinguishable from the present one. In any case, we must follow the decisions of the Privy Council cited above.

We are of opinion that the order of remand made by the Court below is right. The appeal is accordingly dismissed with costs.

Appeal dismissed.

(4) 26 Ind. Cas. 223: 41 I. A. 142; 18 C. W. N. 617; 17 New Law Reports 56; (1914) A. C. 618; 110 L. T. 918; 83 L. J. P. C. 131 (P. C.).

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 139 OF 1918.

June 24, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

JAMNADAS SHIVRAM BARI—PLAINTIFF—APPELLANT

versus

CHUNILAL HAMBIRMAL MARWADI—DEFENDANT—RESPONDENT.

Malicious prosecution—Suit to recover damages—Reasonable and probable cause, what is—Malice—Presumption.

In order to protect him from the liability of having to pay damages for malicious prosecution a prosecutor's belief in the guilt of the accused must be based on grounds which, or some of which, are reasonable and arrived at after due inquiry. [p. 521, col. 2.]

Where the desire to prosecute the accused arises, not from an honest belief in his guilt but from the disappointment experienced by the prosecutor in being prevented from reaping the fruits of a purchase, it cannot be said that he had reasonable and probable cause for the prosecution. [p. 521, col. 2.]

Malice might be presumed from the want of reasonable and probable cause. [p. 522, col. 1.]

First appeal from the decision of the First Class Subordinate Judge, Nasik, in Suit No. 25 of 1917.

Mr. *Bahadurji* (with him Mr. *J. R. Gharpure*), for the Appellant.

Sir *Thomas Strangman*, (with him Mr. *D. C. Virkar*), for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is a first appeal from the decision of the First Class Subordinate Judge of Nasik who rejected the plaintiff's claim for damages against the defendant for malicious prosecution. It appears that one Vithu had obtained some disafforested land from Government on new terms in 1915. In October he sold the crop to the defendant. When the defendant wished to reap the crop, a claim was made on the first occasion by plaintiffs Nos. 2 and 4, and two days later the claim was renewed with the addition of plaintiff No. 1 who purported to have bought the crop from plaintiff No. 3. The defendant alleged that he had been assaulted by the servants of the plaintiff, and had left the ground under the honest belief that the plaintiffs had no right whatever to reap the crop and had been guilty of a criminal offence. He thereupon lodged a complaint of theft against the plaintiffs. In the first Court the plaintiffs were convicted but on appeal the conviction was reversed.

The question now arises, whether the first plaintiff who alone appeals is entitled to a decree for damages. In these cases the first thing is to ascertain the facts, the next step is to ascertain whether on those facts there was a reasonable and probable cause for instituting the prosecution, and finally whether there is malice. In a trial before a Judge and Jury, the Jury have first to ascertain the facts: then it is a matter for the Judge to decide whether there is a reasonable and probable cause; and then the question of malice will be one for the Jury. The learned Trial Judge has rightly laid down what the plaintiffs had to prove in order to succeed. He came to the conclusion that they had not proved that the defendant had no reasonable and probable cause for instituting the prosecution against them; that he came to an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds, and there was a state of circumstances existing which, assuming them to be true, would lead any ordinary and cautious person to the conclusion that the person charged was probably guilty of the crime imputed.

The facts, however, are far from clear from the record. Undoubtedly, Vithu had leased the ground from Government, and undoubtedly Rama had raised the crop which was ready to be reaped in October. But in what circumstances Rama had raised the crop is by no means certain. It is alleged that he raised the crop on behalf of Vithu on payment of a specific sum, and therefore, he had no title to reap the crop, and, therefore, no title to dispose of the crop in favour of the first plaintiff. But this is by no means clear on the evidence. We are perfectly entitled to assume that Rama thought that he had got a good title to the crop and had a right to dispose of it to the first plaintiff. Undoubtedly, Vithu disposed of the crop to the defendant. But on the day when the defendant was dispossessed the first plaintiff produced a receipt for the amount that he paid to Rama. It was, therefore, a case of a purchaser of a crop finding that there was some ground for thinking that his vendor had not played fair with him. The defendant had no particular reason

for knowing who had raised the crop until he was confronted with a person who asserted a title to reap the crop. Taking those as the facts in the case, could it be said that the defendant had reasonable and probable cause for instituting the prosecution? Had he an honest belief in the guilt of the accused, or, rather, was not the desire to prosecute the accused one which arose from the disappointment he experienced when he found that he would not be able to reap the fruits of his purchase from Vithu without a contest? And it is a common experience in this country that persons in that position are far too apt to rush off to a Criminal Court as the speediest method of establishing their case. On a due consideration of the evidence, I have come to the conclusion that the facts did not warrant any reasonable and probable cause for instituting the prosecution. I must mention that, placed in the position of a Jury, directed by the Judge that there was no reasonable and probable cause for instituting the prosecution, this would be a case in which one might safely infer malice for the purpose of giving the plaintiff a decree. The result must be then that the decree of the lower Court dismissing the plaintiff's claim must be reversed and there must be a decree in favour of the first plaintiff for Rs. 500 damages and costs throughout.

FAWCETT, J.—I concur. In the defendant's deposition in the suit he admits that, when the obstruction of the plaintiffs to the reaping of the crop occurred, he did not ask the plaintiffs as to why they were obstructing him. He also says he did not inquire as to what right the plaintiff Jamnadas or others had to the crops. Now, the fact that plaintiff No. 3, Rama, had cultivated the land and raised the crop in question is undisputed. The question whether Rama had a right to take the whole crop, as he alleges, or whether the right to the crop remained in the lessee, Vithu, is no doubt one that is open to dispute. Personally, I agree with the view which the District Magistrate took in his judgment in the criminal case that the probabilities are strongly in favour of Rama's assertion that, under the arrangement he made with Vithu, he had a right to the crop. I think that the Subordinate Judge is not justified in his conclusion that the probabilities are in favour of Vithu's assertion of a right to the crop, and that he erred in holding it was quite impossible that Vithu should have arranged to let this land to Rama in February or March 1915, as the plaintiffs stated he did. It is no doubt the case that the actual *kabuliyat* and possession did not take place until later on in April and May. But, undoubtedly, correspondence must have been going on in connection with the disposal of the disafforested lands, and it is to my mind quite possible that Vithu may have known in February that he was going to be given a particular piece of this disafforested land. However that may be, still as Rama, plaintiff No 3, had actually raised the crop, the defendant, when he found him, or his alleged assignees, claiming the crop, should as a prudent person have made inquiry into the claim; and I do not think he could honestly have thought that that claim was necessarily an untrue one and that plaintiff No. 3 and those who assisted him were mere thieves who were taking the crop without any right to do so. I take the law to be that the prosecutor's belief in the guilt of the accused must be based on grounds which, or some of which, are reasonable and arrived at after due inquiry. That is how it is summarised in Halsbury's Laws of England, Volume XIX, page 681, Article 1451. Here the defendant admittedly did not make due inquiry, and the facts are such as to contradict his plea that he had an honest belief in the guilt of the plaintiffs. No doubt, it very likely was a case of plaintiff No. 1 and the defendant each trying to get hold of the crop in order that his particular debt might be satisfied out of it. In the one case Rama, plaintiff No. 3, was a debtor of plaintiff No. 1 and in the other case Vithu was a debtor of the defendant. But this does not affect the fact that plaintiff No. 3 had at any rate some *prima facie* justification for asserting a title to the crop, and the fact that, as appears from the evidence, the defendant had been dunning Vithu for his debt may explain why Vithu assigned the crop to the defendant in spite of his having already transferred his title to it to plaintiff No. 3. It is a form of dishonesty which is not of an uncommon character. I think, therefore, that the plaintiffs have succeeded in showing that the defendant had no

reasonable and probable cause for the prosecution of the plaintiff, and, having regard to the frequency of such cases, it is in my opinion very desirable that, when a prosecution is shown to have been without such reasonable and probable cause, the Court should assist the persons who have suffered thereby in recovering damages for the malicious prosecution. The judgment of the lower Court to my mind is a very one-sided one and, after going carefully through the evidence I think the view there taken is one entirely against the weight of the evidence.

On the question of malice, I think that, in addition to the inference arising from the want of reasonable and probable cause, there are clear indications that the defendant's main object was to get the plaintiffs in any case imprisoned and so cause them injury. As is pointed out in the judgment of District Magistrate in the appeal that he heard, the defendant did not go to the Police to report the theft, but preferred to file a complaint, and, in doing this, he did not go to the Second Class Magistrate but to the Third Class Magistrate. Further, the complaint was made on a holiday when there would be difficulties about the plaintiff obtaining bail. The result was, that they were two days in the lock up and after their conviction four days in jail. The circumstances, I think, therefore, show that the defendant was actuated by spite or ill-will towards the plaintiffs, and by improper motives in bringing the prosecution. I accordingly concur that the plaintiffs are entitled to recover damages.

Decree reversed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 401 OF 1916.

October 27, 1920.

Present :— Mr. Shadi Lal, Chief Justice, and Mr. Justice LeRossignol.

JIWAN SINGH—PLAINTIFF—APPELLANT

versus

GARBHA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 3, scope of—Joint trial, when justified—Declaratory suit by reversioner in respect of several alienations—Alienees, whether can be made joint defendants.

The language of Order I, rule 3, Civil Procedure Code, is extremely wide, and even if there be only one question common to all the cases, that is sufficient to justify a joint trial. [p. 522, col 2.]

Plaintiff sued for a declaration to the effect that certain alienations shall not affect his reversionary rights. He impleaded all the alienees as defendants in the case :

Held, that there being at least one question common to all the transactions, namely, whether the plaintiff, by reason of his relationship to the alienor, was competent to maintain the suit it was not bad for misjoinder of parties. [p. 523, col. 1.]

Ralia Ram v. *Mulk Raj*, 54 Ind. Cas. 512; 1 L. 295; 2 U P. L R. (L) 29; 17 P. L. R. 1920; 24 P. W. R. 1920, followed.

Second appeal from the decree of the District Judge. Ambala, dated the 25th November 1915, reversing that of the Subordinate Judge, Ambala, dated the 31st of May 1915, decreeing the claim.

Lala *Ram Chand Manchanda* and Mr. *Muhammad Rafi*, for the Appellant.

Lala *Ganga Ram*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit in which the plaintiff, who alleged that he was a collateral of the alienor, sought a declaration in respect of eight different alienations that his reversionary rights should not be affected thereby. The first Court disposed of the suit on the merits and granted the plaintiff a decree. The defendants, alienees, appealed to the District Judge who accepted the appeal and dismissed the suit with costs throughout on the ground that there had been misjoinder of defendants and that the defect was not cured by section 99 of the Civil Procedure Code as, "on the whole," the learned Judge "was inclined to think that the defendants very likely had been prejudiced in their defence" by the misjoinder. Further, the learned Judge thought that the plaintiff, by joining all the alienees in one suit, had evaded the payment of the proper Court-fee.

On the question of misjoinder we are of opinion that the learned District Judge's decision was wrong. The language of Order I, rule 3, Civil Procedure Code, is extremely wide, and even if there be only one question common to all the cases, that is sufficient to justify a joint trial. In the

case before us there was at least one question common to all the transactions, namely, whether the plaintiff by reason of his relationship to the alienor was competent to maintain the suit Moreover, this question of law is concluded by the decision *Ralia Ram* v. *Mulk Raj* (1).

Even, however, if there had been misjoinder, we do not think that the lower Appellate Court would have been justified in dismissing the suit on that ground alone. It was not one of the written grounds of appeal to the lower Appellate Court that the misjoinder had in fact prejudiced the defence, and the reasons given by the learned Judge for his conclusion that the defence had been prejudiced are vague. Before us, also, the learned Counsel for the respondents is unable to point out to us in any palpable manner how the joinder prejudiced the defence.

With regard to the learned Judge's remark that a joinder of several causes of action is prejudicial to the fisc, we refer him to section 17 of the Court Fees Act which provides for the levy of Court fees on each subject comprised in a multifarious suit.

For these reasons, we accept this appeal, set, aside the order of dismissal of the suit, and remand the case under Order XLI, rule 23, Civil Procedure Code, to the District Court for disposal on merits. Costs in this Court shall be costs in the case. Court fee on the memorandum of appeal to be refunded.

Appeal accepted.

(1) 54 Ind. Cas. 512; 1 L. 295; 2 U. P. L. R. (L.) 29; 17 P. L. R. 1920; 24 P. W. R. 1920.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 120 OF 1919.

June 30, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

JANARDAN TRIMBAK GADRE—DEFENDANT—APPELLANT

versus

MARTAND TRIMBAK GADRE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Stay of execution, order granting—Appeal, whether lies.

An order granting a stay of execution is not a decree nor does it fall within the purview of section 47 of the Civil Procedure Code. No appeal, therefore, lies against such an order.

First appeal from the decision of the First Class Subordinate Judge, Poona in Suit No. 110 of 1918.

Mr. *H. G. Kulkarni*, for the Appellant.

Mr. *P. V. Nijsure*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff applied in *darkhast* No. 138 of 1918 for a stay of execution proceedings for the execution of the decree in Suit No. 69 of 1915, pending the disposal of his Suit No. 110 of 1918, in which he prayed for a declaration that the decree in Suit No. 69 of 1915 was void and incapable of execution as against him.

The First Class Subordinate Judge of Poona made an order for stay of execution in *darkhast* No. 138 of 1918 pending the disposal of the plaintiff's suit, on the plaintiff's furnishing security to the extent of Rs. 11,000.

The question now arises whether that is an appealable order. It can only be appealable if it is an order under section 47. In section 47 no mention is made of an order for stay of execution. The words which appear at the end of section 244 (*c*) in the Code of 1882, "or to the stay of execution thereof" have been omitted. It is argued that the words are omitted, because they are unnecessary, the question regarding the stay of execution being a question regarding the execution of a decree. Referance must be made to section 2 in which "a decree" is defined. It is provided that "decree shall be deemed to include the rejection of a plaint and the determination of any question within section 47,"

It is therefore, intended that orders made under section 47, as being in the nature of decrees, should be appealable as decrees. It is difficult to imagine that the Legislature thought that an order for the stay of execution would be considered in any way as in the nature of a decree and that, therefore, it should be deemed to be included within the term 'decree'. A question relating to the stay of execution is within the discretion of the Court to which the application is made, and it is certainly not desirable to extend the number of appealable orders unless there is distinct authority for such an extension.

I note this is the view taken by Mr. Mulla in his commentary, while the opposite view is taken by Mr. Woodroffe.

The appeal, therefore, must be dismissed with costs.

FAWCETT, J.—I concur. I would only add one further argument in favour of the view that no appeal lies. No doubt the words "questions relating to the execution of a decree" are very wide and *prima facie* cover a question regarding stay of execution of a decree. But in construing the words of section 47 the Court is entitled to have regard to the fact that the corresponding section of the old Code contains an express reference to a stay of execution, which has been omitted in the present section. I do not think that this omission is necessarily due to its being considered that the previous words of the section were wide enough to cover this particular question. I think it is very likely that it was considered that a suit would never be brought in regard to the mere question of a stay of execution and that it was, therefore, unnecessary to make the section cover such a question.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS No. 174 OF 1918.

July 22, 1919.

Present :—Mr. Justice Rutledge.

B. COWASJI AND OTHERS—PETITIONERS

versus

NATH SINGH OIL COMPANY LTD.

—RESPONDENTS.

Companies Act (VII of 1913), s. 162 (6), scope of —Winding up by Court, when to be ordered.

Though a Court is not bound to construe clause (6) of section 162 of the Companies Act as only covering grounds of a like nature with those specified in clauses (1) to (5) of the section, yet it will require grounds of a like magnitude before acting under the clause, and it is only in extreme cases that it will, at the suggestion of the minority, disregard the wishes of the domestic forum, and condemn the company to extinction. [p. 525, col. 2.]

Messrs. *Giles* and *Burjorji*, for the Petitioners.

Messrs. *Leutaigne* and *N. M. Cowasji*, for the Respondents.

JUDGMENT.—This is a petition by fifteen share-holders in the Nath Singh Oil Company, Limited, for an order winding-up the Company by the Court under section 162, clauses V and VI, of the Indian Companies Act, 1913

Previous to the hearing, petitioners' Advocates wrote to the respondents' Advocates (Exhibit A) that they did not intend to proceed with the ground under clause V, but wished to amend their petition by adding a new paragraph 23. At the hearing, petitioners' Advocate submitted that the proposed amendment should be allowed.

The amendment was opposed by the respondents' Advocate on the ground that it was contradictory to the allegations contained in the petition, and that it converted what was a subsidiary ground into the main ground, and that the respondents would be prejudiced in the conduct of the case, if the amendment were allowed. In my opinion, the admendment is not contradictory of the allegations in the petition, as it is quite possible that a Company might be unable to pay its debts, and yet have very valuable assets to realize. Also, the bulk of the allegations in the petition in no way relate to the financial position of the Company, but to the conduct of Baij Nath Singh, the predominant share holder, which, if relevant at all, could only be relevant under clause VI of section 162. Without the amendment, it would be impossible for the

Court to try the real issue between the parties. It would not be in the interests of justice to dismiss the petition on such a technical ground only to have the same presented afresh with the consequent delay and expense. I accordingly allowed the amendment. As amended, it is submitted that none of the allegations in the petition would justify the Court in making the order, as clause VI must be read *ejusdem generis* with clauses I to V. If clause VI must be so read, I agree; for it cannot be contended that any of these allegations are of a similar nature to that given in any of these first five clauses. In support of this objection it is argued that the words of clause VI of section 162 are identical with those of section 79 of the English Companies Act of 1862, and section 129 of the English Act of 1908, and this Court should follow the Engligh decisions on the subject.

The *ejusdem generis* doctrine laid down by Lord Cottenham in the *Agricultural Cattle Insurance Co., In re* (1), in construing similar words in the Joint Stock Companies Winding up Act of 1848, has been followed by Lord Cairns in the *Suburban Hotel Co, In re* (2), in dealing with a petition to wind-up under the fifth head of section 79 of the Companies Act of 1862. It is a decision of the Court of Appeal in which Turner, L. J., concurred with the conclusion and the reasons, though he died before judgment was delivered. Lord Cairns was prepared to admit a kind of exception to the rule in cases where the whole substratum of the Company had gone. I have been referred by both sides to a great number of decisions, and I think the trend of the decisions is an attempt to get away from the *ejusdem generis* doctrine which was found to act as a fetter on the discretion which the "just and equitable" clause gave to the Court. The fact that long ago the Engligh Courts were compelled to recognise exceptions to the strict rule in cases where the substratum of the company had gone, or where it was impossible to carry on the business of the Company by reason of a deadlock, shows that almost from the first statement of the *ejusdem generis* doctrine the Courts were prepared to refuse to be bound by it, for it cannot be contended that either of the two exceptions cited were of the same nature as the grounds previously specified in the section. The modern view of the English Courts is, in my opinion, accurately stated by the late Master of the Rolls, Lord Cozens-Hardy, in *Yenidje Tobacco Co., In re* (3): "It has been urged upon us that, although it is admitted that the 'just and equitable' clause is not to be limited to cases *ejusdem generis*, it has nevertheless been held, according to the authorities, not to apply except where the substratum of the Company has gone, or where there is a complete deadlock. Those are the two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the 'just and equitable' clause." A perusal of recent decisions *Bleriot Manufacturing Aircraft Company, Limited, In re* (4), *American Pioneer Leather Co., In re* (5) and the *Newbridge Sanitary Steam Laundry, In re* (6) leads me to the conclusion that the Courts of the United Kingdom have ceased to observe the *ejusdem generis* rule or have so widened it, that it has ceased as such to be a fetter upon the discretion of the Court. The Indian Companies Act of 1882, by section 128, clause (*e*), gave the *ejusdem generis* doctrine the force of law in India by adding the words "whenever for any reason of a like nature." These words are omitted from section 162, clause VI, of the Indan Companies Act, 1913, which follows the words of the English Acts. And, in refusing to read clause VI *ejusdem generis* with the preceding five clauses, I am supported by the decisions of the Courts of the United Kinkdom to which I have already referred. Though the Court is not, in my opinion, bound to construe clause VI as only covering grounds of a like nature with those previously specified, a perusal of the cases brought under the "just and equitable" clause shows that it has always required grounds of a like magnitude, and that it is only in extreme cases that it will, at the suggestion of the minority, disregard the wishes of the

(1) (1884) 84 R. R. 41; 1 Mac. & G. 170; 1 H. & Tw. 227; 18 L. J. Ch. 261; 41 E. R. 1228.

(2) (1867) 2 Ch. App. 737; 36 L. J. Ch. 710; 17 L. T. 22; 15 W. R. 1096.

(3) (1916) 2 Ch. 426 at p. 432; 86 L. J. Ch. 1; 115 L. T. 530; 60 S. J. 707; 32 T. L. R. 709.

(4) (1916) 32 T. L. R. 253.

(5) (1918) 1 Ch. 556; 87 L. J. Ch. 493; 118 L. T. 695.

(6) (1917) 1 Ir. R. 67.

domestic forum, and condemn the Company to extinction.

The grounds relied on by the petitioners have been ranged under eleven heads, *viz* :—

(1) Juggling with shares so as to render the provision limiting the voting of vendor's shares abortive.

(2) Juggling with the constitution and personnel of the Board of Directors, so as to remove any director who showed independent tendencies.

(3) Vendor's conduct as regards the Managing Directorship.

(4) Corrupt return to the vendor of 17 well-sites in 1916 which he had agreed to sell to the Company.

(5) Abuse by the vendor of position as Managing Director and Company's agent to gain personal advantage at the expense of the Company by using the Company's tools and materials.

(6) The carrying on by the vendor of a separate oil-mining business in breach of his agreement.

(7) Breach of undertaking by the vendor to protect the Company's interest in regard to 12 oil well-sites transferred by the vendor to the Company, and active opposition by vendor to the Company's interests in regard to such sites.

(8) Wrongful substitution of well-site No. 38 for No. 43.

(9) Efforts of vendor to get rid of the managing agents in order to have a free hand.

(10) Efforts to remove the registered office of the Company to Yenangyaung for the same purpose.

(11) Wrongful withholding from the Board of Directors and the managing agents of accounts of stores since 1st June 1918.

It is not alleged that each of these grounds is sufficient in itself. The substantive charge is the fourth relating to the 17 well sites. The fifth and sixth directly spring from it. Most of the other grounds are rather facts qualifying this main charge than distinctive substantive charges. It is necessary to examine the matter of the 17 well-sites with some detail.

Five days before the registration of the company, the vendor Baij Nath Singh entered into an agreement with the first petitioner, B. Cowasji, as trustee for the Company. A certified copy of the agreement is attached to the petition on the file. It is dated 25th May 1908. It recites that the vendor has, (*a*) a number of oil wells some of which he has worked, and others are lying idle for want of capital, and (*b*) certain well-sites about which there are revenue proceedings. He agrees *inter alia* to sell 44 oil wells, 13 oil well-sites, the numbers and locality of which are stated in the first schedule, and one well-site subject to Revenue Case No. 150 of 1903 of Yenangyaung, that is, in all 58 wells and sites. He covenants to give a good title. The consideration is to be Rs. 51,720 for each well or site when duly transferred to the Company, to be satisfied by allotment to vendor of 5,172 fully paid shares of rupees ten each. Vendor was to retain possession until incorporation, and adoption of the agreement. The vendor further agreed to transfer the 12 well-sites mentioned in the second schedule as the subject of litigation with the Burma Oil Company in revenue proceedings without getting any shares in payment. These are referred to, for short, as the 12 free sites and are the subject of the 7th ground of complaint. The Nath Singh Oil Company was incorporated on the 30th May 1908. The Memorandum of Association specifies, as the first object of the Company, to adopt, carry into effect and seal the agreements mentioned in Article 3 of the Articles of Association. The capital of the Company is stated to be Rs. 40,00,000 divided into 4,00,000 shares of Rs. 10 each. The chief object of the Company is stated to be to acquire and develop Baij Nath Singh's properties in Yenangyaung consisting of 58 valueable oil wells and well sites.

For some reason the vendor did not transfer the 58 wells and sites as agreed but only 36 in 1908, for which he was allotted 1,86,192 shares by way of payment. Shares to the extent of 51,931 were allotted to various applicants in 1908, and since then no allotment has been made. Of the proceeds of those cash shares one lakh went to the vendor under the agreement of 25th May 1908 and the balance of over four lakhs constituted the working capital of the Company. The agreement was adopted without modification at the first Directors' meeting on 30th June 1908. The reason of the vendor's failure to convey the balance of 22 well-sites to the Company is not explained ; but I think we may take it that the correct reason is as stated by

Mr. Paton at the Directors' meeting on 29th November 1911, (Exhibit F 2) that "the transfer of the sites referred to has all this time been excused on the allegation that they were resumed sites, and could not be transferred to the Company on that account." At the same meeting the vendor stated that he had transferred 24 well-sites to the Company's name on the 8th December 1911; that they were all resumed sites, and that the resumption was revoked about September 1911; that as to the sites not yet transferred, all were in dispute except one No. 38 settled in his favour, but he expected four named ones to be decided by the 12th January 1912, and that, as regards the remaining five sites, he could not say if he ever could tender them, but would do so if he obtained them. This is an important statement. He tells the Board that there are five sites which he may never be able to transfer. He has already had 24 sites put into the Company's name, and in these 24 are included 12 which had been awarded to him by the Revenue Officer in the litigation with the Burma Oil Company. The Board resolved to accept 12 of the tender 24 sites as satisfaction in respect of the 12 free sites, but declined to accept the other 12 sites until (*a*) the date of resumption, (*b*) the validity of the title, and (*c*) the present value were ascertained. In ascertaining the present value, the Board stipulated that due regard was to be had to the comparative value of the sites which the vendor was unable to deliver. The vendor objected to any inquiry as to the value, but agreed to other parts of the resolution. The Board at this time consisted of Messrs. Cowasjee and Paton, representatives of the cash shareholders, and the vendor, and it is noteworthy that they do not suggest that they would be justified in refusing to take delivery of the well-sites by reason of the delay of over three years, thus leading one to infer that the delay was due to causes beyond the vendor's control. At the end of 1911, the Board was increased to five, Messrs. Desai and Pandia coming on as additional members and Mr. Turner taking the place of Mr. Paton.

In the latter part of 1911, Mr. Desai (afterwards a Director) and Mr. Warren of the managing agents' firm visited Yenangyaung and made a report, part of which is put in as Exhibit 4-A. In this report Messrs. Desai and Warren state: "The Company's manager and field manager, besides others at Yenangyaung well acquainted with the field, are of opinion that out of the 24 sites said to be transferred by Mr. Nath Singh on the 8th December 1911 only Nos. 2911, 3404, 3408 and 3438 (one of the 12 free well-sites) are of any value, a value which is rather doubtful. The rest are of no value at all." This information was no doubt in the minds of Messrs. Cowasji and Paton when they resolved, as we have seen in Exhibit F 2, and also explains why the Board seems to have taken no steps to carry out that resolution, and dispose of this question during 1912. Their failure in this respect is mainly responsible for much of the confusion and irregularity that subsequently ensued.

Both sides agree that difference arose in the year 1912 between Mr. Cowasji and the vendor. Mr. Cowasji is the largest of the cash share holders, having invested nearly a lakh of rupees in the Company's shares. He was active in the formation of the Company, and acted as Chairman of the Board of Directors from the first. He was guarantor of the vendor's account with the Bank of Bengal to the extent of some two and a half lakhs. Mr. Cowasji withdrew his guarantee, with the result that the Bank required payment, and the vendor was in financial straits, and had to borrow at high interest from Mr. Abba and a Mr. Jamal. Mr. Cowasji may have been perfectly justified in withdrawing his guarantee, but the vendor, who attributed his financial difficulties to Mr. Cowasji's action, not unnaturally determined to get rid of him and the other Directors who supported him. I should add that although the vendor had a vast predominance in shares, by clause 2 of the basic agreement, for voting purposes the vendor's shares only carried one vote for ten shares whilst in the hands of the vendor. This provision gave the cash shareholders a substantial majority in voting power over the vendor. The result of the vendor's financial difficulties was, that some 30,000 shares found their way into Abba's name on the register, and by the latter's help the vendor got the Company in general meeting to increase the number of Directors to ten, and to select as new Directors five

of his nominees, including Mr. S. S. Halkar, who seems from the minutes, and the Court records in the Abba and Jamal litigation, to have acted for some time as the vendor's legal adviser. From May 1913, the control of the Company passed out of the hands of the cash share-holders to the nominees of the vendor. The next step of the vendor's party was to reduce the Board of Directors from ten to five, and eliminate their opponents. This was done about July 1913. The vendor finally ejected Mr. Cowasji from the Board in February 1914.

Though the vendor had thus got rid of all representatives of the cash share-holders, he still found himself in the toils of his creditors, Messrs. Abba and Jamal, both of whom by this time he had placed on the Board of Directors. It is admitted that he entered into an agreement purporting to sell his shares to them at a rupee a share, and that in 1916 litigation was going on between them, the vendor contending that the transaction was one of mortgage, and not a sale. The vendor became Managing Director under under Article 72 from the beginning, but ceased in November 1911 when his mortgage shares ceased to be registered in his name, and he did not again become Managing Director till 4th June 1913.

Though the Board refused to accept transfer of the balance of the 12 well sites in 1911 and 1912, drilling on these sites started early in 1913 with the Company's materials and tools and at their expense. The vendor says this was done at the instance of the Field Manager and it is pointed out that he was not then Managing Director. He was, however, the only Director resident at Yenangyaung and I have no doubt that the work was done at the vendor's instance, and under his directions. This drilling seems to have gone on during 1914 and 1915 with the result that on 9th December 1915 it was brought to the Board's notice that a number of the unaccepted well-sites had not only been drilled, but were producing. All this has an important bearing on the new Board's action in dealing with the 17 well-sites. We have seen that the vendor was anxious to transfer the well-sites and get his shares in 1911-12. I am asked to believe that he was equally anxious in 1916. This I cannot accept. Vendor's agreement with Abba and Jamal made it unsafe and impolitic for him to get any fresh shares until the question of the agreement was finally decided. Abba and Jamal were naturally keen to have the well-sites accepted and the shares issued to the vendor. The question was postponed by the Board on the 6th January 1916. (*Vide* Exhibit B 2). Vendor's brothers put in their claim that the well-sites were joint Hindu family property on the 11th January 1916 (exhibit B-3). It was brought up by vendor asking that shares be issed to him for the 17 well-sites, at the Board meeting of 29th January 1916. This I think, he did in pursuance of his agreement (Exhibit F in Civil Regular No. 62 of 1916) with Abba and Jamal, but it is not material whether he was obliged to do so or not. Messrs. Abba and Jamal voted in favour of this being done. Messrs. Halkar and Naikwara voted against it, and by Mr. Halkar's casting vote it was decided that the 17 well-sites be not accepted, and that operations on them be suspended. I am asked to hold that, in doing so, Messrs. Halkar and Naikwara were merely carrying out the policy of the earlier Board, and opposing the interests of the vendor on behalf of the Company. But some of the sites had now been proved to be valuable as they were drilled and producing. If these two Directors, who were elected as nominees of the vendor in this important matter, were acting contrary to the wishes of the vendor, we would expect that they would meet with the fate of Mr. Cowasji and his friends at the next meeting for the election of Directors. But this fate did not overtake them. They were duly elected. Messrs. Abba and Jamal brought up the question again on the 29th February 1916 (Exhibit C-2), but they are again worsted by Mr. Halkar's casting vote. At the Board meeting of 18th May 1916, by his casting vote Mr. Halkar secured the relection of the vendor as Managing Director, and at the meeting of 29th May 1916, the vendor repaid the compliment by seconding Mr. Naikwara's motion that Mr. Halkar be Chairman of the Company for the ensuing year. At the annual general meeting of

20th May 1916, we find Mr. Halkar as Chairman ruling that Messrs. Abba and Jamal cannot vote in respect of shares registered in their names, because there is litigation over those shares, and thus be prevented the control of the Company passing from the vendor's hands to those of Messrs. Abba and Jamal. At the same meeting, Mr. Naikwara is relected a Director on the proposal of Mr. Halkar, seconded by the vendor. From all this it seems clear that in rejecting the well-sites and refusing to issue shares, Messrs. Halkar and Naikwara were carrying out the wishes of the vendor, and were primarily concerned in assisting him in his struggle with Messrs. Abba and Jamal At the Board meeting on 24th May 1916 (Exhibit C-7), Messrs. Naikwara and Halkar, by means of Halkar's casting vote, decided that the 17 well-sites, and those still to be tendered be not accepted at the price specified in the principal agreement, and on 1st July 1916 by a like vote they caused the title-deeds of the 17 well-sites to be returned to vendor's Advocates Messrs. Cowasji and Das with the intimation that the Company did not relinquish possession. The meaning of this surious provision is explained in Mr. Halkar's first resolution, (Exhibit C-9), at the meeting of 9th September 1916, as a lien for expenditure on the sites till settlement of accounts,

In consequence of the Board's rejection of the well-sites and their return of the grants to the vendor, the vendor applied for their transfer before the Warden of the oil fields from the Company's name to the vendor's, and the field manager Willes consented to this being done on behalf of the Company. * * * It does not seem that even now the petitioners are willing that the 17 well sites should be taken over. That being so, it is difficult to hold that the vendor has committed such a breach of the original agreement in this respect, as would justify the Court in winding-up the Company. Proir to May 1913, while the petitioners controlled the Company they had refused to take over the sites, and failed to take any steps to get the price lowered on any ground of delay, in the belief that the sites were of little or no value. Subsequently, when vendor got control of the Company, and the sites were proved to be of value, the vendor got his nominees to adopt the same policy, and to refuse to take the sites. Finally, he got the Company, after the petition was filed, to endorse this action at the general meeting of 19th August 1918. (Exhibit E-3). However improper and reprehensible the action of the vendor may have been in many respects throughout the transaction, I do not consider that it constitutes an adequate ground for winding-up the Company under section 162, clause VI. This is the main ground in the petition.

The fifth ground charges the vendor with abuse of his position as Managing Director and Company's agent to gain personal advantage at the expense of the Company by using the Company's materials and tools to drill and equip the wells which are now his property. I have already held that the drilling was done at the instance of the vendor and under his directions, as he was the only Director resident at Yenangyaung. I do not see anything wrong or adverse to the Company's interests in demonstrating the value of these properties. At this time there is no indication that the vendor had formed the design of drilling the wells at the Company's expense, and then getting the Company to reject them so that he could carry on an oil business independent of the Company. He does not dispute his liability to pay for the materials and tools used, but claims that the Company has got more than the value of these in the oil won before 19th July 1916. This is a matter of accounts, and not a ground for winding-up. It is argued for the respondent, B. N. Singh, that he has committed no breach of clause V of the principal agreement as there is a necessary inference that carrying on business has no reference to the well sites named therein. I can discover no such inference in the agreement, and the words of the clause are in no way ambiguous. It is further urged that as the Company failed to take the wells tendered, the vendor was forced to work the wells to save serious loss, pending settlement of the question. This might be important, if I were assessing the damages. On the facts before me, there seems to be a substantial breach of clause V,

but such a breach, in my opinion, does not justify a winding up order under section 162, clause VI.

The seventh ground relates to vendor's action in regard to the 12 free sites which we have seen were accepted with the concurrence of vendor on the 29th December 1911. (Exhibit F-2.). Vendor obtained from the Board the title deeds of these well-sites for the purpose of protecting the Company's interests in certain litigation with the Burma Oil Company, Limited. Vendor claimed the wells as his own in his written statement, and endeavoured to get the warden to transfer the wells to his name. It is pleaded for respondent that his claim in the written statement was a *ruse de guerre* to defeat the claim of the Burma Oil Company. This explanation might be of some weight if the vendor had offered it to the Directors at the meeting of the 17th March 1917, (Exhibit C 23), but, instead, he states that his undertaking was to make over these 12 well-sites on the Company taking over and issuing shares for all the wells. With justice the vendor is accused of the grossest breach of faith in this matter. But at most it is a fraud that did not succeed, and as such it is not a ground for winding-up the Company under section 162, clause VI.

The eighth ground relates to the substitution of well No. 38 for No. 46. A great number of Exhibits has been put in regarding this question and the time spent on it was out of proportion to its importance. Both wells are specified in Schedule I of the principal agreement, but well No. 46 was delivered to the Company, and the vendor got 5,172 shares in payment in 1908. One Po Ya claimed a half share in this well, and filed a suit early in 1910 which vendor compromised in May 1910. The well was given to Po Ya, and he was to pay vendor Rs. 22,500. Vendor said nothing to the Board about the well till August 1920, when he mentioned that there was a claim by a Burman to this well, but said nothing about the compromise as he certainly should have done. Mr. Paton, a Director, heard about the compromise in March 1917, and no doubt was not favourably impressed by the conduct of his co-Director. Vendor offered either to buy out Po Ya, or to present another well in lieu of No. 46 (Exhibit 3 C). Mr. Cowasji was for accepting one or other alternative, but Mr. Paton was not satisfied. I need not go in detail into the Board's attempts to deal with the cancellation of the shares issued in respect of No. 46 which do not seem to have been very successful. They resolved to charge him interest on the face value of the shares, *viz.*, Rs. 51,720. This they probably would have been entitled to do, if they had resolved that the issue of 5,172 vendor's shares in respect of well No. 46 was for no consideration, or for a consideration that had totally failed, and must consequently be charged for like other cash shares. Ultimately, the new Board (Halkar's) agreed to accept well No. 38 in lieu of No. 46 and abandoned the claim for interest from the vendor. There is nothing before me to show that well No. 38 is less valuable than well No. 46. If vendor had, like an honest man, informed the Board of the claim brought in 1910, no one could have taken serious exception to the substitution of one well for another. But neither this nor the vendor's concealment of the Burman's claim, and the compromise, constitutes a ground for winding-up under clause VI of section 162.

As regards the ninth and tenth grounds, the managing agents, since the formation of the Company, have been Messrs. Wightman & Co., who also act as secretary to the Company. One of the first Directors, Mr. Paton, was a member of this firm and two of the petitioners, Messrs. Nuding and Look, are members of the firm. The vendor regards the managing agents as hostile to him, and has used his best endeavours to have them removed. His direct efforts having failed, he carried a resolution removing the registered office of the Company from Rangoon to Yenangyaung. But, as this involves an alteration in the memorandum of association, it is inoperative without the sanction of the Court, which has not yet been asked for. However ill-advised the vendor's actions may have been in these respects they do not seem to be going beyond his legal rights as the predominant shareholder and as such controller of the Company.

COWASJI v. NATH SINGH OIL COMPANY LTD.

As regards the eleventh ground, the vendor having failed directly to rid himself of the managing agents has forced them to give notice of resignation by reducing the Rangoon office to a nullity. It is allegred by the petitioners that since 1st June 1917 no stores account has been furnished to the managing agents, and since 1st June 1918 no account of cash transactions has been furnished. The facts are not denied by the respondent, and to my mind constitute one of the most serious charges against the vendor. Whether he likes it or not, Rangoon is the headquarters of the Company where the Board of Directors meets, and where the secretariat office of the Company is situated. To cut off the head office from all sources of information regarding the assets and expenditure of the Company, is so indefensible that, if only the vendor's interests were concerned, I should be inclined to direct that the Company be wound-up, as the legal remedy for this flagrant abuse of power is not very clear, and probably not very effective. There are, however, a large body of share-holders unconnected with the vendor who do not ask for the extinction of the Company. Under the circumstances, to extinguish a flourishing Company would require the most abundant justification. And, bad as the vendor's conduct in this respect is admitted to be, I do not think that it is sufficient.

I shall deal very briefly with the first three grounds as it is not seriously argued that by themselves they would justify an order for winding up.

As regards the juggling with shares it is pointed out that the vendor has placed 101,000 shares in his wife's name and 8,500 in his brother's name in order to evade the limitation in voting power on vendor's shares held by vendor. Vendor was restricted from alienating shares for the first three years after incorporation. After the lapse of this period he could transfer shares without restriction. And it is pointed out that the vendor and his family hold more shares in the Company to-day than at the time of incorporation. This strongly points to his confidence in the Company, as well as the fact that he has not sought to make money out of the public after the usual manner of the unscrupulous large vendor share-holder. I am asked to hold that the wife and brother are *benami* holders of these shares for Baij Nath Singh, the real holder. If this were an application to decide what voting power the wife's and brother's shares carried, I would decide the question. But I decline to do so in the present proceedings, as the vendor was not acting unlawfully in transferring his shares at the time that he did, and the question cannot affect the application now made.

As regards juggling with the Board of Directors, it is admitted that vendor used his influence to increase and decrease the number of the Board, to outvote, and get rid of Directors who did not vote according to his wishes, and that he caused 500 of his shares to be registered in the name of one of his nominee Directors. I was asked to infer that the same thing had happened as regards Halkar's and Naikwara's shares. With regard to the latter, after a reference to the transfer register, and the several different periods when shares were registered in their names, or transferred by them, I am unable to draw any such inference. I am referred to vendor's conduct in making Willes, the field manager, a Director after he had been dismissed by the Board for alleged misconduct, and in making Mahabir Singh a Director while occupying the relatively menial position of a storekeeper at the oil fields. All this might justify a Rangoon share holder losing confidence in the vendor's intelligence or business integrity. But the Court has no more disciplinary powers over a share-holder in exercising his right of electing Directors, than over parliamentary electors in choosing members of the Legislature. In both instances, they may be swayed by unworthy motives, and may not choose fit and proper representatives, but for such action there is no legal redress. In my opinion, the facts proved in connection with the second charge form no ground for winding-up. There is nothing in his acting as Managing Director when his period of office had expired, or in his acts as Managing Director apart from those already considered which would justify an order for winding-up.

I am asked by the petitioner's Advocate

to consider the cumulative effect of all the charges admitted or proved, which, if too weak singly, are sufficient when taken together. It is also urged that, if recourse is had to suits, some eight suits would be necessary to obtain the redress claimed. Reference has been made to Lord Davey's judgment in *Burland* v. *Earle* (7) and it is argued that internal fraud, such as unconscientious conduct of the Directors in conducting the Company's business, would not give a right of action to the petitioners who are minority share holders, and consequently if they cannot invoke section 162, clause V', they have no remedy. But what Lord Davey had in mind in fixing the limits of the dissentient share holders' rights to sue was that all other questions had to be settled by the domestic forum. He was not contemplating that conduct which, though not fraudulent enough or unconscientious enough to justify a separate suit, would be enough to justify the much more drastic and extraordinary remedy of extinguishing the Company. None of the cases cited in which orders for winding up have been granted on the petition of minority share-holders bears any resemblance to the present.

Lack of precedent is not a reason for refusing to act, but it suggests greater care before acting. Associations with limited liability have been constantly growing in number and power in the commercial life of the United Kingdom during the past eighty years. If facts similar to those in the present case constituted adequate ground for windidg up a Company we should certainly expect to find many such cases reported. That there are not such cases is, because winding up is an extraordinary remedy to be resorted to in extreme cases to put an end to an intolerable situation.

Taking all the facts into consideration, I am not satisfied that it would be just and equitable to hold that the Nath Singh Company, Limited, be wound-up. The petition is accordingly dismissed. But the conduct of Baij Nath Singh in connection with a great many of the matters in issue has been so improper and unconscientious that I depart from the ordinary rule that costs follow the event, and I direct that each party bear their own costs. Mr. Clay's costs are to be paid by the Company.

Petition dismissed.

(7) (1902) A. C. 83; 71 L. J. P. C. 1; 50 W. R. 241; 85 L. T. 553; 18 T. L. R. 41; 9 Manson 17.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1094 OF 1919.

July 21, 1920.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

W. KRISHNAMACHARRY—DEFENDANT—PETITIONER

versus

W. KOMALAMMAL—PLAINTIFF—RESPONDENT.

Presidency Small Cause Courts Act (XV of 1882), s. 19 (g)—Suit to recover stones of well wrongfully removed, whether cognisable by Small Cause Court.

A suit to recover certain stones forming part of a well, and said to have been wrongfully removed, or their value, does not fall under clause (*g*) of section 19 of the Presidency Small Cause Courts Act, and is cognizable by a Presidency Small Cause Court, even though, in order to dispose of the suit, it is necessary to determine the question of title to the well. [p. 533, cols. 1 & 2.]

Petition, under section 115 of Act V of 1908, and section 107 of the Goverment of India Act, praying the High Court to revise the decision of the Court of Small Causes, Madras, in Full Bench Application No. 156 of 1919, in Small Cause Suit No. 7201 of 1919.

FACTS appear from the judgment.

Messrs. *S Duraisawmy Aiyangar* and *S. Rangasami Aiyangar*, for the Petitioner.—The suit falls under clause (*g*) of section 19 of Act XV of 1882. The defendant claimed title to the well and the site on which it stood and it is necessary to determine that question to dispose of the suit. In a case under the Provincial Small Cause Courts Act it was held by this Court that where the suit involved not incidentally but necessarily the determination of a question of title it fell under the analogous provision of Article 11 of Schedule II of that Act. *Vide Tirupati Razu* v. *Vissam Razu* (1).

(1) 20 M. 155; 7 Ind. Dec. (N. s) 109.

CHARANDAS CHATURBHUJ v. CHHAGANLAL.

Mr. *K. Rajah Aiyar*, for the Respondent.—The suit is only for recovery of moveables. Its character is not altered by the Court having to adjudicate on the question of title to the wall. It satisfies the requirements necessary to bring it within the jurisdiction of the Small Cause Court. The question of title is not interwoven with the relief claimed. See *Puttangowda Mallangowda Patil* v. *Nilkanth Kalo Deshpande* (2), *Venkatarama Chetty, In re* (3), *Chintala Ragava Reddi* v. *Chintala Krishna Reddi* (4) and *Vema Rangiah Chetty* v. *Vajravelu Mudaliar* (5).

JUDGMENT.—The question for our decision is, whether the Small Cause Court had jurisdiction to dispose of this case or whether it falls under clause (*g*) of section 19, Presidency Small Cause Courts Act (XV of 1882).

We agree with the learned Judges of the Small Cause Court that it does not. The suit as framed is certainly not one for the determination of a right or interest in immoveable property but simply to recover certain stones forming part of a well and said to have been wrongfully removed, or to recover their value. Defendant claimed title in the well, and the land in which it was situate, and it was doubtless necessary to determine this question of title in order to dispose of the suit. But we do not think this affects the character of the suit or brings it within the scope of section 19 (*g*), *vide* the decision of a Full Bench of the Bombay High Court, *Puttangowda Mallangowda Patil* v. *Nilkanth Kalo Deshpande* (2).

We have been referred to a case of this Court reported as *Tirupati Raju* v. *Viswam Raju* (1). The suit was of a totally different nature and appellant relies simply on a single phrase of the judgment, in which the learned Judges speak of the suit as involving 'not incidentally but necessarily' the determination of a title to land and as consequently falling under Article 11 of Schedule II of the Provincial Small Cause Courts Act, which corresponds to section 19 (*g*). With all respect, we have great difficulty in understanding the distinction suggested: unless the disposal of a suit necessarily involves the determination of a title it is difficult to see why the title should be determined at all. But whatever may have been the meaning of the learned Judges, the practice and the current of decisions in Madras have been consistent with *Puttangowda Mallangowda Patil* v. *Nilkanth Kalo Deshpande* (2) and we need only refer to three decisions of this Court:—*Chintala Ragava Reddi* v. *Chintala Krishna Reddi* (4), *Vema Rangiah Chetty* v. *Vajravelu Mudaliar* (5) and *Venkatarama Chetty, In re* (3).

We consider that the Small Cause Court had jurisdiction and we dismiss this petition with costs.

M. C. P.

Petition dismissed.

(2) 20 Ind. Cas. 974; 15 Bom. L. R. 773; 37 B. 675.
(3) 51 Ind. Cas. 512; 7 L. W. 610.
(4) 16 Ind. Cas. 201; 12 M. L. T. 203; (1912) M. W. N. 810; 23 M. L. J. 193.
(5) 40 Ind. Cas. 655; 6 L. W. 80.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 23 OF 1920.

SUIT No. 1727 OF 1919.

August 9, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

CHARANDAS CHATURBHUJ—PLAINTIFF

versus

CHHAGANLAL PITAMBARDAS—DEFENDANT

AND

ALIBHOY KHUSAL 3RD PARTY—RESPONDENTS.

Letters Patent (Bom.), cl. 15—"Judgment," meaning of—Bombay High Court Rules, rr. 130, 131—Third party proceedings—Order refusing directions, whether judgment—Appeal, whether lies.

The word "judgment" in clause 15 of the Letters Patent means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined. [p. 535, col. 1.]

An order refusing directions in third party proceedings under rules 130 and 131 of the Bombay High Court Rules is not a "judgment" within the meaning of clause 15 of the Letters Patent of that High Court and is not appealable under that clause. [p. 535, col. 1.]

CHARANDAS CHATURBHUJ *v.* CHHAGANLAL.

Appeal against an order of Mr. Justice Pratt.

Messrs. *Coltman* and *Mirza*, for the Appellant.

Mr. *Jinnah*, for Respondents No. 1.

Mr *Munshi*, for Respondent No. 2 (Third Party).

JUDGMENT.

MACLEOD, C. J.—The plaintiff filed this suit against the defendants for damages for breach of contract because the defendants failed to take delivery of 100 bales of cotton which they had contracted to buy for the September delivery 1918. On the 8th January 1920 leave was given to the defendants to issue a third party notice against one Alibhoy Khushal. The defendants claimed to be indemnified by Alibhoy Khushal in respect of the breach of the contract with the plaintiff, because Alibhoy surveyed the said bales and failed to take delivery of the same from the plaintiff under the delivery order which had been sent to him. The third party entered an appearance on the 8th of March. The defendant then took out a summons for directions. The third party proceedings have been introduced into this Court by rules, while the Code of Civil Procedure makes no mention at all of such procedure.

Rule 130 is as follows :—

"If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court or Judge for directions, and the Court or Judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit as the Court or Judge may direct; and, if not so satisfied, may pass such decree as the nature of the case may require in favour of the defendant giving the notice against the third party."

Again, under rule 131 :—

"The Court or a Judge upon the hearing of the application mentioned in rule 130 may, if it shall appear desirable to do so, give the third party liberty to defend the suit, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken documents to be delivered, or amendments to be made, and give such directions as to the Court or Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the decree in the suit."

The first direction that was sought in the summons was that the third party, Alibhoy Khushal, should be made a party defendant to the suit and the second that he should be ordered to file his written statement within a fortnight or such other time as this Honourable Court might deem fit, and that he should also be ordered to file his affidavit of documents. These directions ought to have been asked for, if at all, under the Code, on the ground that Alibhoy was a necessary party in the trial of the action between the plaintiff and the original defendant. As this was a summons for directions issued after the third party had appeared on the third party notice, the only directions that could be asked for were those directions which can be given by the Court under rules 130 and 131.

The directions under these rules which were asked for were as follows:—"That the said third party Alibhoy Khushal be at liberty to appear at the trial of this suit and the questions in issue between the defendant and the third party be tried simultaneously with the questions in issue between the plaintiffs and the defendant."

The learned Judge in dealing with the summons said that he was not concerned with the defendant's contention, that as plaintiff had treated Alibhoy as the person responsible for taking delivery he, the defendant, was exonerated and he considered the question, whether the defendant if liable had a right to indemnity or contribution against Alibhoy.

In considering the facts of the case, the learned Judge came to the conclusion that there was nothing in the rules of the Bombay Cotton Trade Association to support the contention that the defendants

had any right to contribution or indemnity against the third party, and, therefore, declined to give directions.

It is contended that no appeal lies against an order refusing directions, on the ground that it is not a 'judgment' within the meaning of clause 15 of the Letters Patent. The meaning of the term 'judgment' has often been considered in this Court, and the following definition in *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1) has been consistently approved of by all the High Courts. Couch, C. J., in the course of his judgment, said :—

"We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined."

I find that the Judge did not consider, on the facts placed before him, that the questions in issue between the defendant and the third party should be tried in the suit which had been filed by the plaintiff against the defendant. Nothing has been decided which affected the merits of those questions between the defendant and the third party, by determining any right or liability between them. This is purely a question of procedure; furthermore, a procedure which is peculiar to this High Court under its own rules. There may be cases where the procedure may be of advantage to the parties, and may save expense, but, as far as my experience goes, much time is wasted and more money is spent than is saved in discussing whether the procedure should be applied or not. However, we are of opinion that the order refusing directions under rules 130 and 131 is not a judgment within the meaning of clause 15 of the Letters Patent, and, therefore there is no appeal. The appeal is dismissed with costs.

Appeal dismissed.

(1) 8 B. L. R. 433 at p. 452; 17 W. R. 364.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 590 OF 1919.

March 16, 1920.

Present:—Mr. Justice Rigg.

G. H. PAUL—APPLICANT

versus

T. THOMSON AND OTHERS—RESPONDENTS.

Will—Probate—Burden of proof—Suspicious circumstances.

Where circumstances exist in connection with a Will which, in Probate proceedings, excite the suspicion of the Court it is for those who propound the Will to remove the suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only when this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the Will. [p. 537, col. 2.]

Application for administration, with the Will annexed, of the estate of one T. M. T. Thomson, deceased.

Messrs. *Villa* and *McDonnell*, for the Applicant.

Mr. *Rutledge*, for the Crown.

Mr. *O. Ray*, for the Respondent.

JUDGMENT.—The only question for decision is, whether a Will, which is said to have been executed by T. M. T. Thomson on the 15th August 1919, is or is not his Will. The contention that the Will may have been made under undue influence or at a time when Thomson was not of sound mind has been abandoned. Deceased, who was of Canadian or American origin, came to Burma about forty years ago, and was for some time a driver in the Burma Railways. He never returned to America, and died in Rangoon on the night of the 21st August, or the early morning of the 22nd. He was about eighty-nine years of age. After he left the Burma Railway Company's employment, he became a money-lender. About twenty years ago, he went through the Burmese form of marriage with Ma Shin Hla at Leingon village, and lived there with her for some time. He came back to Rangoon, but seems to have left Ma Shin Hla behind at her village. Ma

PAUL v. THOMSON.

Shin Hla bore him one child, Thomas. She died when he was quite young. Thomson educated Thomas, and Ma Shin Hla's sister Ma E May. I think there is no doubt that Ma E May and her mother Ma Shwe Ma stayed with Thomson from time to time, and that he was attached to Ma E May. His account books show that he made Ma E May an allowance fairly regularly up till the time of his death, and gave her a present of jewellery on one occasion, and she has produced a letter written by him to her in April 1918 the tone of which was most friendly. His boy, however, caused him anxiety and disappointment. His career at school showed not only that he did not devote himself to work, but that he was not honest, and he was finally sent away in charge of a Buddhist priest to Mandalay. His schoolmaster had suggested that Thomas should be baptized, but to this Thomson objected. I have no hesitation in rejecting the evidence about Thomson's opposition to the boy taking the yellow robe. The evidence that Thomson approved of the step and encouraged it is overwhelming. Probably he hoped that the priest would exercise a good influence on his son. In 1917 Thomas was sent to him with his grandmother. It is suggested on behalf of the petitioner that Thomas's conduct annoyed his father so much, that he decided to disinherit him, and that the deceased severed his connection with his Burmese friends before his death. Batchelder says that Thomson spoke to him of his son as a 'bad pill and not to be trusted". Stevens states that Thomson told him he had warned his son that he would get no money from him and advised him to work. Such a warning, however might be given by any father to a son whose conduct was not pleasing him. The evidence of Mr. and Mrs. Gibbs, and Mr. and Mrs. Carter, who knew Thomson well, proves that, althogh he was anxious and annoyed about his son's behaviour, he did not lose interest in him, but was fond of him. He undoubtedly continued to make him an allowance until the time of his death. When Thomson sent his son to live with his Burmese relatives, he was eighty-seven years of age, and probably preferred that some one else should have the trouble of looking after Thomas. Possibly he also thought he would do better away from Rangoon. But whatever his motives may have been, Thomson certainly never severed his connection with either his son or his Burman friends, and there is no evidence to prove any intention on his part of abandoning the boy to his fate.

In 1919 Thomson began to engage Mr. Bose to conduct his cases. The petitioner, Paul, is Bose's clerk, Thomson was frequently litigating and must have had many interviews with Paul. In 1918 Thomson was ill, and spent a fortnight in the General Hospital, and in 1919 his health rapidly deteriorated. He proposed to go away from Rangoon for a change, and was advised to close his money lending business, On the 14th August he gave Paul a registered power-of-attorney to conduct his cases and collect his debts. Mr. Matthews, whom I regard as a reliable witness, saw Thomson a day or two before this, and discussed his business with him. Thompson told him he would give Paul a power-of-attorney to collect his debts, and would allow him the usual commission of five per cent. Mrs. Carter says she called on Thomson on the 13th August, and was told that he was making over his business affairs to his lawyer's clerk. He proposed that he should live with them after January. On the 17th Matthews again saw him. He was then very feeble, and talked of a sea voyage, and of going to the Carters' or to the Little Sisters of the Poor on his return. He evidently did not realise how short a time he had to live. Four or five days later he died.

The case for the petitioner, Paul, is that on the 15th August Thomson went into Chapple's typewriting school, and asked to type out his Will. Paul says that he had always been treated with great friendship by Thomson, and used to nurse him and wash him when he was sick. There is no evidence whatever to show that Paul was on intimate terms with Thomson, or that he was more than Thomson's agent in business matters. Chapple says that Thomson brought a draft Will written in his own handwriting, and after he had typed it for him, asked him to witness it, and to obtain another witness to the signature. Chapple went

down and found Ebrahim, a lawyer's clerk, who had come to the office for the repair of a typewriter. Ebrahim's employer Mr. Agabeg had an office one door away from Mr. Bose's office. Ebrahim consented to be a witness, and the Will was signed by Thomson in his presence and in that of Chapple. If the evidence of Chapple and Ebrahim is believed, the Will is proved. The caveator denies that the signature of Thomson is genuine, and alleges that even if it is genuine, the Will has probably been typed over a blank paper given by Paul to Thomson for the purpose of having some Court petition written on it. Examples of the kind of petition referred to by the caveator are to be found at pages 29 and 30 of Civil Miscellaneous Suit No. 6 of 1917. Thomas and Ma E May swear that they have seen Thomson sign his name in this way, but their evidence is open to the obvious objection that they are deeply interested in the result of this case. The signature on the Will has been photographed by Mr. Savarese, but he is not a handwriting expert, and his opinion on its genuineness cannot be accepted. Other admittedly genuine signatures have also been photographed, but I am unable, in the absence of expert evidence, to come to the conclusion that the result of photographing the signature on the Will is a forgery. The signature seems to me to resemble Thomson's signature. The question is whether, assuming that the signature is Thomson's, it is proved that the Will is his.

The onus of proof lies of course upon the person setting up the Will. In *Sukh Dei* v. *Kedar Nath* (1) Lord Macnaghten, in dealing with a case where a plaintiff impeached a Will as a forgery, said: "In the opinion of their Lordships the conclusion of the Court below that the alleged Will of the 4th June 1890 was not proved is perfectly correct, and it was not necessary for the Court to go so far as to declare that the document was a forgery.....It would have been quite enough for the Court...to say that the alleged Will was not proved." In *Tyrrell* v. *Painton* (2) Lindley, L. J., said: "This rule in *Barry* v. *Butlin* (3), *Fulton* v. *Andrew* (4) and *Brown* v. *Fisher* (5) is not, in my opinion, confined to the single case in which a Will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the Will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the Will." This dictum was referred to by their Lordships of the Privy Council in *Shama Charan Kundu* v. *Khettromoni Dasi* (6) and it was pointed out that the only suspicion in that case rested upon a conflict of evidence as to whether the testator was in an unconscious state at the time he was alleged to have made the Will. The question, therefore, was merely which of two sets of witnesses ought to be believed. Their Lordships did not dissent from the dictum of Lindley, L. J. It was accepted as sound law by the learned Judges of the Allahabad High Court in *Lachho Bibi* v. *Gopi Narain* (7). The Indian Evidence Act lays down that a fact is proved if, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act on the assumption that it exists.

The question for my decision, therefore, is, whether the circumstances in the present case are such as to excite suspicion sufficiently strong to raise a reasonable doubt as to whether the Will was made by Thomson or not.

There are, in my opinion, grave doubts about the genuineness of this Will. The

(1) 23 A. 405 at p. 413; 5 C. W. N. 895; 23 I. A. 136; 3 Bom L. R. 704; 8 Sar. P. C. J. 103.

(2) (1894) P. D. 151; 6 R. 540; 70 L. T. 453; 42 W. R. 348.

(3) (1838) 2 Moo. P. C. 480; 1 Curt. 614; 46 R. R. 123; 12 E. R. 089.

(4) (1875) 7 H. L. 448; 44 L. J. P. 17; 32 L. T. 209; 23 W. R. 566.

(5) (1891) 63 L. T. 435.

(6) 4 C. W. N. 501; 2 Bom. L. R. 538, 27 C. 521; 27 I. A. 10; 7 Sar. P. C. J. 638.

(7) 23 A. 472; A. W. N. (1901) 145.

estate, if regard is had to the station in life of those who are to be benefited by the Will, is a large one. It has been left entirely to a lawyer's clerk, who, beyond doing Thomson's business, has failed to establish any claim on his generosity. It excludes from all benefits and makes no provision for the testator's only child, or for the Burmese girl to whom he had been making a monthly allowance for many years. Paul is a man whose record is not free from suspicion. He was tried in the Chief Court for serious offences in connection with the estate of Redmond, a former employer of his, and was convicted by a majority of the Jury at the first trial, and unanimously acquitted at the second. He has been bankrupt twice. His witness, Chapple, has also been through the bankruptcy Court, but he gave evidence against Paul in the criminal case, and it was through the application of Paul that he was forced into the bankruptcy proceedings. The other witness, Ebrahim, is another lawyer's clerk who happened to be in Chapple's office when Thomson came in, but did not succeed in the purpose for which he says he came. He is one of those casual witnesses of the unfulfilled purpose who are generally regarded with mistrust. Chapple owed Thomson some money which he had borrowed in 1912, and the choice of the two witnesses to the Will is a curious one. Gibbs who was a friend of Thomson lived close to Chapple's school, and might easily have been called.

The execution of the Will is said to have taken place about 10 A. M. Chapple states that Thomson came to his office alone, and walking; that he looked well and hearty, and went upstairs without any difficulty. Thomson lived about half a mile from Chapple's office, and if his physical condition was such as some of the witnesses depict it is impossible that he could have walked to Chapple's office.

I shall now consider the Will. It begins: "This is the last Will and testament of me T. M. T. Thomson of the town of Rangoon, and by religion a Christian, being by the mercy of God in sound mind and health." Mr. Rutledge contends that the fact that Thomson described himself as a Christian, and uses such an expression as "by the mercy of God" is sufficient in itself to throw the most serious doubt on the Will. The evidence about Thomson's religious belief is somewhat conflicting, but I have no doubt that he was never a Catholic, as Paul asserted, but in his later years was an unbeliever with strong leanings towards Budhism. I regard Paul's statement that Thomson advised him to go to Church and went with him fairly frequently to the Roman Catholic Cathedral as absolutely false. The fact that he was sworn on the Bible when making affidavits proves nothing. Matthews has produced infidel books in Court which no Catholic or Christian would care to keep or read, and which were ordered by Thomson from America. One of them is a violent attack on the doctrines of the Roman Catholic Church. Thomson refused to allow his son to be baptized. The evidence that Thomson was, in his declining years, not only not a Christian, but decidedly opposed to that religion is overwhelming. It is certainly a matter for great surprise that he should commence his Will by a declaration of pious faith. Mr. McDonnell suggests that this paragraph of the Will has been copied from some form of a Will, but no stock form with such a declaration in it has been produced. It is remarkable that he should have inserted what is untrue in fact, and omitted to appoint an executor. The insertion and omission are explained if the Will was the work of some one who did not know Thomson's opinions, or whom he would be likely to appoint executor.

The evidence regarding the finding of the Will contains several discrepancies. Paul says he found the Will in the drawer at 6 P. M. the evening after the death of Thomson, in the presence of inspector Castor, Ahmed Meah and Thomas. Ahmed Meah lives below Thomson. He is one of Mr. Bose's clients, and is an undischarged bankrupt. Castor stated, when first examined, that the Will was found in an almirah. At the next hearing he corrected this statement, and said that it was in a chest of drawers. At the first hearing, he spoke of the finding of a gold watch in the drawer, and at the second of a revolver. He says the Will was handed to him, and he read it casually and gave it back to Paul. At first, Ahmed Meah stated that the Will was in

the drawer, and that the drawer was looked. He then said that the drawer was in a chest of drawers, and that nothing else was taken out of the drawer. He further stated that it was read out by Paul and the Inspector. In his second examination Ahmed Meah stated that the Inspector took the Will out of the drawer. Paul talked about jewellery in the drawer. Thomas denies that any Will was found on the 22nd and says that the Inspector went upstairs only to take charge of his father's revolver, which was lying underneath the chest of drawers. Thomson had a safe where he kept his valuable papers, and it is strange that he did not put his Will there. But that safe could not be opened unless the key word was known. On the 26th, in the absence of any one to represent Thomas's interests, the safe was broken open by Sperrink in the presence of Inspector Castor. Castor was not authorized to break open the safe, and it was a most improper proceeding in the absence of such authorization and of Thomas. It was quite unnecessary, and afforded Paul an opportunity of tampering with Thomson's private papers. The evidence about the discovery of the Will, and the forcing of the safe, throws grave suspicion on the conduct of Paul.

Thomson had his own typewriter, and used it. Castor states that the typewriter could not be manipulated, but I sent for the machine, and tried it. It can certainly be used; the ribbon gives a faint impression, but there is no difficulty in changing a ribbon. There is no good reason why Thomson should not have typed his own Will, and had it witnessed by some of his friends.

The suspicions surrounding this Will have not been removed, and I am of opinion that it is not proved. I dismiss the petition of Paul.

Petition dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 72 OF 1918.

SUIT No. 1278 OF 1916.

December 11, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Justice Sir Earnest Fletcher, KT.

RAM CHUNDER-GOURI SHANKER—DEFENDANT—APPELLANT

versus

GANPUTRAM-BISWANATH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20—Place of suing—Jurisdiction - Cause of action—Hundi *drawn in Cawnpore for acceptance and payment in Calcutta*—Hundi *accepted and paid in Calcutta—Suit to recover sum paid - Place of suit—Commission to examine specific witness—Witness not named examined, effect of.*

D., a firm at Cawnpore, drew a *hundi* in favour of the Bank of Bengal on *P.*, a firm carrying on business at Cawnpore and Calcutta; the *hundi* was to be accepted in Calcutta for the accommodation of, and was to be debited to, *D*, who in case of non-payment undertook to indemnify *P.* against any loss or damage. *P.* accepted the *hundi* in Calcutta and made payment there. On failure by *D.* to pay the amount of the *hundi*, *P.* brought the present suit in Calcutta to recover that amount and it was objected that the Calcutta Court had no jurisdiction to entertain the suit:

Held, that as the plaintiff's cause of action would not be complete unless he proved the fact that he had accepted the *hundi* in Calcutta and had proved that he had paid in Calcutta on the due date in accordance with his acceptance, part of the cause of action arose within the local limits of the Ordinary Original Jurisdiction of the High Court at Calcutta and the Court had jurisdiction to entertain the suit. [p. 540, col. 1.]

Where, on the application of the defendant, a commission is issued for taking the evidence of one particular witness only, and, in spite of protests of the plaintiff, the evidence of another person is also taken, the Court would be justified in ignoring the evidence of such person. [p. 541, col 1.]

Appeal against the decree of Mr. Justice Walmsley, dated the 24th July 1918.

Mr. *N. Sarkar* (with him Mr. *B. K. Ghose*), for the Appellant.

Mr. *S. R. Das* (with him Mr. *K. P. Khaitan*), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Walmsley, whereby he gave judgment for the plaintiff.

The learned Counsel for the appellant has raised a point going to the jurisdiction of the learned Judge, and he, first of all,

drew our attention to the fact that, although this plaint had been treated in the first instance as being a plaint under Order XXXVII, of the Civil Procedure Code the learned Judge had not so treated it but had held that there was a clear cause of action disclosed in the plaint by reason of paragraphs 4, 5, 6 and 7. The learned Counsel then proceeded to argue that, that being so the learned Judge had no jurisdiction to try the case because neither the whole of the cause of action nor any part of it arose within the local limits of the Ordinary Original Jurisdiction of this Court. I think that the learned Counsel's argument cannot be supported, because, in my judgment, a part of the cause of action. did arise within the local limits of the Ordinary Original Jurisdiction of the High Court; and inasmuch as leave was given by the Court the Court had jurisdiction to hear the case. The agreement which it was sought to enforce against the defendant is alleged in paragraph 4 of the plaint, and it is there alleged: "the plaintiff firm agreed to the aforesaid terms for the defendant firm's accomodation without receiving any value therefor at the repeated requests of the defendant firm, and the defendant firm agreed to indemnify the plaintiff firm against any loss or damage by reason of the plaintiff firm's agreeing to the aforesaid terms." In order to see what were "the aforesaid terms" we must turn to the first paragraph of the plaint. There it is stated: "on the 11th October 1916, one Jankidas Murlidhar of Delhi drew a *hundi* in favour of the Bank of Bengal in its Delhi Branch on the plaintiff firm in Calcutta for the sum of Rs. 2,500 payable 54 days after the said date. The said *hundi* was to be accepted by the plaintiff firm in Calcutta for the accommodation of and was to be debited to the defendant firm in case of payment by the plaintiff firm". Those are "the aforesaid terms" which the plaintiffs alleged they had undertaken to be bound by and in respect of which they alleged that the defendants had agreed to indemnify the plaintiffs against any loss or damage by reason of the plaintiff firm's agreeing to the aforesaid terms. It, therefore, appears that, by the arrangement between the plaintiffs and the drawers of the *hundi*, the plaintiffs were under a liability to accept the *hundi* in Calcutta for the accomodation of the defendants and the defendants had agreed to indemnify the plaintiffs against any loss or damage which they might incur by accepting the *hundi* in Calcutta. There is an allegation in the plaint that the plaintiff firm did accept the *hundi* in Calcutta, that the *hundi* became payable on the 7th of December 1916, and that on that day they in fact paid the amount of the *hundi* in Calcutta and that the defendants, although called on to perform their part of the agreement, had failed to reimburse the plaintiffs.

Our attention was drawn to what was said by Lord Justice Fry, when he was dealing with the meaning of the words "cause of action" in *Read* v. *Brown* (1) referred to in *Dobson and Barlow Limited* v. *Bengal Spinning and Weaving Company* (2), namely: "everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action." And, again, Mr. Justice Brett in *Cooke* v. *Gill* (3), is reported to have said: "cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse." In my judgment, in this case the plaintiff's cause of action would not be complete unless they proved the fact that they had accepted the *hundi* in Calcutta in accordance with their undertaking to the drawers of the *hundi*, the plaintiffs' cause of action would not be complete unless they had proved that they had paid the bill in Calcutta on the due date in accordance with their acceptance. For these reasons, in my judgment, part of the cause of action did arise within the local limits of the Ordinary Original Jurisdiction of this Court and consequently the learned Counsel's point with regard to jurisdiction cannot be sustained.

The only other argument which the learned Counsel presented to us was with regard to the learned Judge's decision not to read or look at the evidence of a man

(1) (1883) 22 Q. B. D. 128 at p. 132; 58 L. J. Q. B. 120, 60 L. T. 250; 37 W. R. 131.
(2) 21 B. 126 at p. 133; 11 Ind. Dec. (N. S.) 83.
(3) (1873) 8 C. P. 107; 42 L. J. C. P. 98; 28 L. T. 52; 21 W. R. 334.

called Gulzari Mull, whose evidence was taken on commission. It is clear from the terms of the order for the commission that the evidence of a man called Rameswar alone was to be taken, but by some means or other in the writ the words "Gulzari Mull" appeared before the word "Rameswar." It looks to me as if the person who had inserted those words regarded "Gulzari Mull" as being one of the names owned by the man Rameswar. But the defendants insisted upon Gulzari Mull being examined upon commission, and his evidence was taken on commission on the 7th of July 1918, in spite of the protest of the plaintiffs. From the letters, which appear at pages 155 and 156 of the paper-book, it is clear that Messrs. Leslie and Hinds were informed by Mr. Khaitan, who was then acting as Solicitor for the plaintiffs, that the order had been made for the examination of Rameswar alone and Messrs. Leslie and Hinds were pressed to wire that Rameswar alone should be examined: so that the defendant's Solicitors clearly had notice either on the 6th or the 7th of July that the order did not provide for the evidence of the Gulzari Mull being taken upon commission, and if the defendants had desired to have his evidence taken on commission they should have made a further application to the Court either before the trial or at the trial. As far as I know, no such application was made. The trial did not take place until the 17th of July and there was ample opportunity, as far as I can see, for the defendants to make an application to the Court if they wished to do so. In my judgment, the learned Judge was right in refusing to read the evidence of Gulzari Mull taken on commission. For these reasons, we refused the application made by the learned Counsel for the appellant to be allowed to read the evidence of Gulzari Mull or to call him as a witness in this Court. The learned Counsel frankly said that, if Gulzari Mull's evidence was not to be read or if he was not allowed an opportunity of calling Gulzari as a witness in the Appeal Court, it was hopeless for him to attempt to contest the findings of fact of the learned Judge, which accordingly must stand.

For these reasons the appeal must be dismissed with costs.

MOOKERJEE, J.—I agree.

FLETCHER, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 244 OF 1917.

July 13, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

VITHALDAS PRABHU—

PLAINTIFF—APPELLANT

versus

SUBRAYA MANJAPPA AND OTHERS—

DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 53—Execution of decree—Attachment of decree in favour of judgment-debtor—Sale of attached decree—Procedure.

Where a decree in favour of a judgment-debtor is attached in execution of a decree against him, the Court ought, under Order XXI, rule 53 of the Civil Procedure Code, to proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. The Court has no power to sell the attached decree. [p. 542, col. 1.]

Where, however, an attached decree was sold and was purchased by the attaching decree-holder who proceeded to execute it and realised a larger amount under it than he had paid for it:

Held, (1) that the procedure adopted by the Court was quite irregular; [p. 542, col. 1.]

(2) that the decree-holder must give credit to the judgment-debtor for the full amount realised by him in execution of the attached decree. [p. 542, col. 2.]

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 218 of 1914, confirming the decree passed by the Subordinate Judge at Sirsi, in *Darkhast* No. 283 of 1912.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *S. N. Karnad*, for Respondent No. 2.

JUDGMENT.

MACLEOD, C. J.—This is an appeal under section 47 of the Civil Procedure Code. The 3rd defendant in Suit No. 119 of 1911 prayed that the decree-holders realized much more than what was due on the decree which was sought to be executed,

and prayed that the *darkhast* should be struck off. The application has been granted in both the lower Courts. What had happended was this. In execution of their decree, the decree-holders attached the mortgage-decree in favour of their judgment-debtors. Order XXI, rule 53 lays down the procedure to be followed when a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, is attached. The Court shall, under sub-rule (2), on the application of the creditor who has attached the decree of the judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. Instead of doing that, the Court put up the decree for sale and the decree was purchased for Rs. 200 by the decree-holder. These proceedings were absolutely wrongly conceived, and it certainly is very strange that, in the face of Order XXI, rule 53, the Court should have allowed such a sale to take place. Then the decree-holder having become the purchaser of the decree proceeded to recover what he could on the decree and realized Rs. 600. Obviously, there is no equity whatever in favour of the decree-holder who seeks to pocket Rs. 400 which really belonged to his judgment-debtor.

But it has been argued that the matter which has been dealt with by the lower Courts is *res judicata* because the 1st defendant had endeavoured to stop the sale, and on his application it was held that the sale was valid. The 3rd opponent was not served with notice of that application. An order was obtained from the Court either that the notice might be served on the first opponent or, if he refused to accept it, that substituted service should be effected. The first opponent accepted service of the notice. But that cannot be taken as service on opponent No. 3 who has not been proved to have been living with opponent No. 1 at the time. It is quite possible that, if opponent No. 1 had not accepted service, then substituted service, according to the provisions of the Code, would have been effected. Then opponent No. 3 would be bound by it. But all that we have before us is that notice was served on some one who did not represent the 3rd opponent. Therefore, he cannot be considered as being bound by the decision in the matter. That is sufficient to dispose of the appeal, because, in my opinion, it is perfectly clear the appellants cannot take advantage of the wrong procedure which was adopted by the Court in order to put money in their pocket which really belonged to their judgment-debtor. What would have happened if an outsider had purchased the decree is a question which need not be gone into. The appeal is dismissed with costs.

FAWCETT, J.—I concur.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 49 OF 1919.

February 12, 1920.

Present :—Justice Sir Asutosh Mookerjee, Kt, and Justice Sir Earnest Fletcher, Kt.

MURLIDHAR ROY—PETITIONER—APPELLANT

versus

THE BENGAL STEAMSHIP COMPANY LIMITED—RESPONDENTS.

Companies Act (VII of 1913), s. 162—Suspension of business—Winding-up—Discretion of Court—Dead lock—Substratum gone, principle of, when applicable.

The matter of granting or refusing an application for winding-up a Company rests entirely in the discretion of the Court, and, in the case of a Company which has suspended business for a whole year, the power will be exercised only when there is a fair indication that there is no intention to carry on the business; if the suspension is satisfactorily accounted for and appears to be due to temporary causes, the order may be refused. [p. 543, col. 1.]

The fact that the firm of Managing Agents of a Company has been dissolved, but steps have been taken to appoint new Managing Agents, is no indication of a complete dead lock which can only be removed by compulsorily winding-up the Company. [p. 544, col. 1.]

In the absence of proof that the objects of a Company as set out in the Memorandum of Association, cannot be fulfilled in other ways, or by the employment of other agencies, the principle of 'substratum gone' cannot be applied. [p. 544, col. 2.]

Appeal against the judgment of Mr. Justice Greaves.

Mr. *S. R. Das*, (with him Mr. *S. C. Bose*), for the Appellant.

Messrs. *Langford James* and *I. B. Sen*, for the Respondent Company.

Mr. *T. O. P. Gibbons*, *K. C.*, Advocate-General, and Mr. *B. C. Ghose*, for the Respondent Haladhar Roy.

JUDGMENT.

MOOKERJEE, J.—We are invited in this appeal to consider the propriety of an order dismissing a petition for the winding-up of a Company incorporated under the Indian Companies Act, 1913. The facts are fully set out in the judgment of Mr. Justice Greaves and we need not recapitulate them.

The application is supported here on three grounds, namely, first, that the Company has suspended its business for a whole year; secondly, that there has been a dead-lock, and thirdly, that the substratum is gone; the first of these grounds falls within the third clause of section 162 and the second and third are comprised in the sixth clause which provides for the winding up of a Company if the Court is of opinion that it is just and equitable that the Company should be wound-up.

As regards the first of these grounds Mr. Justice Greaves has pointed out that the matter rests entirely in the discretion of the Court, as is clear from the decisions in *Metropolitan Railway Warehousing Company, In re* (1), *Middlesbrough Assembly Rooms Company, In re* (2) and *Capitol Fire Insurance Association, In re* (3). The power will be exercised only when there is a fair indication that there is no intention to carry on the business; if the suspension is satisfactorily accounted for and appears to be due to temporary causes, the order may be refused. Now, in the present case, if it be conceded, that the business has been suspended for a whole year, the suspension is due to very exceptional circumstances. To carry on their business, the Company employed a steamer and two flats. The flats were acquired by Government during the War and the Company have not yet been able to replace them in view of the rise in prices. Consequently, the suspension of business for a whole year is satisfactorily accounted for, and does not furnish an indication that there is no intention to carry on the business. In our opinion, no ground has been made out to justify the winding-up of the Company on the ground mentioned in section 162 (*iii*).

As regards the second ground, it is contended that the proceedings of the meetings of the Company furnish ample indication that there is a complete dead lock. The chief promoters of the Company are three brothers Muralidhar Roy, Sasadhar Roy and Halodhar Roy. These three formed themselves into a firm which became the managing agents of the Company. Subsequently, there was disagreement amongst the brothers and the firm was dissolved with effect from the 1st November 1918. There is no room for doubt that there are acute differences amongst the brothers, and the proceedings disclose much bitterness of feeling. In view of these circumstances, reliance is placed, on behalf of the appellant, upon the decision of the Court of Appeal in *Yenidje Tobacco Co., In re* (4). In that case, no doubt, the Master of the Rolls (Lord Cozens-Hardy) pointed out that the two Directors were not on speaking terms, that the so called meetings of the Board of Directors had been almost a farce or comedy, that the Directors would not speak to each other on the Board and that some third person had to convey communications between them which ought to go directly from one to the other. But the circumstances of that case were very peculiar and the real reason for the decision of the Court of Appeal was that there was no way to put an end to the state of things which existed, except by means of a compulsory order. Warrington, L. J., laid stress on the fact there were only two persons interested, that there were no share-holders other than those two, and that there were no means of overruling, by the action of a general meeting of share-holders, the trouble which was occasioned by the quarrels of the two Directors and share-holders, in such circumstances the Company should be wound-up, if there existed such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the

(1) (1868) 17 L. T. 103; 36 L. J. Ch. 827; 15 W. R. 1121.

(2) (1880) 14 Ch. D. 104; 49 L. J. Ch. 413; 42 L. T. 609; 28 W. R. 868.

(3) (1882) 21 Ch. D. 209; 52 L. J. Ch. 20; 47 L. T. 123; 30 W. R. 941.

(4) (1916) 2 Ch. 426; 86 L. J. Ch. 1; 115 L. T. 530; 60 S. J. 707; 32 T. L. R. 709.

other. The same principle was applied in *Newbridge Sanitary Steam Laundry, In re* (5) and an order for compulsory winding-up was made on the ground that, in the situation which had arisen, such winding-up order afforded the only means of enabling justice to be done to the petitioners. In the case before us, the circumstances are, however, of an entirely different description. No doubt, the firm of Managing Agents composed of three members, was dissolved on the 31st October 1918; but since then at Extraordinary General Meetings steps have been taken to appoint new Managing Agents. We need not express an opinion as to the propriety or legality of the proceedings taken; but it is sufficient for our present purpose that there are ample indications that it is possible to carry on the business of the Company. In such circumstances, it is impossible for us to hold that there is a complete dead-lock which must be got rid of by a compulsory winding-up; the Act creates as between the share holders a domestic Tribunal, and, unless a clear case is made out, the Court will be slow to withdraw from it the decision whether the Company's business shall or shall not be carried on. In our opinion, the second ground urged in support of a winding-up order has not been established.

As regards the third ground, it is urged that the whole substratum of the business has become impossible. Mr. Justice Greaves has pointed out that there is really no foundation for this contention. The objects of the Company, as stated in the Memorandum of Association, are, *inter alia*, "to purchase charter, hire, build, or otherwise acquire steam or other ships or vessels with all equipments and furniture and to employ the same in the conveyance of passengers, mails, live stock, grain and other agricultural produce and treasure and also of goods and marchandise of every description and species on the principal rivers of India and Burma with their tributaries, and also to run vessels to sea, to any port or ports whatsoever, whether inland or sea board and to take vessels, flats, barges and other crafts in tow of its vessels as the Company may from time to time determine, and to acquire postal subsidies and enter into mail or other contracts." No doubt, the business has hitherto been carried on with one steamer and two flats, and that the flats have been taken up by Government. But that does not prove that the objects of the Company, as set out in the Memorandum, cannot be fulfilled in other ways or by the employment of other agencies. The principle of substratum gone clearly cannot be applied to a case of this description. Two illustrations of that class of cases will be found in *Haven Gold Mining Co., In re* (6) and *German Date Coffee Co., In re* (7). In the first case, the principal and substantial object of the Company was to acquire a particular gold mine in New Zealand, and the title to the gold mine altogether failed. In the second case, the object was to manufacture from dates a substitute for coffee under a German Patent, but the German Patent was not and could not be obtained. In such cases, it could be rightly held that the substratum was gone, notwithstanding that the Memorandum of Association contained general objects and it might be justly ruled that a majority could not hold a minority to the speculative continuation of a scheme which had proved futile. That doctrine has plainly no application here. We are consequently of opinion that there is really no foundation for the application which has been rightly dismissed.

The appeal is accordingly dismissed with costs, one set of costs to the Company and one set to the opposing share-holders.

FLETCHER, J.—I agree.

Appeal dismissed.

(5) (1917) 1 Ir. R. 67 at p. 87.

(6) (1882) 20 Ch. D. 151; 51 L. J. Ch. 242; 46 L. T. 322; 30 W. R. 389.

(7) (1882) 20 Ch. D. 169; 51 L. J. Ch. 564; 46 L. T. 327; 30 W. R. 717.

LOWER BURMA CH EF COURT.

CRIMINAL REVISION No. 346 B OF 1919.

January 15, 1920.

Present :—Mr. Justice Robinson.

P. S. PILLAY—APPLICANT

versus

MOULMEIN MUNICIPAL COMMITTEE —RESPONDENT.

Bye-laws, Municipal, validity of, test of—Interpretation, rule of—Burma Municipal Act (III of 1898), s. 142 (d), *bye-laws made under—Bye-law prescribing license-fee for lodging houses, whether* ultra vires.

In determining the validity of bye-laws made by public representative bodies under statutory powers, their consideration is approached from a different standpoint from bye-laws of Railway or other Companies, which carry on business for their own profit, although incidentally for the advantage of the public. Courts of Justice are slow to condemn Municipal bye-laws as invalid, on the supposed ground of unreasonableness, and support them if possible by a "benevolent" interpretation, and credit those who have to administer them with an intention to do so in a reasonable manner. But, on the other hand, if a bye-law necessarily involves that which is unreasonable, it is the duty of the Court to declare it to be invalid [p. 548, col. 1.]

A bye-law of a Municipal body requiring keepers of lodging-houses to pay a license-fee reckoned on the maximum number of lodgers authorized, although the actual number of lodgers in the house may be less than the authorized number, is not illegal or *ultra vires.* [p. 546, col. 2.]

Messrs. *Oowasji* and *Das*, for the Applicant.

Mr. *Ginwala*, for the Respondent.

JUDGMENT.—The applicant P. S. Pillay has been convicted under section 180 of the Burma Municipal Act for keeping a lodging house without having the same registered and licensed and fined one rupee. He now comes to this Court to test the validity of the bye-law under which the Municipality acted. He is the owner of a tenement lodging house in Moulmein, and bye-laws had been made under section 142 clause (*d*) for fixing and varying the number of persons who may occupy a lodging house, for rendering licenses necessary and for fixing the fees payable for such licenses, and the conditions subject to which they shall be granted and may be revoked. The bye-laws provide that no person shall keep a tenement lodging house unless it has been registered and licensed, and that before the house is registered and licensed it shall be inspected by an officer generally or specially appointed in that behalf by the Committee who is to report in writing to the Committee whether the house is sufficiently ventilated and satisfies other requirements, and especially as to the number of lodgers that can be properly accommodated in the several rooms. It is then provided that any person wishing to have a lodging house registered and licensed shall make a written application in a form that is given. This form does not provide for a prayer as to the number of persons for which a license may be granted. Then the rules provide that no keeper of a lodging house shall, at any one time, receive or allow to be received into the house a greater number of lodgers than shall be fixed by the Committee as the maximum number of lodgers authorized and specified in a certificate in the prescribed form. This form gives the maximum number of lodgers authorized. The last rule to which it is necessary to refer prescribes that the fee to be charged for the licensing of each lodging house shall be two rupees for every lodger authorized in the certificate, that is to say, twice as many rupees as the number of lodgers authorized. It had been the practice for applicants to specify in their applications the number of lodgers which they wish should be specified as the maximum number, and provided that number was less than the maximum number which the Assistant Health Officer had reported as being permissible, licenses for a lesser number were issued and fees were charged according to that number. This practice continued even after the bye-laws assumed their present form, but it was brought to the notice of the Committee that they were losing revenue, and it was decided in future to charge fees strictly in accordance with the present bye-laws. The applicant applied for a license for thirty lodgers in respect of a house held by the Assistant Health Officer to be fit to contain thirty-nine lodgers. The Municipality declined to issue a license unless fees were paid on thirty-nine, and this the applicant refused to do. As he took out no license, he has been prosecuted. It is urged that the whole object of the Act and the bye-laws made under it in respect of lodging houses is to insure the public health, and public decency: and that, and

not the revenue must be the first consideration of the Municipality in administering the power that they have under the Act. The powers were given not to supply the Municipality with a source of revenue, but primarily for the preservation of the public health, and the provision as to fees was intended only to enable them to provide the necessary staff for inspection, and for enforcing the bye laws. It is urged that, when the Assistant Health Officer has certified for thirty-nine lodgers, the primary object of his inspection and certificate will be even better served by entering in the certificate thirty instead of thirty-nine as the maximum number, and that if the proprietor so wishes there is nothing to prevent the Municipality acceding to his request, and that that request being eminently reasonable, the Municipality is bound to grant it.

The rules as to the interpretation of such Acts as the Burma Municipal Act are laid down in Maxwell on the Interpretation of Statutes, fifth Edition, page 481, *et seq*: "Rules and bye laws made under statutory powers enforceable by penalties are construed like other provisions encroaching on the rights of persons. They must, on pain of invalidity, be not unreasonable, nor in excess of the statutory power authorising them, nor repugnant to that Statute, or to general principles of law.....In determining the validity of bye laws made by public representative bodies under statutory powers, their consideration is approached from a different standpoint from bye laws of Railway or other Companies, which carry on business for their own profit, although incidentally for the advantage of the public. Courts of Justice are slow to condemn Municipal bye-laws as invalid, on the supposed ground of unreasonableness, and support them if possible by a "benevolent" interpretation, and credit those who have to administer them with an intention to do so in a reasonable manner. But, on the other hand, if a bye-law necessarily involves that which is unreasonable, it is the duty of the Court to declare it to be invalid." On the other hand, it is pointed out that "where the Statute conferring the power to make bye-laws enacts that any such laws consistent with the provisions of the Statute, and not repugnant to any other law in force, shall have the force of law when confirmed by the executive, it is doubtful whether a Court would not be precluded from questioning the reasonableness of such bye-laws, or whether they are *ultra vires*, unless it be in some very extreme case."

In considering these bye-laws in the light of these principles, it is impossible to say that they are *ultra vires* of the powers given by the Act, or that they are unreasonable or invalid as being repugnant to general principles of law. It is essential that the maximum number of lodgers which may properly be permitted must be specified, and it is impossible to say that the Municipality is not authorized to charge fees on that maximum number. Unless the bye law can be held to be invalid as being unreasonable, the Court is not justified in interfering. At the same time, it is impossible not to admit that the applicant's request is perfectly reasonable. This is a tenement lodging house divided for several families, and to compel him to pay fees calculated on the maximum number reported by the Assistant Health Officer may only lead him to take in more lodgers to the discomfort of families occupying a tenement or compel him to alter the construction of the house by reducing the size of the tenements to the detriment of families who might otherwise occupy the present accommodation. The wisdom of the Committee may be questioned, but it is not for this Court to dictate to them, and the Court has no power to interfere where the bye law is valid and legal, as it is in the present case. The application is dismissed.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION APPLICATION No. 384 OF 1920.

July 23, 1920.

Present :—Mr. Justice Piggott.

RAHU AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 55, 110—Accused, discharge of, from custody—Magistrate, jurisdiction of, to order further detention—Proceedings under s. 110—Defence evidence, when should not be discredited.

Where by the order of a Magistrate a person is discharged from custody on the ground of insufficient evidence to connect him with the offence in connection with which he was detained, the Magistrate has no authority to direct his further detention in connection with a different matter, unless and until he has been re-arrested by the Police under section 55, Criminal Procedure Code. [p. 548, col. 1.]

In a proceeding under section 110 of the Criminal Procedure Code, the fact that a large number of the defence witnesses are caste-fellows of the accused, many of them coming from villages several miles from the village of the accused, and that they have come forward voluntarily without being summoned is not sufficient to discredit their evidence, notwithstanding that they admit frankly that they have come forward because they regard the accused as head of their brotherhood and look upon it as a slur on the brotherhood that the accused should be treated as a habitual thief or robber. [p. 549, col. 2.]

Criminal revision against the order of the District Magistrate, Moradabad, dated the 25th May 1920.

Messrs. *Nehal Chand* and *K. R. Dang*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Opposite Party.

JUDGMENT.—This is an application in revision in connection with a proceeding under section 110 of the Criminal Procedure Code in which ten persons were originally involved. All of them have been ordered to furnish security to be of good behaviour. Eight of these appealed to the District Magistrate, but without success. The application before me is on behalf of four of these persons. The record shows that the ten men concerned were first arrested on suspicion in connection with a particular case of dacoity. They were arrested, therefore, under section 54 and not under section 55 of the Code of Criminal Procedure. Action was then taken under section 167 of the same Code and these men were lodged in the local jail under the warrant of a Magistrate. The investigation into the case continued for some time longer and before it was completed, and before any final report had been sent in under section 173 of the Criminal Procedure Code, the investigating Police Officer came to the conclusion that there was no sufficient evidence or reasonable cause of suspicion to justify further proceedings against these ten men on the dacoity charge. It does not seem to me that the Code of Criminal Procedure makes any express provision for a case like this, in which an accused person, after having been arrested, forwarded to a Magistrate and confined under a Magistrate's warrant, is found by the investigating Police Officer to have been arrested upon insufficient evidence. I should have thought that, ordinarily, a person so arrested would remain in custody until the final report under section 173 of the Code had been submitted and would then be released under the Magistrate's order, on the ground that the Police report disclosed no adequate ground for further proceedings. I am told, however, that the practice generally adopted is to stretch the provisions of section 169 of the Criminal Procedure Code, although that section in terms applies only to the case of an accused who has never been forwarded to a Magistrate. Apparently, the common procedure is for the investigating Police Officer to report to the Magistrate under whose warrant the accused has been committed to jail that he desires to release him under section 169 of the Criminal Procedure Code. The Magistrate then sends for the accused from the jail, discharges him from the custody of the jail authorities and hands him over to the investigating Police Officer; when this has been done the Police Officer can exercise the authority given him by section 169 aforesaid to release the accused.

The peculiar feature of the present case was that the investigating Police Officer or officers, although failing to find sufficient evidence to justify further proceedings against any of these ten men on the charge of dacoity, came to the conclusion that the ten persons arrested were members of a gang associated together for the purpose of habitually committing thefts and

robberies. They desired in fact to institute proceedings against them under section 110, Criminal Procedure Code. A report substantially to this effect was submitted to the Magistrate by whose warrant the accused had been committed to the jail. The order passed on this report was, in my opinion, irregular and not to be justified by anything in the Code of Criminal Procedure Sufficient information had not been laid before the Magistrate to warrant his passing an order under section 112 of the Criminal Procedure Code. Indeed, it would appear that he was not the Magistrate who had jurisdiction to pass any such order. If, therefore, the ten accused persons were to be discharged from custody, so far as the dacoity case was concerned, no Magistrate had any authority to direct their further detention in custody on a different matter, unless and until they had been re-arrested by the Police under section 55 of the Criminal Procedure Code. The Magistrate, however, seems to have treated this as a mere technical difficulty and to have assumed that there had been a purely formal discharge of the accused under section 169 of the Criminal Procedure Code; but he ought to have allowed the Police to re arrest them under section 55 of the same Code. The order he passed was that the ten accused persons should be further detained in jail unless they could furnish security for their appearance when required. It was not until 12 days after this that a formal report was laid by a competent Police Officer before a Magistrate having jurisdiction in the matter under section 110 of the Criminal Procedure Code, and, three days later, the said Magistrate having caused the ten accused to be brought before him from the jail, drew up and communicated to them the necessary order under section 112 of the Criminal Procedure Code initiating the prosecution for bad livelihood. It has been contended before me that, on the principles laid down by a learned Judge of this Court in *Maiku* v. *Emperor* (1), these irregularities attendant on the initiation of the proceedings would in themselves justify this Court in quashing the orders which have been passed against these accused persons, or, at any rate, against those eight out of the ten accused who contested the matter in the Trial Court and appealed to the District Magistrate. I think this contention is based on some misapprehension as to the meaning of the decision above referred to and the evils against which that decision was directed. This Court was dealing in that case with an accused person who had been tried and acquitted and ordered to be released by a competent Court, but who was then immediately re-arrested, not because of any fresh information received as to his character or repute, but in accordance with a standing order, most improperly issued in that particular district, directing that all accused persons acquitted on a charge of dacoity should be immediately arrested under section 55 of the Criminal Procedure Code. I am of opinion that, although the proceedings prior to the passing of the order under section 112 aforesaid were irregular, and though, I have thought it right to point out my objections to those proceedings, the irregularity was cured when the accused persons came before the Magistrate on the 13th of February and the Magistrate, having jurisdiction to do so, proceeded upon proper materials to pass the formal order under section 112 of the Criminal Procedure Code.

Having said this, however, I feel bound to add that the curious fashion in which this prosecution for bad livelihood was initiated has led me to examine the record with greater strictness than I would otherwise have thought necessary. The accused persons were a curiously miscellaneous lot to have formed a gang habitually associated for the purposes of committing thefts or dacoities. To take the case of the eight persons dealt with by the District Magistrate, they belonged to seven different castes and came from six different villages. Assuming it to be in no way impossible that such a miscellaneous assortment of accused persons might have been associated together for the habitual commission of thefts or dacoities, one would certainly feel inclined to presume that they would find it impossible to carry on such association without providing a competent investigating officer with [overwhelming

(1) 50 Ind. Cas. 989; 17 A. L. J. 458; 1 U. P. L. R. (A.) 19; 20 Cr. L. J. 38; 41 A. 423.

evidence of the fact. Another criticisim which I have to make against the proceedings in the Court below is, that there seems to me to have been an attempt to combine the provisions of clauses (*a*) and (*f*) of section 110 of the Criminal Procedure Code, and that, as regards some of the accused persons at any rate, the judgments before me do not clearly show whether the Courts below were satisfied that these men were habitual thieves and robbers, or whether the action against them was based upon a general finding that they were desperate and dangerous persons within the scope of section 110, clause (*f*), of the Code. The point is not a purely formal one, because, under section 117 of the Criminal Procedure Code, the fact that a person is a habitual offender may be proved by evidence of general repute or otherwise, but there is no similar provision to relax the ordinary rules of evidence where the case is sought to be brought under clause (*f*) of section 110 of the Criminal Procedure Code. For these reasons, I have, as already stated, examined the record of this case with more particularity than would ordinarily be considered necessary upon an application in revision. I have come to the conclusion that the prosecution case against three, at any rate, of the applicants, Rahu, Narpat and Kharga, is a bad one, and that the orders against them are liable to be set aside, not merely on the general merits of the case, but on a specific ground which has been repeatedly held by this Court to be sufficient to warrant interference in revision. Rahu and Narpat are brothers, *jats* by caste As against the allegations made by the prosecution witnesses they were able to produce an exceedingly voluminous body of evidence for the defence, no fewer than 46 witnesses coming forward to give them a good character. The defence witnesses, moreover, proved that these men are substantial cultivators, that their methods of life are such as to render it distinctly unlikely that they could find time to indulge in the habitual commission of theft or robbery. This large body of defence evidence has been brushed aside by the Courts below upon what seem to me a wholly unadequate grounds. The District Magistrate himself was satisfied that these two men were substantial cultivators, with a considerable amount of occupancy land. He thinks that the evidence produced by them in their defence is wholly discounted by the fact that 38 of their witnesses are their caste fellows, many of them coming from villages four miles or more distant from that in which Rahu and Narpat reside, and that these witnesses came forward at their trial voluntarily, without being summoned. Some of the witnesses admitted frankly that they had come forward because they regarded these accused as *sarpanch*, or heads of their brotherhood, and looked upon it as a slur upon the brotherhood generally that these men should be treated as habitual thieves and robbers. I cannot see in this fact anything which should discredit the evidence for the defence. On the contrary, it impresses me with the good faith of the witnesses and their honest and emphatic belief that these two men have been prosecuted in consequence of some private feud, of which there are certainly traces on the record, and that they really are respectable persons enjoying the confidence of their community. I have examined the defence evidence for Kharga and Cheta on the same lines. I thought at first that the Trying Magistrate had given nothing which could be described as a reason for disregarding the evidence of the 13 witnesses produced by Kharga in his defence. I find, however, that, in a later passage of his judgment, where he is discussing the defence evidence produced by another of the accused persons, he makes, as it were, an incidental remark that, in his opinion, Kharga's defence witnesses, as well as those for the accused persons whose case was immediately under consideration, had no such adequate opportunities of forming an opinion as to the character of the accused persons as to make their evidence of any value. Upon this, I have been through the defence evidence of Kharga in detail, and I think it sufficient to say that it forms, in my opinion, a substantial and serious body of evidence which ought not to be brushed aside for the reasons given by the Magistrate. After careful consideration, I have decided that the case of the applicant Cheta, stands upon a different footing. His defence evidence was lumped in with that of a Muhammadan accused of the name

of Rahim, a circumstance which alone would corroborate the prosecution assertion that there must be some especial and peculiar association between these two men. The evidence itself strikes me unfavourably and I certainly cannot take it upon myself to say that the body of prosecution evidence, where it affects Cheta, is outweighed or any thing like outweighed by the evidence produced by him and by his co-accused, Rahim, jointly.

The result is, that I dismiss this application so far as Cheta is concerned. I allow the applications of Rahu, Narpat, and Kharga and set aside the orders requiring them to furnish security to be of good behaviour. If these men are in custody they will be forthwith released; if they have furnished security, their own recognizance-bonds and those of their sureties will be discharged.

Application of Cheta dismissed and of the others allowed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1063 OF 1920.

November 19, 1920.

Present:—Mr. Justice Martineau.

ANANT RAM—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 27, 451—Possession of wife on account of husband, nature of—Entry into house with wife's consent with intent to commit adultery with her, whether offence.

Where, in *K's.* absence from home, the accused entered his house with his wife's consent in order to commit adultery with her:

Held, (1) that the accused was guilty of the offence specified in section 451, Indian Penal Code;

(2) that the house being in the wife's possession on account of her husband, it was in his possession within the meaning of section 27, Penal Code, and the consent of the wife to the entry of the accused could not save him.

Petition, under section 439 of the Code of Criminal Procedure, for revision of the order of the Sessions Judge, Karnal, dated the 19th June 1920, varying that of the Magistrate, First Class, Karnal, dated the 30th April 1920.

Bakhshi *Tek Chand*, for the Petitioner.

JUDGMENT.—It has been found by the Courts below that, in Kundan's absence, the petitioner entered Kundan's house at about midnight with the intention of committing adultery with Kundan's wife, Budho, and he has been convicted of an offence under section 451, Indian Penal Code, and sentenced to six months' imprisonment.

It is urged that the evidence is conflicting in regard to the place where Budho's little girl was at the time when the men who are said to have caught the petitioner in the house arrived, two witnesses saying that she was inside the house and that they brought her out, while the third says she was already outside when they came. This discrepancy seems important, and I see no reason for not accepting the finding of the Courts below on the facts.

The contention that the petitioner could not be prosecuted except on the complaint of Budho's husband is untenable. The prosecution is not for the offence of adultery but for that of committing house trespass with intent to commit adultery.

The main argument for the petitioner is that as the house was in the possession of Budho and he entered it with her consent he is not guilty of an offence. I cannot agree with this argument. Kundan lived in the house and his absence from it was only temporary. The house was in Budho's possession on account of her husband, and it was consequently in her husband's possession within the meaning of the Indian Penal Code (section 27).

The conviction is correct, but the petitioner has already undergone three months' im-

prisonment, and I think that this is a sufficient punishment for the offence. I accordingly reduce the sentence to the term of imprisonment which the petitioner has alredy undergone.

Sentence reduced.

PATNA HIGH COURT.
CRIMINAL APPEAL No. 103 OF 1920.
June 14, 1920.
Present:—Mr. Justice Coutts and
Mr. Justice Sultan Ahmed.
MADHU MAJHI AND OTHERS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 164—Confession, record of, when not in accordance with law.

A confession recorded in answer to the question—"(After due warning) do you want to say anything?" without any indication of what the due warning was, cannot be accepted as a confession recorded in accordance with law.

Criminal appeal against the order of the Sessions Judge, Purulie, dated 29th March 1920.

FACTS.—The confession was recorded by the Magistrate as follows:—

"*Q.*—(After due warning). Do you want to say any thing?

"*A.*—I want to say what is true, I won't make false statement.

"*Q.*—What do you want to say?"

Then follows the main confession.

In the end the Magistrate recorded the following certificate.

"The confession has been recorded when the accused has been in Court-room for about two hours while other cases were heard. It is very straight forward. I am convinced that it is voluntary."

The Magistrate was examined as a witness at the trial and stated: "I am satisfied the confession was a voluntary one and I gave him the usual warning."

The Assistant Government Advocate, for the Crown.

JUDGMENT.

COUTTS, J.—The appellants in this case have been convicted under section 396 of the Indian Penal Code and have been sentenced to ten years' rigorous imprisonment each. The convictions are based on the retracted confession of one of the appellants, Madhu Majhi. The only question put by the Magistrate before recording the confession was "(After due warning) do you want to say anything?" What the due warning was we are not informed and it is clear that this confession has not been recorded in accordance with law. It is impossible to accept it, and with it the whole basis for the convictions disappear. I would accordingly allow this appeal and, setting aside the conviction and sentences, acquit the accused.

SULTAN AHMED, J.—I agree.

Appeal allowed.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 17 OF 191[illegible].
February 14, 1919.
Present:—Mr. Justice Chevis.
MANGAL SINGH AND OTHERS—CONVICTS—
APPELLANTS
versus
EMPEROR—PROSECUTOR—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 350—Failure to comply with provisions of section, whether vitiates proceedings.

The case of the accused was taken up by a Magistrate who, after recording the prosecution evidence and framing a charge, was transferred. On the case coming before his successor the accused applied for a trial *de novo*, and the Magistrate fixed a date for the trial, but took it up on an earlier date without notifying the change of date to Counsel for the accused, and on this date he merely read over to each witness the statement recorded by his predecessor, asking such further questions as he thought necessary. On a subsequent date Counsel applied on behalf of accused to re-call

FAIZ MAHOMED *v.* EMPEROR.

certain of the prosecution witnesses for cross-examination, but this was refused:

Held, that the whole of the proceedings were irregular and unfair to accused, who had a right under section 350 of the Criminal Procedure Code, to demand all the prosecution witnesses to be, re-summoned and re-heard, and that the proceedings must, therefore, be set aside.

Appeal from the order of the Magistrate first Class, exercising enhanced powers under section 30, Criminal Procedure Code, Multan, dated the 19th December 1918.

Mr. *Brij Lal*, for the Appellant.

Mr. *Dalrymple*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The three appellants have been tried and convicted of house breaking by night. The case came before Munshi Aminulla Khan, Magistrate, who recorded the prosecution evidence and framed a charge, but was then transferred before the trial could be completed. The case then came before Lala Hari Chand. On 16th November 1918 Lala Kewal Kishen, Pleader, appeared and asked for a trial *de novo*, and requested that it might be taken up at Sadr. But the Magistrate fixed 9th and 10th December 1918, for the trial, to take place at Macleod Ganj. For some unexplained reason the Magistrate took up the case at Macleod Ganj on the 6th December. No legal practitioner appeared, nor does it appear from the record whether appellant's Pleader was ever informed of change of date. The prosecution witnesses were examined, and the statements of the accused were recorded, and the case was adjourned to the 14th December 1918. On the 14th December Lala Kewal Kishen asked that certain prosecution witnesses should be re-summoned for further cross-examination. This was refused, the Magistrate writing: "It is by defence Counsel who is recently engaged too late, cannot re-call the prosecution witnesses when accused did not like to do so." Two defence witnesses were then examined, one on the 14th and one on the 18th December and the trial then closed.

Another point to be noted is that, when the prosecution witnesses were examined on the 6th December, they were not really re-heard.

Their statements recorded by Munshi Aminullah Khan were read out to them, and admitted by them to be correct, the Magistrate merely asking such further questions as he thought necessary. This is by no means a sufficient compliance with the requirements of section 350, Criminal Procedure Code.

The whole of the proceedings before Lala Hari Chand seem to be irregular and unfair to the appellants, who have been deprived of the benefit of Counsel. The request of the 14th December was a very reasonable one and might well have been allowed. The accused had a perfect right under section 350 to demand that all of the prosecution witnesses should be re-summoned and re-heard, *i.e.*, that their evidence should be recorded anew, not merely that their former statement should be read out to them.

I accept the appeal and setting aside the conviction and sentence and all the proceedings in Lala Hari Chand's Court, I direct the appellants be re tried. Lala Hari Chand has been transferred from Multan. The fresh trial will be by the District Magistrate or by such Magistrate as he may depute. Care must be taken to see that this time the provisions of section 350, Criminal Procedure Code, are properly observed. The accused will remain in under-trial lock-up pending re-trial unless the District Magistrate should see cause to allow them out on bail.

Appeal accepted.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 64 OF 1919.

September 15, 1919.

Present:—Mr Kincaid, J. C., and Mr. DeSouza, A. J. C.

Shiekh FAIZ MAHOMED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 250—Complaint dismissed as false and malicious—Complainant, liability of, to pay compensation—Complainant, who is.

M. enlisted in a Labour Corps, and a few days later deserted, whereupon *S.* was deputed to search

for him. *S.* reported to the Commandant that in his endoavours to arrest *M.* he had been assaulted by two other persons who had released *M.* The Commandant invoked the assistance of the Police who, in the first information report, described *S.* as the complainant; he pointed out two men as those who had assaulted him and released *M*; they were arrested and sent up for trial, but the Magistrate discharged them finding the complaint to be false and malicious, and ordered *S.* to pay compensation. In revision it was urged that *S.* did not file the complaint and that as there was no finding that the complaint was frivolous or vexatious the order for compensation was not justified:

Held, (1) that *S.* was the complainant as it was he who pointed out the men whom he falsely alleged had effected the release of *M.*;

(2) that the finding that the complaint was false and malicious was tantamount to finding it to be vexatious, and that the order for compensation was justified.

Application to set aside an order of the Magistrate, Karachi.

Mr. *Kewachand Vasanmal*, for the Applicant.

Mr. *A. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—The facts of this application are shortly as follows: On the 2nd of January 1919 one Ali Mahomed Khudabux, a recruiting agent, took a man called Mahomed Bux to Captain Shepherd, Commandant of the Combined Labour Depôt, to be enlisted. He was duly enlisted and received an advance of Rs. 15 0-0 and deserted a few days later. The Commandant complained to Ali Mahomed who in turn told one Shakar, the present complainant, to search for the deserter and seize him. On the 23rd of January 1919 Shakar with Ali Mahomed presented himself before Captain Shepherd and stated that at 9 P. M. the previous night he had met Mahomed Bux with two other persons near the Cantonment Railway Station. He had tried to arrest Mahomed Bux and take him to the Depôt but the two men with him had beaten him and released Mahomed Bux. On hearing this story, Captain Shepherd gave Shakar a note to the Cantonment Police Inspector. The same evening Shakar pointed out the two men who had been with Mahomed Bux, the deserter, and had, according to Shakar's account, beaten him and released Mahomed Bux.

The two men after their arrest were prosecuted before the Cantonment Magistrate, Mr. Richardson. He, however, found that the complaint was false and malicious. He discharged the two accused persons and after calling upon Shakar to show cause ordered him, under section 250 of the Criminal Procedure Code, to pay Rs. 25-0 0 to each of the two accused. Against this order under section 250 Shakar has made the present application.

The learned Pleader who appears for the applicant has urged that his client did not file the complaint before the Police. Relying on the case of *Emperor* v. *Sumar* (1), he has urged that a mere instigation to lodge a false or frivolous complaint was not sufficient ground for the Court to order payment of compensation. In our opinion however, the learned Pleader is wrong in stating that the complaint was not filed by Shakar. In the first information recorded by Mr. Samson, the Sub-Inspector of Police, Captain Shepherd is described as the informant, whereas Shakar is described as the complainant. Moreover, it was Shakar who went to the Police and who pointed out the two men who, as he falsely alleged, had effected the release of the deserter. All that Captain Shepherd did was to write a note in which he did not ask for the arrest of the accused persons but merely claimed Police assistance in securing the deserter. It cannot, thus, be said that he had any connection whatever with the arrest of the two persons whom Shakar pointed out to the Police.

The learned Pleader raised a further point, namely, that there was no finding by the Magistrate that the accusation made by Shakar was frivolous or vexatious. There is, however, a finding by the learned Magistrate that the complaint is false and malicious. It is impossible that a complaint which is false and malicious should not be vexatious.

We see no reason to interfere with the order made by the learned Magistrate and we dismiss this application.

Application dismissed.

(1) 48 Ind. Cas. 980; 12 S. L. R. 76; 20 Cr. L. J. 100

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 53 OF 1919.

February 7, 1919.

Present:—Mr. Justice Richardson and Justice Sir Shamsul Huda, KT.

BAI DAS—ACCUSED—PETITIONER

versus

ALI BUX KHAN COMPLAINANT—OPPOSITE PARTY.

Calcutta Police Act (IV B. C. of 1866), s. 54 A, requisites for conviction under—Possession of old chuddar, whether sufficient in itself to arouse suspicion.

To justify a conviction under section 54 A of the Calcutta Police Act there must be reason to believe that the article in possession of the accused has been stolen or fraudulently obtained. The possession of an old *chuddar* is not enough in itself to arouse suspicion that the article was stolen or fraudulently obtained.

Rule against the order of the Honorary Presidency Magistrate, Northern Division, Calcutta.

Babu *B. M. Misra* (with him Babu *Debi Prasad Dut*), for the Petitioner.

JUDGMENT.—The petitioner in this case was found in possession of a *chuddar* which we understand was an old one. He could not indicate the exact person from whom he had purchased it, but examined two witnesses to show that he had purchased it as an old cloth from a pilgrim at a *dharamsala*. Whether this account is correct or not need not be considered, for, in our opinion, the possession of an old *chudder* is not enough in itself to arouse suspicion. The conviction is under section 54 *A* of the Calcutta Police Act; and to justify a conviction under that section there must be reason to believe that the article has been stolen or fraudulently obtained. We are not satisfied that there was any reasonable ground for suspicion in this case.

We accordingly make the Rule absolute, acquit the petitioner and set aside the conviction and sentence. The petitioner will be discharged from his bail-bond.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 734 OF 1920.

December 2, 1920.

Present :—Sir Grimwood Mears, KT., Chief Justice.

CHAUBEY KUNJ BEHARI LAL—APPLICANT

versus

LAUUA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 12 (1), (2)—Jurisdiction—Sub-Divisional Magistrate, whether can take cognizance of offence outside his sub-division.

A Sub-Divisional Magistrate has no jurisdiction to take cognizance of matters outside the local area within which the District Magistrate has appointed him to act. [p. 555, cols. 1 & 2.]

Criminal reference, by the Sessions Judge, Agra, dated the 3rd September 1920.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application for revision of an order of Mr. Mohammad Azim-ud-din Khan, who is a Magistrate of the First Class, at Agra. A complaint was laid before him in the Court of the Sub-Divisional Magistrate at Fatehabad. When the matter was looked into and some evidence taken, it appeared, to use the words of the learned Sessions Judge, that "undoubtedly the proper Court in which the complaint should have been launched was that of the Sub-Divisional Magistrate of Agra Tahsil." At this time Mohammad Azim-ud-din Khan was Sub-Divisional Magistrate of Fatehabad Tahsil and he, having heard part of the evidence, had the the question of jurisdiction brought to his notice. He thereupon returned the complaint for presentation to the proper Court. The matter was brought to the attention of the learned Sessions Judge and he took the view that, inasmuch as Mohammad Azim-ud din was a First Class Magistrate, he had the power to decide the matter and should have taken cognizance of it, and he called upon the Magistrate for an explanation which explanation is to be found amongst the papers Notice was given to the Government Advocate and he appeared before me. The question is a very simple one but it deals with an important matter of practice which turns apparently on the right construction of sec-

tion 12, clauses (1) and (2) of the Criminal Procedure Code. The words in that section so far as they are pertinent to this matter, are as follows:—"the District Magistrate subject to the control of the Local Government may, from time to time, define local areas within which such persons (*i. e.*, Sub-Magistrates) may exercise all or any of the powers with which they may respectively be invested under this Code." That, therefore, shows that districts may be carved up and Sub-Magistrates put in power over them. Clause (2) says: "except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such district." It is true that Mr. Mohammad Azim ud din Khan was a Magistrate of the First Class in a district: it also is beyond doubt that he had had jurisdiction defined within local limits by order of the District Magistrate; also there is no doubt that the offence in question lay outside his Sub-Divisional district. Under these circumstances, I am of opinion that the Sub-Divisional Magistrate took the right view when he stated that he, having been placed in charge of a sub-division, his jurisdiction was confined to that sub division, and he could not take cognizance of offences beyond this limit. The only case which was brought to my attention by the learned Government Advocate was the case of *Emperor* v. *Syed Sajjad Husain* (1). There is a marked distinction between the two cases. In that case the trial commenced before an Officiating District Magistrate. He ceased to be Officiating District Magistrate but he continued to be a First Class Magistrate and in that capacity continued the hearing of the matter. The question in that case was, whether the mere fact that he ceased to be the District Magistrate ousted his jurisdiction to continue and conclude a trial which he had commenced whilst he was District Magistrate. The answer to that, as may very well be imagined, was that it did not. That, however, involved quite different considerations from the case before me, which is whether the Sub-Divisional Magistrate can take cognizance of matters outside the local areas within which the District Magistrate has appointed him to act. For these reasons, I am of opinion that the Sub Divisional Magistrate was right in the view that he took and the order that he made that the complaint must be returned for presentation to the proper Court was the right order to make under the circumstances.

Complaint returned.

(1) A. W. N. (1903) 201; 3 A. L J. 825; 4 Cr. L. J. 140.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 332-B OF 1919.

December 12, 1919.

Present:—Mr. Justice Robinson.

MA TWE—APPLICANT

versus

LWE HAIN—RESPONDENT.

Marriage, validity of, test as to—Law applicable—Buddhist Law, Burmese—Consent of parties, whether necessary—Consent obtained by pressure, whether free.

The law of the place where it is contracted determines the validity of a marriage. [p. 556, col. 1.]

Under the Burmese Buddhist Law there must be free consent of the parties to a valid marriage. [p. 556, col. 1.]

Consent reluctantly given under pressure is not such free consent as is required by that law. [p. 556, col. 1.]

Mr. *Sin Hla Aung*, for the Applicant.

Mr. *Thein Maung*, for the Respondent.

JUDGMENT.—The point for decision in this case is, whether petitioner and respondent were man and wife. The two ran away together, and respondent kept petitioner in the house of one San Min. It is clear that he made no attempt to treat her as his wife during this period. He got tired of the girl, and did not wish to continue his connection with her. The girl would not return to her home unless he took her and surrendered her to her parents. It appears that considerable persuasion was used to induce him to take her back to them. Eventually, both went to the house of Tun Nyein which is close to the house of the girl's parents. The girl then returned to her home, the neighbours were collected, and the girl and her elder sister went and begged the respondent to come and surrender the girl to her parents. It is perfectly clear that he went there with

the greatest reluctance. When he went there he found a collection of people waiting him, and some so called elders proceeded to question him. They asked him whether he would live with the girl as his wife, and he reluctantly said that he would. He was then asked where they would live, and he said in her parents' house. Two of these *lugyis* admit that they did not think that he ever intended to carry out his promise to marry the girl. These witnesses further go on to state that for about a month from that time they saw petitioner and respondent living in the girl's parents' house as man and wife. In order to decide whether there was a valid marriage, it is first necessary to decide the law binding upon the parties in this matter. Petitioner is a Burman Buddhist and respondent is a Chinese Buddhist born in Burma. I have no hesitation in agreeing with the dictum of Sir Charles Fox in the case of *Maung Sein Kyi* v. *Ma E* (1) that the law of the place where it was contracted determines the validity of a marriage and that this question must be decided by the Burmese Buddhist Law. Under that law there must be free consent of the parties, but it is obvious that the consent of the respondent was induced and was very reluctant. But, assuming that this amounts to such consent as would constitute this a promise of marriage, it would be necessary for that promise to be followed by open living as man and wife. As regards this latter point, the evidence is conflicting. The position of the so-called *lugyis* is not such as tends to inspire confidence in their veracity. They are neighbours. They were specially called in order to effect this marriage. No sufficient ground has been made out, in my opinion, for me to differ from the finding of fact on this point come to by the Magistrate. If, therefore, the parties did not live together after the surrender of the girl to her parents, the question is, whether the consent that he gave was such as would render the contract a marriage. It is clear that the respondent was only dragged there after much persuasion, and did not expect to find a number of people collected, and it is equally clear that he was rushed into giving his consent. Even the witnesses for the petitioner state that they did not think that he ever meant to carry out the contract. One of them went so far as to ask him what was to be done, if he did not carry out the contract. He said "Do whatever you like."

Taking all the circumstances into consideration, I am of opinion that there is no valid marriage. The application is dismissed.

Application dismissed.

(1) 34 Ind. Cas. 159; 9 Bur. L. T. 179; 8 L.B.R. 399

LAHORE HIGH COURT.
CRIMINAL REVISION NO. 531 OF 1920.
May 28, 1920.
Present :—Mr. Justice Scott Smith.
SURTA SINGH AND OTHERS—PETITIONERS
versus
EMPEROR—REPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal, criminal—Presentation to wrong Court—Subsequent presentation to proper Court beyond limitation—Extension of limitation.

Where a criminal appeal was erroneously filed in the High Court and on being returned for presentation to the proper Court was, on the same day filed in the Sessions Court, but by that time limitation for presentation of the appeal had expired :

Held, that the delay should be excused under section 5 of the Limitation Act inasmuch as in the case of a criminal appeal it could not be said that there was a "successful litigant" who had secured a "valuable right." [p. 557, col. 2.]

Criminal revision from the order of the Sessions Judge, Lahore, dated the 23rd February 1920, affirming that of the Additional District Magistrate, Lahore, dated the 12th January 1920.

Lala. *Narinjan Das*, R. B. for the Petitioners.

Lala *Tirath Ram* (for Government Advocate), for the Respondent.

JUDGMENT.—This is an application for revision of an order of the Sessions Judge of Lahore dismissing the petitioner's appeal to him as being barred by time.

The petitioner was sentenced by the Additional District Magistrate to two sen-

tences of four years' and nine months' rigorous imprisonment, respectively. The sentences to run concurrently. Under these circumstances, the appeal lay to the Sessions Judge, see *Sher Muhammad* v. *Emperor* (1). The appeal was, however, erroneously filed in the High Court on the 2nd February 1920, the order appealed against being dated 12th January. The appeal was returned on the 21st February 1920 for presentation in the proper Court and was filed in the Sessions Court on the same day. The learned Sessions Judge dismissed it as time barred, relying upon *Sant Singh* v. *Qaim* (2). That was a case where, in a suit of which the jurisdictional value was over Rs. 5,000, the appeal was filed in the Divisional Court instead of in the Chief Court, and it was held that mere carelessness or oversight of the appellant or his Counsel in presenting the appeal in a wrong Court, which, by the exercise of due diligence, could have been avoided, cannot be recognised as a sufficient reason for delay under section 5 of the Indian Limitation Act. In that case the appellant's Pleader was obviously guilty of carelessness, and, further, when the memorandum of appeal was returned for presentation in the proper Court the appellant delayed for several days to present it in the Court having jurisdiction to hear it. Counsel for the petitioner tells me that he saw that the sentences were four years' and nine months' rigorous imprisonment, respectively, and, therefore, he thought that the total amount which the convict had to undergo was four years and nine months and that the appeal lay to the High Court. Had he exercised due diligence he would certainly have seen that the sentences were to run concurrently and, therefore, the total sentence of imprisonment to be undergone was only four years. Had he done this, he would no doubt have realised that the appeal lay to the Sessions Court and not to the High Court. The case, however, is in several respects distinguishable from that reported as *Sant Singh* v. *Qaim* (2), especially inasmuch as that was a civil appeal. The Judges there quoted, with approval, the following passage from the case reported in *Karsondas* v. *Bai Gungabai* (3), "when the time for appealing is once passed a very valuable right is secured to the successful litigant, and the Court must, therefore, be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantage which he has obtained". Now, in the present case where the appeal is a criminal one there is no "successful litigant" who has secured any "valuable right". It cannot be said that the Crown has secured any valuable right by reason of the appeal not having been filed within the prescribed period. Government has nothing to gain by the appeal being dismissed as time barred. All that the Government is, or should be anxious for is that justice should be done. It would, I think, be very hard in this case if the appellant who is in jail should be deprived of the advantage of his appeal being heard on the merits merely because his Counsel has been somewhat careless in filing the appeal in a wrong Court.

I, therefore, allow the revision, and setting aside the order of the learned Sessions Judge, direct him to hear the appeal in accordance with law.

Revision accepted.

(1) 25 P. R. 1901 Cr.
(2) 118 P. R. 1903.
(3) 30 B. 329; 7 Bom. L. R. 965.

PATNA HIGH COURT.
CRIMINAL APPEAL No.—OF 1920.
September 30, 1919.
Present :—Mr. Justice Jawala Prasad.
BAIJNATH MAHTON AND ANOTHER—
ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 297, 298—Trial by jury—Jury asked to take broad view of the evidence—Warning against minor discrepancies—Misdirection.

Where a Sessions Judge in his charge to the jury observed :—

"If you are satisfied that there was no object in proving a false case, not from the point of view of seeking for small discrepancies, but upon a broad view of the evidence given before you :"

Held, that there was no misdirection to the jury and the Sessions Judge was right in conveying the

caution against minor discrepancies in immateria and collateral events in the case.

Messrs. *Hasan Imam* and *G. C. Pal*, for the Appellant.

JUDGMENT.—I have carefully gone through the heads of charge to the jury recorded by the learned Sessions Judge and have considered the petition of appeal and the arguments advanced by the learned Counsel. The charges are full and comprehensive and the evidence appears to have been properly laid before the jury. I have not found any thing to show that the summing up of the case was, in any way, unfair to the accused.

The principal contention of Mr. Hasan Imam has been that the learned Judge misdirected the jury in concluding the general discussion of the evidence by giving a warning against small discrepancies in the evidence of the prosecution. The learned Judge drew the attention of the jury to the material parts of the evidence, which might, in his opinion, tell against the prosecution and in favour of the defence. Then he conveyed the caution against minor discrepancies in the following words :—

"If you are satisfied that there was no object in proving a false case, not from the point of view of seeking for small discrepancies, but upon a broad view of the evidence given before you."

Reading this passage in the light of the context in the summing up, far from finding fault with it, I consider that it was a wholesome and proper caution to the jury. It does not do anything more than conveying to the jury the way in which the evidence, in any case, should be looked into. While discrepancies, affecting the material part of the case should receive proper consideration in favour of the accused, minor discrepancies in immaterial and collateral events should carry no weight in judging the case as a whole. A broad view of the evidence need only be taken. This is true both for the Jury as well as for the Judge and, in fact, for any one, who has to form a serious opinion upon the evidence placed before him.

The learned Judge has, therefore, done what he ought to have done, namely, to point out to the jury the way in which the minor discrepancies should be looked into. He has also asked them to take a broad view of the evidence and to be satisfied upon the evidence as to the case being false or true.

In the case of *Queen* v. *Bustee Khan* (1) the Sessions Judge conveyed the warning to the jury in the following words:—

"A large number of witnesses have sworn to the facts and if a minor discrepancy in their statements is here and there discoverable, I do not think that such stress should be laid upon them as the Vakil for the defendant urges, or that you should on such grounds only reject the whole of their testimony."

This warning is in terms similar to, if not stronger than, the one given by the Judge to the jury in the present case. Mr. Justice Kemp, so far back as in 1864, observed as follows :—

"I am of opinion that in giving the warning to the jury not to disbelieve a mass of otherwise consistent evidence, because in one or two minor and immaterial points the witnesses made different statements, the Judge used a wise discretion."

I agree entirely with the aforesaid view of that eminent Judge, and also with the reason stated by him that the warning is necessary so that the jurors may not jump to the conclusion that, because a case is weak in one point, the whole charge is false. That case, though ancient, does not seem to have been dissented from, or, in any way, varied by later decisions, nor can the principle of that decision, to my mind, be disputed. In that case, as in the present, the jury appeared to have exercised their own unfettered judgment. They appear to have weighed the evidence properly and given the benefit of the material defects and discrepancies in the prosecution case and have acquitted the accused of the serious charges of murder or of grievous or simple assault under sections 323/109, 325/114, 323/109. They unanimously returned a verdict of guilty under section 147, Indian Penal Code, against some of the accused and by majority against others. The learned Judge accepted the verdict of the majority of the jury and sentenced the prisoners under section 147 some to one year and others to six months' rigorous imprisonment. Mr. Hasan Imam has cited certain authorities, but, when pointed

(1) 1 W. R. Cr. 17.

out, he conceded that those cases have no application to the present case. There was clear misdirection in those cases. It was then said that the learned Judge did not explain the common object to the jury. I find that he has done so very clearly. He has explained to them the essential elements that constitute an offence under section 147 and directed their attention to the common object specified in that charge.

I need not refer to the other minor points urged by Mr. Hasan Imam. Suffice it to say, that I have considered them and I do not find any defect in the charge to the jury so as to justify the admission of the appeal.

I, therefore, dismiss this appeal.

I need not have written a long judgment, but for the great importance attached by Mr. Hasan Imam to his contentions, particularly relating to the warning by the Judge to the Jury in the passage referred to above.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 603 OF 1920.
July 9, 1920.
Present :—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Ryves.
JAISUKH—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 309—Sessions trial—Evidence taken and assessors discharged—Sessions Judge taking evidence thereafter, legality of.

In a Sessions trial with the aid of assessors, a Sessions Judge has no power to take evidence after the assessors have been discharged, and if he does so, the trial is vitiated.

Criminal appeal against the order of the Sessions Judge, Saharanpur, dated the 17th June 1920.

Mr. *B. M. Vyas*, for the Appellant.

Mr. *W. Wallach* (Government Advocate), for the Crown.

JUDGMENT.—Jaisukh, accused, was charged before the Sessions Judge of Saharanpur with having brought about the death of one Udmi by administering arsenic. A great deal of evidence was taken, the assessors gave their opinion and the assessors were

discharged and then it occurred to the learned Sessions Judge, when he was about to write his judgment, that he would like to put one or two questions to another man by name Jaisukh, son of Sahibu, who had originally been challaned with the accused but had been discharged by the Magistrate. The learned Sessions Judge thought he would like to put further questions to another witness who had already given evidence. This he, in fact, did and did so in the absence of the assessors and he justifies having done that by placing reliance upon a decision of Mr. Justice Walsh who, in the case of *Emperor* v. *Birbal* (Criminal Appeal No. 580 of 1915, decided on the 22nd of September 1916), decided that a Judge after having discharged the assessors could, nevertheless, take further evidence. Now, Mr. Justice Walsh could have arrived at that decision only by the fact that the case of *Queen-Empress* v. *Ram Lal* (1) was not brought to his notice because that case is a distinct authority for the very salutary proposition that evidence must not be taken by a Sessions Judge unless that Sessions Judge has the two assessors sitting with him, otherwise, if the Sessions Judge is sitting alone, he does not appear to be a Court, the Court being the Judge plus the assessors. We, therefore, think that the learned Sessions Judge was wrong in taking the evidence of Jaisukh, son of Sahibu, and the further evidence of Nanu Gara and, therefore, we are obliged to set aside the conviction and sentence, and we direct that the accused be tried *de novo* by the Sessions Judge of Saharanpur as soon as possible.

Conviction and Sentence set aside.

(1) 15 A. 136; A. W. N. (1893) 50; 7 Ind. Dec. (N. S.) 805.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 276 B OF 1919.
November 12, 1919.
Present :—Mr. Justice Robinson.
BO GYI—APPLICANT
versus
MA NYEIN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 489—Order for maintenance—Subsequent declaratory decree of Civil Court, effect of.

DAULAT v. EMPEROR.

The jurisdiction conferred by section 488 of the Criminal Procedure Code is auxiliary to that possessed by the Civil Courts, and before enforcing an order for maintenance made under that section a Magistrate is bound to take into consideration any subsequent order of a Civil Court which would disentitle a wife to maintenance.

A Magistrate ought to refuse to enforce an order for maintenance of a child made under section 488 of the Criminal Procedure Code if, after the passing of the order, a Civil Court decides that the respondent is not the father of the child.

Mr. *Lambert*, for the Applicant.

Mr *Nicol*, for the Respondent.

JUDGMENT.—The respondent obtained an order from the Sub Divisional Magistrate of Shwegyin against the petitioner for payment of two rupees a month for the maintenance of her child The petitioner did not apply to have that order reversed but, instead, he brought a civil suit in the Township Court for a declaration that the child was not his. He obtained a decree and then applied to the Sub-Divisional Magistrate to cancel the order previously made for maintenance. His application was rejected, and properly rejected, as the Magistrate has no power to cancel the order under section 488 once made. But he now comes to this Court, and points out that the Magistrate is not entitled to disregard the civil decree that has been obtained, and which has finally settled the question of paternity.

It has been pointed out in numerous cases that the jurisdiction conferred on a Magistrate under section 488 is only auxiliary to that possessed by the Civil Courts, and a Magistrate ought to take the judgment of a competent Civil Court into consideration, if it settles the question of relationship, and finally places the matter outside the pale of discussion. The result of the civil decree is to supersede the order of the Magistrate directing maintenance, and, as the cases cited in the notes to section 488 of Sohoni's Criminal Procedure Code show, the Magistrate is not entitled to enforce his previous order. As the petitioner did not ask the Magistrate for any order which the Magistrate had jurisdiction to pass, I am unable to accept his application, and accordingly, with the above remarks, it is rejected.

Application rejected.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1088 OF 1920.

December 11, 1920.

Present:—Mr. Justice Chevis.

DAULAT—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 339—Approver failing to comply with conditions of pardon—Sessions Judge, whether can pass order of commitment.

If a Sessions Judge, before whom an approver has given evidence, finds that the approver has not told the truth, he has power himself to pass an order committing the approver to stand his trial.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Gurdaspur, dated the 8th June 1920.

The Hon'ble Mian *Fazal i Hussain*, K. B., for the Petitioner

Sardar Bahadur Sardar *Mahtab Singh*, Public Prosecutor, for the Respondent.

JUDGMENT.—The learned Sessions Judge has come to the conclusion that the approver has falsely accused two persons of murder in order to screen others. So he has acquitted the two accused and passed an order committing the approver to stand his trial.

The correctness of this procedure is questioned. Counsel for the petitioner quotes *Emperor* v. *Kathia* (1) and *Emperor* v. *Abani Bhushan Chuckerbutty* (2); according to these judgments the Sessions Judge is bound to discharge the approver, though a Magistrate can then make an enquiry and commit him. He also cites *Habibullah* v. *Empress* (3), though I do not here find anything to support the contention that a Sessions Judge before whom an approver has given evidence cannot order a commitment.

Crown v. *Kadu* (4) and *Chanan Singh* v. *Emperor* (5) are authorities to the contrary, and, following them, I dismiss this application

Application dismissed.

(1) 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346.
(2) 8 Ind. Cas. 721; 37 C. 845; 11 Cr. L J. 703.
(3) 15 P. R. 1895 Cr.
(4) 31 P. R. 1904 Cr.; 176 P. L. R. 1905; 1 Cr. L. J. 1082.
(5) 56 Ind. Cas. 774; 1 L. 218; 103 P. L. R. 1920; 21 Cr. L. J. 518.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 6 OF 1920.

July 13, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

DUNDAPPA BASAPPA YEDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHIMAWA BASWANTIAPPA PATIL—PLAINTIFF—RESPONDENT.

Hindu Law — Shudras — *Succession—Illegitimate daughter, whether can succeed to mother.*

Amongst *Shudras* an illegitimate daughter succeeds as heir to her mother in default of any nearer heirs.

Appeal from an order passed by the District Judge, Belgaum, in Appeal No. 43 of 1919, reversing the decree passed by, and remanding the suit to, the Subordinate Judge at Bail-Hongal, in Civil Suit No. 74 of 1918.

Mr. *D. G. Dalvi*, for the Appellants.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.—The plaintiff sued for an account under the Dekkhan Agriculturists' Relief Act of a mortgage executed by her mother Somawa. In their written statement the defendants said that the plaintiff's mother Somawa was kept by Somanaik, therefore, the plaintiff had no right to sue. The seventh issue was: Does the plaintiff prove that her mother Somawa was the lawful wife of Somanaik? The plaintiff's Pleader notified to the Court that he did not wish to lead any evidence on issue No. 7, and it was, therefore, presumed that the plaintiff could not prove that Somawa was married to Somanaik. The Judge seemed to consider that that was conclusive, and that the plaintiff, being the illegitimate daughter of Somawa, was unable to sue for an account.

In appeal this question does not seem to have been dealt with. But the appellant relied on the fourth ground of the appeal that it was not open to the defendants-respondents to question the status of the plaintiff-appellant's mother, Somawa, as wife of Somanaik. Ground No. 6 was that the lower Court failed to see that appellant-plaintiff was entitled to sue as heir of her mother Somawa if not as heir of Somanaik. The judgment of the learned appellate Judge is not very clear but it appears from what he says that both Pleaders agreed that the case had to go back. Therefore, we have not got the findings of the learned Judge on the various grounds of appeal beyond this, that he thought that the defendants could not deny the title of their mortgagor Somawa. That, no doubt, is perfectly correct, but it did not follow from that that the plaintiff was entitled to sue in the place of the deceased Somawa. The decree of the lower Court was reversed and the suit was remanded for trial and decision of the other issues. All evidence having been led, neither side was to be at liberty to adduce further evidence.

Now the question whether the plaintiff can sue on the mortgage executed by her mother depends on the question whether, as an illegitimate daughter, she can succeed as heir of her mother's estate. There can be very little doubt that, amongst Shudras, at any rate, the illegitimate daughters succeed as heirs to their mother in default of any nearer heirs. Mr. Ghose, at page 763 of his work on Hindu Law (Third Edition), says: "According to Hindu Law, an illegitimate child is not the child of the father but only of the mother, and can thus have no relations or rights of inheritance except to the mother's property." The dispute has always been whether illegitimate children can succeed as heirs of their fathers. It has never been disputed that they are heirs to their mother's property. The result must be that as Somawa is the mortgagor, the defendants, as the learned appellate Judge points out, cannot dispute the fact that Somawa was entitled to mortgage the property. Then, as the plaintiff is the nearest heir to Somawa, she is entitled to sue for an account of that mortgage. The judgment of the learned Judge in the Court below reversing the decree of the Trial Court is, therefore, correct. The case must be dealt with by the Trial Court in the light of our remarks and findings recorded on issues Nos. 1 to 6. The appeal is dismissed. The respondent is entitled to her costs of the appeal.

Appeal dismissed.

HAZRA BIBI *v.* SULEIMAN HAJI MOHAMMAD.

LOWER BURMA CHIEF COURT.
CIVIL REGULAR No. 471 OF 1919.
April 27, 1920.
Present :—Mr. Justice Rigg.
HAZARA BIBI—PLAINTIFF
versus
SULEIMAN HAJI MOHAMMAD—DEFENDANT.

Muhammadan Law—Sunni Schools—Guardianship—Mother, right of, to visit child after expiry of period of hizanat—*Suit to enforce right, maintainability of—Jurisdiction of Chief Court of Lower Burma over infants, limits of.*

According to Sunni law, a mother has a right to visit and see her child after it has come under the control and guardianship of the father or his relatives, but there is no machinery under the Guardians and Wards Act for working out such a right by means of a suit [p. 563, col. 2; p. 564, col. 1.]

The Chief Court of Lower Burma has no special jurisdiction over infants; its powers in this respect are confined to those given under the Guardians and Wards Act and are only those of a District Court. [p. 563, col. 2.]

Messrs. *B. Cowasji* and *Rutledge*, for the Plaintiff.

Mr. *Das*, for the Defendant.

JUDGMENT.—Plaintiff, Hazara Bibi, is the widow of Abdul Guffar, and the defendant, Suleman Hajee Mohammad, is his father. Mohamed Ariff, who was born in March 1911, is the child of Hazara Bibi and Abdul Guffar. In 1918, Hazara Bibi married again, and the defendant, in consequence of her re-marriage, took away Mohamed Ariff from her custody and now refuses to allow her access to the boy. Plaintiff sues for a declaration that she is entitled to such access, and for orders as to the times and occasions on which such access is to be given. Defendant denies that he is under any legal obligation to allow Hazara Bibi to see her child, and asserts that there is no cause of action against him, and that the Court has no jurisdiction to make the order desired by the plaintiff.

Two preliminary issues have been fixed, and Counsel have addressed me on them. The first issue is, whether the plaintiff is entitled to access to her son.

The parties are Sunni Muhammadans. It is admitted that, according to the law binding on them, the defendant is entitled to the control and guardianship of Mohamed Ariff, Among the Hanifis the accepted doctrine is that the mother's *hizanat* terminates when the son has completed seven years of age. In Hamilton's Hedaya (Second Edition, page 139) it is laid down that a boy or girl who has passed the period of *hizanat* has no option to be with one parent in preference to the other, but must remain in charge of the father. The opinion of Shafei to the contrary is not accepted, on the ground that, in the instance given, the prophet gave the boy the choice of parents after prayer to God to direct him. The instances cited in sections 2 and 3, page 140, Tagore Law Lectures (1891-92) are also instances of choice made after special guidance. Mr. Rutledge relies upon the following passage in the Durr-al Mukhtar (Brij Mohan Dayal's translation, page 314) as authority for the mother's right of access to her child after her guardianship has ended:—

"It is in the Sirajiah: when custody of the mother ceases, and the father takes the child, the father cannot be forced to send the child to her, but whenever she likes to see the child, she will not be prohibited from doing so. My master Shaik Ramli has held that the father can take the child on a journey after expiry of the period of tutelage, and that all agnates other than the father are like the father in this matter, . . . Ramification:—a father goes away with his child and then divorces the mother, she demands the child. If the father took away the child with the mother's consent, he is not bound to take the child to her, but if he took it away without her consent, he is bound to do so."

The "Ramification" obviously applies to the case of a child still under the mother's custody, and Mr. Das argues that the previous portion of the Sirajiah should be restricted to children who have not passed out of the mother's control. The language of the passage seems to me to negative any such interpretation, and the reference in the very next sentence to the expiry of the period of tutelage seems to indicate that "ceases" means "when the period of her *hizanat* has terminated." In Neil and Bailey's Digest of Muhammadan Law (Second Edition, page 439) the rule regarding access is stated thus: "When a child is with one of its parents, the other is not to be prevented from seeing and visiting it." No other authority on this question has been quoted, nor have I been able to find any. The

Durr-al Mukhtar is a great authority, and, in the absence of any text to the contrary, the rule laid down must be accepted as binding. I think, therefore, that, according to Sunni law, a mother has a right to visit and see her child after it has come under the control and guardianship of the father or his relatives.

It is argued that, even if Muhammadan Law does not confer this right, it is a right inherent in the mother; a natural right to which the Court will give effect, according to principles of equity, justice and good conscience. As my decision on the mother's right under Muhammadan Law is in her favour, it is perhaps not necessary to deal with this part of Counsel's argument, but, in view of the stress laid upon this view by Mr. Rutledge, I think it advisable to consider the point.

There is no doubt that this is a case in which, if we were not in a Court of law, but acted under the influence of feelings of natural indignation at the spite prompting the action of the boy's grandfather, we might be tempted to decide in the mother's favour from sympathy with her natural desire to see her child, and the ill effects the deprivation is having on her health. But, until the passing of Guardianship of Infants Act, 1886, even in England the rights of a father to the guardianship of his child were absolute. See *A & B (Infants), In re* (1). The history of the law on this subject, and the principle on which the law was administered in the Chancery Court, are discussed in *Agar Ellis, In re, Agar Ellis* v. *Lascelles* (2). In that case the father put a restriction on the intercourse between his daughter, aged seventeen, and her mother on the plea that he believed that the mother would alienate the daughter's affection from him. The Court suggested modifications of the terms imposed by him, but he was not willing to accept any of them. In spite of his somewhat unreasonable attitude, the Court declined to interfere. The "sacred rights" of the father were considered paramount, except in the utmost need and in the most extreme case. English case law seems to me to afford no foundation for the contention that a mother has a natural and inherent right of access to her children. Nor can such a right be founded on "justice, equity and good conscience." As their Lordships of the Privy Council pointed out in *Waghela Rajsanji* v. *Shekh Masludin* (3), equity and good conscience are generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Until 1886 there was no rule in English law recognising the mother's right of access; and if Hazara Bibi had no cause of action under her own law, I do not think such a cause can be conferred by an English Statute altering the law relating to English mothers. In my opinion, her case, so far as it is based on "natural and inherent rights," cannot be accepted. I answer the first issue by saying that Hazara Bibi has a right of access to her child under Muhammadan Law, and as this right has been infringed, she has a cause of action.

The next point is, whether this Court has jurisdiction to make the mandatory order for which she asks. In the Court of Chancery, jurisdiction was exercised over infants by the Lord Chancellor, probably by way of delegation from the Crown as *parens patriæ*. The way in which that jurisdiction was exercised was discussed by Cotton, L. J., *Agar-Ellis, In re, Agar-Ellis* v. *Lascelles* (2) (p. 332). Special jurisdiction over infants has been conferred on the Indian High Courts by Charter, and this jurisdiction is not affected by the Guardians and Wards Act (VIII of 1890): See section 3. But the Chief Court of Lower Burma seems to me to have no such special jurisdiction. It is not conferred by section 13 of the Burma Laws Act of 1898, which merely provides for the law to be administered in certain cases, nor by the Lower Burma Courts Act of 1900. Unless this Court has special jurisdiction, its powers are confined to those given under the Guardians and Wards Act, and are only those of a District Court. See *Annie Besant* v. *Narayaniah* (4) and *Sathi* v. *Rimandi*

(1) (1897) 1 Ch 786; 66 L. J. Ch. 592.

(2) (1883) 24 Ch. D. 317; 53 L. J. Ch. 10; 50 L. T. 161; 32 W. R. 1.

(3) 14 I. A. 89 at p. 96; 11 B. 551 (P. C.); 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 334.

(4) 24 Ind. Cas. 290; 38 M. 807 at p. 820, 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 595; 6 M. L. T. 195; 20 C. L. J. 253; 16 Bom. L. R. 525; 12 A. L. J. 1155; 41 I. A. 314 (P. C.).

Pandaram (5). The proceedings, if competent at all, should have been by petition and not by suit *inter partes*. There does not, however, seem to be any machinery under the Guardians and Wards Act for working out what Hazara Bibi desires to obtain by the present suit. The suit is dismissed.

Suit dismissed.

(5) 53 Ind. Cas. 399; 42 M. 647; 9 L. W. 600; 37 M. L. J. 94; 26 M. L. T. 61; (1919) M. W. N. 487.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 61 OF 1919

July 29, 1920.

Present:—Mr. Daniels, A. J. C, and Mr. Wazir Hasan, A. J. C.

RAM BAHADUR SINGH AND OTHER—DEFENDANTS—APPELLANTS

versus

NIRBHAI SINGH AND OTHERS—PLAINTIFFS AND UDAIRAJ SINGH—DEFENDANT—RESPONDENTS.

Hindu Law—Joint family—Partition—Sons, share of, whether included in share of father.

As a general rule, at a partition among the members of a joint Hindu family each member is presumed to represent not only himself but also his sons, and the sons take their share through their father as being included in the share allotted to him, and the rule is not limited in its application to cases where the sons are minors [p. 564, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Fyzabad, dated the 8th September 1919.

Mr. *Har Dhian Ohandra*, for the Appellants.

JUDGMENT.—The plaintiffs are the sons of Udairaj Singh. They instituted the suit from which this appeal has arisen against their father, against their father's brother, Ram Bahadur Singh, and his son, Jolai Singh, and against the descendants of a deceased brother of their father for partition of the family properties. It is not disputed that a partition took place three years ago between Udairaj Singh and his brothers. The partition was carried out in the main by arbitrators though some small portion of the property was divided by the parties themselves. The award was made a rule of Court and a decree was passed in accordence with it. The plaintiffs were not formally made parties to the partition proceedings though it is now beyond dispute that they were fully aware of them No division was made in those proceedings between Udairaj Singh and his own sons, and though the plaintiffs assert that they separated from their father at that time, the evidence leaves little doubt that they still remain joint. The learned Subordinate Judge in his judgment correctly states the general rule of law as being that laid down in *Umed Babar* v. *Khushalbhai* (1), which was quoted and approved in *Jan Mahommed Abdulla Datu* v. *Datu Joffar* (2) that, as a general rule, at a partition among the members of a joint Hindu family each member is presumed to represent not only himself but also his sons, and the sons take their share through their father as being included in the share allotted to him. It is true that in most of the cases in which the principle has been applied the sons have been minors, as, for instance, in the two Privy Council cases of *Balkishen Das* v. *Ram Narain Sahu* (3) and *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (4). But the rule, as laid down in *Umed Babar* v. *Khushalbhai* (1), is not limited to minors nor, in the absence of fraud, is there any reason why it should be so limited. The share of the father and sons is partitioned as a single unit, and to affect a partition is surely within the extensive power wielded by the father as head and manager of the joint family. If there had been any fraud on the plaintiffs the matter would have been different, but no fraud is established by the evidence or even alleged in the plaint.

The learned Subordinate Judge, while fully accepting this principle, has held, on the

(1) 2 Ind. Cas. 426; 11 Bom. L. R. 396.
(2) 22 Ind. Cas. 195; 38 B. 449 at pp. 582, 583; 15 Bom. L. R. 1044.
(3) 30 I. A. 139 at p. 150; 7 C. W. N. 578; 5 Bom. L. R. 461; 30 C. 738.
(4) 20 Ind. Cas 958; 40 I. A. 213 at p 221; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 40 C. 966; 10 N. L R. 1 (P. C.).

strength of a single sentence in the deposition of two of the defendants' witnesses, that a disruption of the family by partial partition has occurred prior to the partition made by the arbitrators, and on this ground he considers that the principle does not apply. He says:—

A partition in the eye of law had taken place on the disruption of the family by partial partition of the family property and the right of 'representation by the father ceased to exist when there was no existing joint family' [*Marudayi* v. *Doraisami* (5)].

It may be noted that the Madras case relied on by the learned Subordinate Judge has been misunderstood by him. In fact, it lays down the exact contrary of the proposition for which the learned Subordinate Judge cites it. "It cannot be argued," say the learned Judges who decided that case, "that a right of representation is incompatible with the existence of separate interests on the part of the heirs in the inheritance. No doubt Vijnaneswara and other commentators, in expounding the doctrine of representation with reference to the partition of the ancestral estate, speak of 'unseparated brother' (Mitakshara 1, Verse 2; Saraswati Vilasa, Foulkes, section 207); but it does not follow that the same doctrine ought not to be applied among separated brethren." The question does not, however, arise, as we are satisfied that the two pages relied on by the learned Subordinate Judge wholly failed to establish any previous disruption of the joint family. The first witness referred to was Jagannath, one of the arbitrators in the previous arbitration. He says that the arbitrators did not divide the *sir* land in village Belawa as the parties informed them that they already had divided this before the aribitration commenced. The other witness, Mahadeo Singh, makes a similar statement as to a private division of grain, cattle and household effects. The whole thing was substantially one transaction, and the mere fact that the parties amicably divided a small share of the property before resorting to arbitration for the division of the rest does not affect the legal results of the partition or entitle the sons to have the partition re-opened in the absence of any evidence that their interest was prejudiced. We accordingly allow the appeal and dismiss the suit with costs in favour of the contesting defendants in both Courts.

Appeal allowed.

(5) 30 M. 348; 17 M. L. J. 275.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 124 OF 1919.

April 22, 1920.

Present :—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

CHANDRA KANTA CHAKRABARTY AND OTHERS—DEFENDANTS—APPELLANTS

versus

ADINATH SHOM AND OTHERS—PLAINTIFF—RESPONDENTS.

Co-owners—Mistake—Rent, payment of, by one co-owner to another, effect of—Relationship of parties.

D. purchased from *P.* a portion of certain lands held by him, and for many years paid rent therefor to *P.* On *D.*'s refusal to pay rent, *P.* brought the present suit to recover rent :

Held, that there was no relationship of landlord and tenant between the parties as the transaction of sale by *P.* to *D.* had the effect of making them co-owners; and that the fact that the parties had for years past understood their mutual relations to be that of landlord and tenant would not result in their being treated in law as if they were superior and subordinate holders respectively, because they could not have a mutual relation in law which was contrary to the true state of facts [p. 566, cols. 1 & 2.]

Letters Patent Appeal against the following judgment of Mr. Justice Newbould, dated the 2nd of June 1919, in Appeal from Appellate Decree No. 774 of 1918 :—

NEWBOULD, J.—This appeal arises out of a suit for rent. The contentions of the defendants, who have been unsuccessful in both the Courts below and who have preferred this appeal, are that the relationship of landlord and tenant did not exist between them and the plaintiffs and that a portion of the rent claimed is not recoverable as it is an *abwab*. As regards the first point, it appears from a *kobala* of 1824 that the defendants purchased from

the plaintiffs a portion of the *taluk* in which this land is situated. Since then, although their purchase gave them a co ordinate right with the plaintiffs the defendants have accepted a subordinate position and have been paying rent to the plaintiffs. On this finding the defendants cannot deny in a rent suit that they are liable to continue paying rent.

As regards the second point, the rent claimed is found to be more than the rent which was payable for the land in suit at the time of the defendants' purchase of a share of the estate. But there is no evidence, and nothing else, to support the inference that this extra sum is an *abwab*. I think that the lower Appellate Court was right in inferring that either this extra sum was not an *abwab* or if it be assumed to be an *abwab* it had been consolidated with the rent. The appeal fails and is dismissed with cost.

Babu *Shibaram Mukherjee* for Babu *Brojendra Nath Chatterjee*, for the Appellants.

Babu *Rajendra Chandra Guha*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for rent. The defendants resisted the claim on the ground that there was no relationship of landlord and tenant between the parties. The Courts below have found this allegation well founded in substance, but still they have decreed the claim.

In 1824, the predecessor of the plaintiffs transferred to the predecessors of the defendants a share of the lands. The result of the transaction was that the parties thereupon became co-owners, and it is inconceivable that the plaintiffs can treat the defendants as their tenants. Mr. Justice Newbould has found that the plaintiffs and the defendants are co-ordinate owners in possession, but, nevertheless, he has made a decree for rent in favour of the plaintiffs against the defendants as if plaintiffs were superior holders and the defendants held a subo dinate position. The plaintiffs-respondents, have conceded that neither law nor logic can justify this view, but they have taken refuge in the contention that, for many years past, the parties have understood their mutual relation to be that of landlord and tenant. It is manifest, however, that the parties cannot have a mutual relation in law which is contrary to the true state of facts; if the facts show, as they undeniably do in this case, that the parties are co-ordinate in position, they cannot be treated in law as if they were superior and subordinate holders respectively. To test the position we invited the respondents to state the incidents of the tenancy, if it was assumed that there was a tenancy between the parties. Mr. Guha, who appeared for them, frankly stated that it was an extremely difficult question to answer, for undoubtedly it is by no means an easy task to define the incidents of a tenancy which has no existence either in fact or in law. Another test, equally efficacious, is to ask, whether the plaintiffs have an estate in reversion immediately expectant on the termination of the lease. Mr. Guha confessed that, if the so-called tenancy came to an end, the plaintiffs-respondents would not be entitled to take possession of the land. We are consequently of opinion that there is no relationship of landlord and tenant between the parties, that the appeal must be allowed, and that the suit, framed as a suit for rent, must be dismissed with costs in all the Courts.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 28 OF 1920.

July 16, 1920.

Present:—Mr. Lindsay, A. J. C, and Mr. Wazir Hasan, A. J. C.

KISHAN DAYAL AND ANOTHER—PLAINTIFFS – APPELLANTS

versus

THE DEPUTY COMMISSIONER, PARTABGARH, AS MANAGER, COURT OF WARDS, KALAKANKAR ESTATE—DEFENDANT—RESPONDENT.

Declaration suit for that decree is ultra vires and void, whether maintainable.

KISHAN DAYAL v. DEPUTY COMMISSIONER, PARTABGARH.

A suit for a declaration that a decree is *ultra vires* and void and futile under the law cannot be maintained.

Appeal against the decree of the Subordinate Judge, Partabgarh, dated the 28th February 1920.

Mr. *Har Dhian Chandra*, for the Appellants.

Mr. *N. N. Ghoshal*, for the Respondent.

JUDGMENT.—In our opinion this appeal must be dismissed and we dismiss it on a purely legal ground, which will be evident from a perusal of the relief which was sought in the Court below. The appellants here, Kishen Dayal and Bhagwan Lal, were the plaintiffs and the defendant was the Deputy Commissioner in charge of Kalakankar estate. In paragraph 14 of the plaint the appellants asked for a declaration to the effect that the decree of the Subordinate Judge of Partabgarh, dated the 23th of April 190?, being *ultra vires* is void and futile under the law. It seems to us that no suit for such a declaration is maintainable.

We may refer to the facts which have given rise to this somewhat extraordinary litigation. A suit for possession was brought on behalf of the Court of Wards against these appellants here, Kishan Dayal and Bhagwan Lal, and a third man, named Ganga Prasad. The claim was for possession and for mesne profits.

The suit was dismissed in the Court of first instance. There was an appeal to this Court and this Court allowed the appeal and directed that a decree for possession be given to the Court of Wards plaintiff. It was also directed by this Court's decree that mesne profits should be awarded to the plaintiff; and for this purpose the Court included in its formal decree directions under the provisions of Order XX, rule 12, sub-rule (1). What happened then was, that the case went down to the Subordinate Judge. He held the inquiry which had been directed by this Court and proceeded himself to pass a final decree for the amount of mesne profits which he found due to the Court of Wards. The appellants here objected to this proceeding on the part of the Subordinrte Judge. They came up to this Court and filed a miscellaneous application in which they questioned the jurisdiction of the Subordinate Judge to pass any final decree. The ground taken, apparently, was that the functions of the Subordinate Judge were confined to making an inquiry and reporting the result of his inquiry to this Court in order that the amount of mesne profits ascertained by him might be incorporated in this Court's final decree. Whatever view we may take of the procedure followed by the Subordinate Judge, it appears to us that, so far as this is concerned, we are debarred from questioning it, because it seems to have been held in proceedings here that the order passed by the Subordinate Judge awarding mesne profits was in law a good decree, and for that reason the miscellaneous application, which the present appellants brought before this Court, was rejected and they were told that if they wanted any redress they ought to file an appeal.

The filing of an appeal against the order or decree of the Subordinate Judge would have involved the payment of a large Court-fee and so it seems to have struck the plaintiffs that it would be a cheaper way of going about the matter if they brought the present declaratory suit, which they were able to do on the payment of a Court-fee of Rs. 10. No doubt, this was the most economical course for the plaintiffs, but, in our opinion, it was not one which was open under the law. It is hardly necessary for us to cite any authority in support of the proposition that a suit for a declaration that a decree is *ultra vires* and void and futile under the law cannot be maintained.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

[SECOND CIVIL APPEAL No. 219 OF 1917
AND
APPEAL AGAINST ORDER No. 33 OF 1917.

February 24, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

IN S. A. No. 219 OF 1917.

KAROOTH PARAKOTE AMMUKUTTY *alias* LAKSHMI AMMA—PLAINTIFF—APPELLANT

versus

K. P. K. P. T. MANAVIKRAMAN *alias* KUTTI KUNHUNNI THAMBURAN AND OTHERS—DEFENDANTS NOS. 3, 4, 8, 9, 2, 6 AND 7—RESPONDENTS.

IN A. A. O. No 33 OF 1917

K. AMMUKUTTY *alias* LAKSHMI AMMA AND OTHERS—DEFENDANTS NOS. 1, 4, 5 AND 8 TO 13—APPELLANTS

versus

MANEMANGALATH VARIATH RAMA WARIAR AND OTHERS—(PLAINTIFFS AND DEFENDANTS NOS. 2, 3, 6, 7 AND 14 TO 30 AND 33 TO 35 AND LEGAL [REPRESENTATIVES OF THE DECEASED RESPONDDNTS NOS. 13 AND 9 RESPECTIVELY)—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL—Receiver, suit against—Sanction of Court, absence of, effect of—Jurisdiction of Court.

The omission to obtain the previous sanction of the Court appointing a Receiver for bringing a suit against the Receiver does not affect the jurisdiction of the Court trying the suit but is an illegality which can be effectively cured by the plaintiff obtaining the requisite sanction during the course of the litigation. [p. 269, col. 1.]

Pramatha Nath Gangooly v. *Khetra Nath Banerjee*, 32 C. 270; 9 C. W. N. 247 and *Venkatasubbaramiah* v. *Nambura Ramiah Sethi*, 24 Ind. Cas. 622, dissented from.

Banku Behary Dey v. *Harendra Nath Mukherjee*, 8 Ind. Cas. 1; 15 C. W. N. 54; *Maharaja of Burdwan* v. *Apurba Krishna Roy*, 10 Ind Cas 527; 15 C. W. N. 872; 14 C. L. J. 50 and *Jagat Tarini Dasi* v. *Naba Gopal Chaki*, 34 C. 205; 5 C. L. J. 270, followed.

IN S. A. No. 219 OF 1917

Second appeal against the decree of the District Court, South Malabar, in Appeal Suits Nos. 679 and 685 of 1915, preferred against the decree of the Court of the District Munsif, Walluvanad, in Original Suit No. 235 of 1914.

IN A. A. O. No. 33 OF 1917

Appeal against the decree of the District Court, South Malabar, in Appeal Suit No. 688 of 1915, preferred against the decree of the Court of the District Munsif, Walluvanad, in Original Suit No. 320 of 1914.

The second appeal came on for hearing on the 29th and 30th October 1918.

FACTS appear from the judgment.

Messrs. *K. P. M. Menon* and *K. P. Padmanabha Pillai*, for the Appellants.—The plaintiff's suit should not have been dismissed on the ground of want of Court's sanction for filing the suit. There is no statutory obligation to get the sanction. It is not a condition precedent. Where it is an indispensable requirement it is expressly stated in the Civil Procedure Code. See Civil Procedure Code, section 62, and Provincial Insolvency Act, section 17. It is a Common Law obligation. In any case, the defect, if any, was cured by the plaintiff obtaining the sanction at a very early stage of the proceedings, even before the written statement was filed.

Messrs. *C. Madhavan Nair* and *T. Eromani Unni*, for the Respondents, referred to the decision of *Venkatasubbaramiah* v. *Nambura Ramiah Sethi* (1) as supporting the position that previous sanction is necessary.

JUDGMENT.—The plaintiff is the appellant. Her suit for specific performance of an alleged contract of 20th March 1910 (under which the plaintiff was entitled to obtain a deed of renewal of a *kanom* mortgage which had been enjoyed by her deceased sister from 1897) was dismissed by the District Court on two grounds: (1) The present suit having been commenced in June 1914 against the Receivers (defendants Nos. 3 to 5) appointed by the Sub-Court of Calicut in a Suit No 13 of 1913 (brought for removal of the 1st defendant, the promisor under the plaint contract, from his position of *karnavan* by some members of his *tavazhi*) without previously obtaining the sanction of the Sub Court, it could not be sustained even though in July 1914 (before even the Receivers filed their written statements), the plaintiff obtained the Sub Court's sanction to proceed with the present suit against the Receiver. (2) Though "there was a general understanding" between the plaintiff and the 1st defendant that the 1st defendant "would be agreeable to the plaintiff" (in the matter of the renewal of the *kanom* of 1897

(1) 24 Ind. Cas. 622.

in the plaintiff's name) "if she evicted one Syed Ali" (in possession of one of the *kanom* lands), "there was no definite contract" for renewal.

We are unable to agree with the learned District Judge as regards the first ground of his decision. Though the judgment in *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (2) (the decision of a single Judge) is in favour of the view of the District Judge and though a decision of this High Court (again, that of a Single Judge) *Venkatasubbaramiah* v. *Nambura Ramiah Sethi* (1) also contains observations in support of the same view, we think that the better opinion is the one enunciated by Division Benches of the Calcutta High Court in *Banku Behary Dey* v. *Harendra Nath Mukherjee* (3) and *Maharaja of Burdwan* v. *Apurba Krishna Roy* (4) and in *Jagat Tarini Dasi* v. *Naba Gopal Ohaki* (5) (one of the members of the said Benches having been that very learned Judge Sir Asutosh Mookerjee). That opinion is also supported by text-writers of acknowledged authority, like High on Receivers, Woodroffe (page 91) and Kerr (page 167). That opinion is to the effect that the omission to obtain previous sanction (a sanction which is not a condition imposed by statutory law, like the sanction mentioned in section 92 of the Code of Civil Procedure or section 17 of the Presidency Insolvency Act but one imposed by the Common Law to enforce due respect towards Courts of Justice) does not affect the jurisdiction of the Court but is an illegality which can be effectively cured by the plaintiff obtaining the sanction during the course of the litigation.

[*Note*: The rest of the judgment is not material for the purposes of this report.—*Ed.*]

M. C. P.

Decree slightly modified.

(2) 32 C. 270; 9 C. W. N. 247.
(3) 8 Ind Cas 1; 15 C. W. N 54.
(4) 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50.
(5) 34 C. 305; 5 C. L. J. 270.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 929 OF 1919.

July 2, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

CHOKHU RAOJI MAHAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

TATYA NAMA MAHAR AND OTHERS —DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Family property sold for arrears of revenue and purchased by one member whether joint or separate.

Where joint family property is put up for sale by the Revenue Authorities on account of arrears of revenue and is purchased by one of the members of the family, then, unless it can be shown that it was purchased out of the joint family purse or was thrown back into the joint family property, it becomes the private property of the purchaser. [p. 570, col. 1.]

Second appeal from the decision of the Assistant Judge, Sholapur, in Appeal No. 125 of 1918, reversing the decree passed by the Joint Subordinate Judge at Barsi, in Civil Suit No. 267 of 1917.

Mr. *P. V. Kane*, for the Appellants.

Mr. *K. H. Kelkar*, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued for partition and possession of their half share in the plaint property. The learned Assistant Judge reversed the decree of the lower Court in favour of the plaintiffs and dismissed the plaintiffs' suit with costs. The learned Judge said: "the only issue in appeal was, whether the property was joint property of Nama, Vithoba and Raoji, the ancestor of the plaintiffs". He came to the conclusion that it was not. That, as far as we are concerned, is a finding of fact. But an entirely new point of law has been raised in second appeal, namely, that assuming that the property had been joint and then lost on account of its being sold for arrears of revenue but afterwards recovered by one of the members of the family, other than Raoji, out of his own means, then the text of the Mitakshara applies, which says that, when family property has been lost and then re acquired by one of the members of the family, that member is entitled to keep a quarter to himself, while the remaining three-quarters must go back into the family. That text and others

were discussed in *Bajaba Bajirao* v. *Trimbak Vishvanath* (1). There the learned Judges say: "though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means to enjoy it, as in the case of another acquisition, free from claims to partition by his co-parceners, yet neither is any express limit set to such enjoyment, and it would probably now be held that such property stands on the same footing as any other purchased property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo Pershad Roy* v. *Debee Pershad Tewaree* (2)". Then the judgment refers to the case of *Visalatchi Ammal* v. *Annasamy Sastry* (3) which said: "The language both of the texts and the commentaries seems to us as at present to indicate that the rule was intended to apply strictly to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time: 'property unjustly detained which could not be recovered before' is the import of the ordinance of Manu, Chapter IX, *Sloka* 209."

This is not a case of a family being violently or wrongfully dispossessed or adversely kept out of possession of the suit property. What happened was that, it was put up for sale by the Revenue Authorities on account of arrears of revenue and was purchased by one of the members of the family. Therefore, unless it can be shown that it was purchased out of the joint family purse or was thrown back into the joint family property, it became the private property of the purchaser. The judgment of the Court below must be confirmed and the appeal dismissed with costs.

Decree confirmed.

(1) 4 Ind. Cas. 255; 34 B. 106; 11 Bom. L. R. 1122.
(2) 6 W. R. 58.
(3) 5 M. H. C. R. 150 at p. 157.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 14 OF 1920.

August 5, 1920.

Present:—Mr. Wazir Hasan, A. J. C.

BASDEO LAL—PLAINTIFF—APPELLANT

versus

MAHABIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Property transferred to pay off father's debts—Sons, right of, to recover property, extent of.

Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted, and the operation of this rule is not limited to cases where the joint family property has passed out of the hands of the family and gone into the hands of persons who were neither previous creditors when the sale is a private alienation, nor judgment-creditors when the sale is by public auction. [p. 571, col. 2: p. 572, col. 1.]

Appeal against the decree of the Subordinate Judge, Gonda, dated the 19th December 1919.

Mr. *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *A. P. Sen*, for Respondents Nos. 1 and 4.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff, Basdeo Lal, against Mahabir, Nanku, Kalidin, and Bachcha, defendants Nos. 1 to 4, for recovery of possession of a one-anna eight pies share in the village of Kohaniar, Pargana Utraula, District Gonda. Ram Saran Lal, father of the plaintiff, was added as defendant No. 5 to the suit.

The facts necessary for the disposal of this appeal are as follows:—The plaintiff and the defendant No. 5 constitute a joint Hindu family; and so do the defendants Nos. 1 to 4. The defendant No. 1 is the son of one Salarn Baqqal and the defendants Nos. 2 to 4 are the sons of the defendant No. 1. On the 16th of January 1901 Ram Saran Lal gave a *zar peshgi* lease by way of usufructuary mortgage to Salarn Baqqal of the property in suit and, in virtue of it, Salarn entered into possession of the share mortgaged. On the 21st of November 1906 Ram Saran Lal executed a deed of further charge

in favour of Salaru. On the 23rd of January 1907, Ram Saran Lal executed a deed of simple mortgage in favour of one Sita Ram in respect of an eight-pies share out of the share in suit. On the 11th of July 1908 another deed of further charge was executed by Ram Saran Lal in favour of Salaru. The debt due under the deed of the 21st of November 1906 merged into the consideration of the second deed of further charge. On the 30th of September 1908, Ram Saran Lal executed a deed of mortgage by conditional sale in favour of the defendant No. 1 in respect of the share in suit. On the 17th of February 1910, the defendant No. 1 purchased the mortgagee rights of Sita Ram. In execution of a decree for simple debt the share in suit was sold by public auction on the 20th of May 1910 and was purchased by the decree-holder, Lachman Das.

In a suit instituted on foot of the mortgage of the 30th of September 1908 by the defendant No. 1 against Ram Saran Lal and Lachman Das, a preliminary decree was passed on the 28th of October 1910, and it was made absolute on the 6th of June 1911. Mahabir, the defendant No. 1, obtained formal delivery of possession in pursuance of the said decree on the 8th of November 1911 over the property in suit; he was already in actual possession under the *zar-peshgi* lease of the 16th of January 1911. The present suit has been instituted on the allegation that the property in suit is the joint family property, that the deed of mortgage, dated the 30th of September 1907, was not binding on the plaintiff because the defendant No. 5 had no power to make an alienation of the ancestral property, nor had the plaintiff been benefited by the said alienation and that he is not bound by the foreclosure decree obtained by the defendant No. 1 because he was no party to it. A large number of pleas were raised in defence which necessitated the framing of no less than eight issues in the case. The lower Court decided the first two issues only and dismissed the plaintiff's suit: hence this appeal by the plaintiff. These two issues are as follows: "1. Whether or not the plaintiff is bound by the decrees, preliminary and absolute, passed in favour of the defendant No. 1 on the basis of the mortgage deed in suit? 2. Has the property in suit been sold in execution of a money-decree obtained by Lachman Das against the defendant No. 5?" I propose to dispose of the appeal with reference to Issue No. 1 only.

It is admitted that the plaintiff and his father, Ram Saran Lal, defendant No. 5, constitute a joint Hindu family, and it is also admitted that the property in suit is the ancestral property of the family. The debt contracted under the deed of the 30th of September 1908 was not challenged on the ground that it was incurred for immoral or illegal purposes or that it was illusory.

Such being the facts of the case, I am of opinion that the rule of law laid down by Sir James Colvile in the case of *Surai Bunsi Koer* v. *Sheo Persad Singh* (1) applies. His Lordship said: "That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted."

The learned Advocate for the appellant argues that the rule applies only to cases where a stranger and not the judgment-creditor is the purchaser. In support of this contention he relies upon certain observations in the judgment of Lord Shaw in the case of *Sahu Ram Chandra* v. *Bhup Singh* (2). The learned Advocate further contends on the same ground that the case of *Gur Narain* v. *Gulzari Lal* (3), upon which the lower Court has relied, must be taken to have been overruled and that I should, therefore, refer this appeal to a Bench of two Judges for decision. I do not think there is anything in the decision of their Lordships of the Privy Council in *Sahu Ram Chandra's case* (2), which limits the operation of the rule laid down by Sir James Colvile to cases

(1) 6 I. A. 88; 5 C. 148 (P. C.); 4 Sar. P. C. J. 1; 3 Suth P. C. J. 585; 4 C. L. R. 226; 2 Shomo L. R. 242; 2 Ind Dec. (N. s.) 705.

(2) 39 Ind Cas. 180; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 507; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 459, 22 M. L. T. 22, 6 L. W. 213; 39 A. 437 (P. C.).

(3) 25 Ind. Cas. 917; 17 O. C. 318; 1 O. L. J. 503,

where the joint family property has passed out of the hands of the family and gone into the hands of persons who were neither previous creditors when the sale is a private alienation or judgment-creditors when the sale is by public auction. On the contrary, the following observations in *Sahu Ram Chandra's case* (2) affirm the rule enunciated in *Suraj Bunsi Koer's case* (1) without prescribing any limitation of the nature suggested by the learned Advocate for the appellant:—"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have been sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head." The learned Advocate refers to the following passage in the same judgment:—"They desire, in the first place, to make it clear that much if not all of the law upon this subject has arisen from the necessity of protecting the rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good faith." These observations directly bear upon the question of *onus* in cases where a creditor is setting up a charge in his favour on the basis of an alienation made by a manager of a joint Hindu family. Immediately following the passage quoted above, occurs the following sentence:—"This is at the bottom of the doctrine of onus, which was dealt with so fully by Knight Bruce, L. J., in *Hunooman-persaud Panday* v. *Musammat Babooee Munraj Koonweree* (4)." This is followed by a quotation from the judgment in *Hunoomna Persaud Panday's case* (4), and at the end Lord Shaw says:—"The onus was accordingly properly laid and the issue of no benefit to the estate is settled." Similarly, the reference to "third parties" in the paragraph immediately following the observations quoted above is made in relation to the ground upon which the rule as to 'onus' in cases of enforcement of a charge rests.

The interpretation which I have placed on his Lordship's judgment bearing upon the point under consideration is supported by the decision of a Bench of this Court in the case of *Muhammad Baqar Ali Khan* v. *Hazari Lal* (5). I am aware of a more recent decision of another Bench of this Court to which I also was a party which has not accepted the interpretation adopted in the case reported in *Muhammad Baqir Ali Khan* v. *Hazari Lal* (5); but the view taken in the latter case as to the point with which I am concerned in this case remains untouched.

I am, therefore, of opinion that the authority of the decision in *Gur Narain* v. *Gulzari Lal* (3), based as it is upon several decisions of the Privy Council as well as of the Courts in India, is not shaken by the ruling in *Sahu Ram Chandra's case* (2). The learned Advocate frankly admitted that the case of *Gur Narain* v. *Gulzari Lal* (3) is fatal to his appeal. I may also refer to a decision of Mr. (now Sir Edward) Chamier in the case of *Parmeshur Dat* v. *Debi Sahae* (6) which entirely covers the present case and is against the appellant.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(4) 6 M. I. A. 393; 18 W. R. 81*n*.; Sevestre 253*n*; 2 Suth P. C. J 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(5) 52 Ind. Cas. 103; 6 O. L. J. 297 at pp. 306 307.

(6) 6 O. C. 101.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 178 OF 1919.

April 29, 1920.

Present:—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

SASANKA SEKHAR BANERJEE—PLAINTIFF—APPELLANT

versus

SUDHANGSU MOHAN GANGULI—DEFENDANT—RESPONDENT.

Bengal Municipal Act (III of 1884), s. 363—Act done in pursuance of Act, what constitutes—Notice of suit, omission to give, effect of.

Where the Vice-Chairman of a Municipality acts under the direction of the Commissioners, any act

done under his instructions is an act done under the Bengal Municipal Act. Consequently, if the provisions of section 363 of the Act as regards notice are not complied with by a person aggrieved by the act, a suit by him against the Vice-Chairman to recover damages is not maintainable. [p. 575, col. 1.]

Letters Patent Appeal against the decree of Justice Sir Syed Shamsul Huda, Kt, dated the 12th of August 1919, in Appeal from Appellate Decree No. 1170 of 1918.

The Hon'ble Mr. *C. T. P. Gibbons* (Advocate-General) and Dr. *Jadunath Kanjilal* and Babus *Lalit Mohan Banerjee* and *Apurba Charan Mukerjee*, for the Appellant.

Mr. *P. Roy Choudhuri* and Babus *Satindra Nath Mukerjee* and *Promotho Nath Banerjee*, for the Respondent.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Shamsul Huda in a suit for recovery of damages due to an unauthorised distress warrant.

At the time of the incidents which have culminated in this litigation, the plaintiff-respondent was a resident within the Municipality of Balley, and the defendant-appellant was its Vice-Chairman. On the 8th October 1914, the Vice-Chairman served the plaintiff with a notice of demand for dues claimed as fees payable for removal of filth from a receptacle in his house. On the 31st October 1914, a bailiff under the orders of the Vice-Chairman, entered the house of the plaintiff and attempted to execute a distress warrant, as no payment had been made in response to the demand. The present suit was instituted on the 2nd February 1915, and the substance of the complaint of the respondent was that the proceedings of the Vice-Chairman were malicious and the Municipality had no authority to levy the sum claimed by summary process. The Court of first instance decreed the suit. Upon appeal the Subordinate Judge reversed that decision. On second appeal to this Court Mr. Justice Shamsul Huda has set aside the decree of the Subordinate Judge and restored that of the primary Court."

It is not necessary for our present purpose to deal with the question, whether or not the sum claimed by the Municipality was recoverable by summary process. The answer to that question turns upon the consideration of a somewhat recondite argument as to the meaning of the word 'rubbish' in section 6 (14) of the Bengal Municipal Act. Upon this matter of interpretation, the Courts below have been divided in opinion, and we shall assume that the sum claimed was not recoverable by summary process, as contended by the plaintiff respondent. We must also observe that the allegation of the plaintiff that the proceedings of the Vice-Chairman were actuated by malice has not been established and that finding plainly cannot be assailed in second appeal.

The Advocate-General has contended on behalf of the appellant that the suit should be dismissed on the ground that the plaintiff has failed to comply with the requirements of section 363 of the Bengal Municipal Act. That section is in these terms :

"No suit shall be brought against the Commissioners of any Municipality, or any of their officers, or any person acting under their direction, for anything done under this Act, until the expiration of one month next after notice in writing has been delivered or left at the office of such Commissioners and also (if the suit is intended to be brought against any officer of the said Commissioners or any person acting under their direction) at the place of abode of the person against whom such suit is threatened to be brought, stating the cause of suit and the name and place of abode of the person who intends to bring the suit ; and, unless such notice be proved, the Court shall find for the defendant. Every such action shall be commenced within three months next after the accrual of the cause of action, and not afterwards. If the Commissioners or their officer, or any person to whom any such notice is given, shall, before suit is brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover."

There can be no doubt that the notice contemplated by section 363 was not given in the present case. Reference has, no doubt, been made to a letter written by the Solicitors for the plaintiff to the defendant. The letter, however, can in no sense be treated as a notice in compliance with the requirements of section 363. But, even if it be so regarded by any stretch of language, it is plain that the plaintiff has not complied with section 363 in so far as notice upon the Commissioners is required. It will be observed that section 363 requires the service of notice

upon the Commissioners in every instance and also upon the person concerned, if the suit is intended to be brought against an officer of the Commissioners or any person acting under their direction. No such notice was served on the Commissioners, and we must proceed on the assumption that the plaintiff has not complied with the requirements of section 363. But his contention is that, section 363 has no application to the circumstances of the present case, because what is alleged by him to have been done by order of the defendant was not something "done under the Act." It is not necessary to consider seriously the suggestion faintly made that this was not a proceeding brought against a person acting under the direction of the Commissioners. There can be no room for controversy that the Vice-Chairman acted under the direction of the Commissioners, and if what was done under his instructions was something "done under the Act," section 363 is applicable.

The provisions of section 363 have a parallel in many Statutes in England, and there are cases in the books which lay down principles obviously applicable to the circumstances of the present litigation. In *Waterhouse* v. *Keen* (1) the plaintiff was obliged to pay, under a Turn-pike Act, two tolls on the same day in respect of the same stage coach. He instituted the suit for recovery of the sum paid on the second occasion, on the allegation that a second toll was not payable and that the levy was wholly unauthorised. The Turn-pike Act provided that no action should be commenced against any person "for anything done in pursuance of the Act," until after the service of a notice to the Clerk of the Trustees (similar to what is contemplated by section 363) and also required that the suit should be instituted within a prescribed time from the date of the Act. It was contended that as the act of which the plaintiff complained could not have been lawfully done under the authority of the Act, the act could not be said to be one done in pursuance of the Act. This contention was overruled. Mr. Justice Bayley pointed out the object of the Act in these terms: "The substantial part of the enactment is, that notice should be given to the Trustees in order that they may tender satisfaction, and that the action should be brought promptly after the fact committed If the Act of Parliament does not apply to this case, parties may be at liberty to maintain actions for all sums levied under a misconstruction of the Act within a period of six years. And thus the object of the Legislature, which was that the action should be brought promptly, will be defeated But it is said that, in this case, there was not anything done by the defendant in pursuance of the Act; but that expression, as used in this Act of Parliament, means that the thing done should be done by the defendant acting *colore officii*; if he did so act, he is within the protection of the Act of Parliament." Mr. Justice Holroyd pointed out that the protection of the Act was not confined to cases where the party had done an act which could be justified: in other words, if the act was so restricted, the result would be that there would be no occasion for the suit, which would necessarily fail on the merits.

A similar view has been taken in subsequent cases; *Selmes* v. *Judge* (2), *Midland Railway Company* v. *Withington Local Board* (3) where Fry, L. J., observed with reference to section 264 of the Public Health Act, 1875, that the protection of the Statute extended to everything done *bona fide* under the colour of the provisions of the Statute; in other words, if a person knows that he has not under a Statute authority to do a certain thing and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that Statute. These decisions were reviewed and approved in *Cree* v. *St. Pancras Vestry* (4). The substance of the matter is that, an act is to be regarded as done in pursuance of a Statute if the doer had a reasonable and *bona fide* belief that he was so acting *Hazeldine* v. *Grove* (5), *Lea* v. *Facey* (6), *Agnew* v. *Jobson* (7), *Heath* v. *Brewer* (8),

(1) (1825) 4 B. & C. 200; 6 D. & R. 257; 107 E. R. 1034; 40 R. R. 858.

(2) (1871) 6 Q. B. 724; 40 L. J. Q. B. 287; 24 L. T. 905; 19 W. R. 1110.

(3) (1883) 11 Q B. D. 788; 52 L. J. Q. B. 689; 49 L. T. 489; 47 J. P. 789.

(4) (1899) 1 Q B 603; 68 L. J. Q. B. 389; 80 L. T. 338.

(5) (1842) 3 Q. B. 997; 3 G. & D. 210; 12 L. J. M. C. 10; 7 Jur. 262; 114 E. R. 791.

(6) (1887) 19 Q. B. D. 352; 56 L. J. Q B. 536; 58 L. T. 32; 35 W. R 721; 51 J. P. 756.

(7) (1877) 47 L. J. M. C. 67; 13 Cox C. C. 625.

(8) (1864) 9 L. T. (N. S.) 653; 15 C. B. (N. S.) 803; 137 R. R. 776; 143 E. R. 1000.

Burling v. *Harley* (9), *Booth* v. *Olive* (10), *Smith* v. *Hopper* (11). Substantially the same view was taken by the Judicial Committee of the Privy Council in the case of *Richard Spooner* v. *Juddow* (12), where Lord Campbell said that, if a party *bona fide*, and not absurdly, believes that he is acting in pursuance of a Statute and according to law, he is entitled to the special protection which the Legislature intended for him, although he has done an illegal act.

The same view was taken by a Full Bench of this Court in the case of *Ohunder Sikhur Bundopadhya* v. *Obhoy Ohurn Bagchi* (13) where Sir Richard Garth observed, with reference to section 87 of Act III of 1864, B. C., that the section was applicable where the plaintiff claimed damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise, or the honestly supposed exercise, of their statutory powers. See also *Shudhangshu Shusan Roy Ohowdhury* v. *Bejoy Kali Roy Ohowdhury* (14), *Shama Bibi* v. *Baranagore Municipality* (15).

Reference has been made on behalf of the respondent to the decision in *Soonder Lal* v. *N. B. Baillie*(16) and *Gopee Kishen Gossain* v. *W. H. Ryland*(17). These cases, however, are of no assistance to the respondent, because, on an examination of the judgments, it transpires that in each instance the requisite notice had been served.

We are accordingly of opinion that in the present case the parties were governed by section 363, and that as the plaintiff had failed to serve the notice required by that section the suit was not maintainable.

The result is that the appeal is allowed, the decree made by Mr. Justice Shamsul Huda set aside and that of the Subordinate Judge restored with costs both here and before Mr. Justice Shamsul Huda.

FLETCHER, J.—I agree.

Appeal allowed.

(9) (1858) 3 H. & N. 271; 27 L. J. Ex. 258; 4 Jur. (N. S.) 789; 117 R. R. 684; 157 E. R. 473.
(10) (1851) 20 L. J. C. P. 151; 10 C. B. 827; 2 L. M. & P. 283; 15 Jur. 563; 84 R. R. 795; 138 E. R. 327.
(11) (1847) 9 Q. B. 1005; 16 L. J. Q. B. 93; 11 Jur. 302; 115 E. R. 1560.
(12) 4 M. I. A. 353; 6 Moo. P. C. 257; Perry O. C. 392; 1 Sar. P. C. J. 363; 4 Ind. Dec. (o. s.) 358; 18 E. R. 734; 13 E. R. 682.
(13) 6 C. 8 (F. B.); 3 Ind. Dec. (N. S.) 6.
(14) 3 C. L. J. 376.
(15) 6 Ind. Cas. 675; 12 C. L. J. 410.
(16) 24 W. R. 287.
(17) 9 W. R. 279.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISIONS NOS. 44 AND 45 OF 1920.

May 18, 1920.

Present :—Mr. Lindsay, J. C.

GAURI—AUCTION-PURCHASER—APPLICANT

versus

HINGA AND OTHERS—JUDGMENT-DEBTORS AND *Musammat* QAMAR JAHAN BEGAM—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 9, O. XXI, r. 90—Application to set aside execution sale, dismissal of, for default—Restoration of application, whether permissible.

The provisions of Order IX, rule 9, Civil Procedure Code, are applicable to an order dismissing for default an application made under Order XXI, rule 90, Civil Procedure Code, to set aside a sale held in execution of a decree.

Thakur Prasad v. *Fakir Ullah*, 17 A. 106 (P. C.); 5 M. L. J. 3; 32 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393, distinguished.

Bhubaneswar Prasad Singh v. *Tilakdhari Lal*, 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75, dissented from.

Diljan Mihha Bibi v. *Hemanta Kumar Roy*, 29 Ind. Cas. 395; 19 C. W. N. 758, followed.

Applications against the decree of the Probationary Munsif, Lucknow, dated the 20th November 1919.

Mr. *Ram Charan*, for the Applicant.

Mr. *H. K. Ghosh*, for the Opposite Party.

JUDGMENT.—Both these cases raise the point whether the provisions of Order IX, rule 9 of the Code of Civil Procedure relate to applications made under Order XXI, rule 90 for the purpose of having an auction sale set aside on the ground of irregularity or fraud.

The lower Court held that Order IX, rule 9, could be applied and it acted accordingly and restored the applications which had been dismissed for default.

It is argued here, on the authority of a Full Bench ruling of the Patna High Court, reported as *Bhubaneswar*

KONDAN DAMU *v.* INDARCHAND BACHARAJ.

Prasad Singh v. *Tilakdhari Lall* (1), that the provisions of Order IX, rule 9 do not apply to an order dismissing for default an application to set aside a sale held in execution of a decree. I have studied the cases on this subject and, with all possible respect, I am unable to accept the view of the law taken by the Patna High Court. The view which is taken there seems to be based upon the observations of their Lordships of the Privy Council in the case of *Thakur Prasad* v. *Fakir Ullah* (2). It was there held, on the construction of section 647 of the Code of Civil Procedure of 1882, that the provisions of section 373 could not be applied in a case where an application had been made for the execution of a decree. Their Lordships pointed out that the law, as laid down both in the Code of Civil Procedure itself and in the Limitation Act, contemplates successive applications for execution of a decree; and it may reasonably, therefore, be argued that, to apply the provisions of Order IX, rule 9, to applications for execution of a decree is not permissible on the ground that it would defeat the provisions of the law which contemplates successive applications for execution. But the applications with which we are dealing here were not, in my opinion, applications for execution of a decree. They were applications to set aside a sale which had been held in execution of a decree, and, therefore, it seems to me that the same reasoning does not apply as in a case where the application is strictly and properly an application for execution. This point is well brought out in a ruling of the Calcutta High Court which is reported as *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (3). I agree with the view which was taken by the Bench in that case and hold that the provisions of Order IX, rule 9, do apply to applications of this kind. It cannot, in my opinion, be argued that, because their Lordships of the Privy Council have laid it down that the provisions of the Code relating to the restoration of suits cannot be applied to applications of a decree; it necessarily follows that their Lordships' observations apply to all applications which are made in the execution department. In my opinion, they do not. They relate only to such applications as can properly be called applications for execution of a decree. Both these applications, therefore, fail and are dismissed with costs.

Applications dismissed.

(1) 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75.
(2) 17 A. 106 (P. C.); 6 M. L. J. 3; 32 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393.
(3) 29 Ind. Cas. 395; 19 C. W. N. 758.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 752 OF 1919.
July 12, 1920.
Present:—Sir Norman Macleod, KT, Chief Justice, and Mr. Justice Fawcett.
KONDAN DAMU—APPELLANT
versus
INDARCHAND BACHARAJ—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13—Mortgage—Account, mode of taking—Evidence, absence of—Procedure.

It is not equitable, and it was not intended by the framers of the Dekkhan Agriculturists' Relief Act, that in a case where a mortgage is admitted a plaintiff should lose everything because he cannot go back far enough to a period before the Act was in force to distinguish what is principal and what is interest. [p. 577, col. 2.]

Where, in taking an account under section 13 of the Dekkhan Agriculturists' Relief Act, in the absence of data showing exactly how much principal has been received, the Court forms a reasonable estimate from the amount of consideration stated in the bond as to the probable amount of actual principal, there can be no legal objection to that estimate being accepted and acted on. [p. 577, col. 2; p. 578, l.]

Second appeal from the decision of the Assistant Judge at Dhulia, in Appeal No. 193 of 1918, reversing the decree passed by the Joint Subordinate Judge at Chalisgaon, in Civil Suit No. 44 of 1917.

Mr. *N. V. Gokhale*, for the Appellant.

Mr. *M. V. Bhat*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to redeem a mortgage bond passed by the first four defendants on the 6th February 1905 for Rs. 600. The mortgage was admitted by the first four defendants. But the 5th defendant who had purchased

the equity of redemption from defendant No. 1 denied all knowledge of the mortgage, and said that he was a purchaser of the land. Defendant No. 6 said that he was a purchaser from defendant No. 5, and that defendant No. 5 ought to pay the mortgage debt. The mortgage was proved. But what was the principal consideration was not proved. The learned Judge came to the conclusion that Rs. 600 was due and passed a decree for that amount against defendant No. 5 and the heirs of defendant No. 6.

The 5th defendant appealed. The decree of the Trial Court was reversed, because the learned Judge was of opinion that there ought to be sufficient data before the Court to enable it to determine how much of the claim was principal and how much was interest, and, in the absence of such data, mere guess work would not be permitted.

The position is somewhat curious, because defendants Nos. 1 to 4 were agriculturists. They sold to defendant No. 5 who was not an agriculturist. Defendant No. 5 sold to defendant No. 6, deceased, who was an agriculturist. It is quite possible had defendant No. 5 not sold the equity of redemption, he could not claim the advantages of the Dekkhan Agriculturists' Relief Act. As he sold again to an agriculturist, clearly defendant No. 6 can take advantage of the Act. The only difficulty is to decide whether the learned Trial Judge was right in allowing Rs. 600 to the plaintiff, or whether the learned Appellate Judge was right in allowing nothing because he said it was impossible to take any account as required by the Dekkhan Agriculturists' Relief Act. Now, the learned Trial Judge dealing with the previous transactions of the mortgagor and mortgagee said: "It is said that cash advances began long before 1899 when the Dekkhan Agriculturists' Relief Act was not in force in Khandesh, and the creditors did not know the utility of evidence to prove cash advance. The fact that past bonds have been produced by the defendants goes to show how little plaintiffs and their uncle then knew the importance of past documents to prove cash advance. I refuse to believe that Rs. 960 were for principal. It is not known how much was for principal and how much for interest in bonds for Rs. 800 and Rs. 160. I do not wish to penalise the plaintiffs by striking off the suit altogether as the circumstances of the case are peculiar. The Court has to deal with transactions by a creditor, admittedly an agriculturist, and the transactions commenced long before the Dekkhan Act came into force in this District. I allow Rs. 600 to the plaintiff." In my opinion that is a very reasonable judgment, considering the peculiar circumstances of the case. It certainly would not be equitable, nor I do think it was ever intended by the framers of the Act, that in a case of this sort when the mortgage is admitted that the plaintiff should lose everything because he cannot go back far enough to a period before the Act was in force to distinguish what is principal and what is interest. The decision in *Dhondi* v. *Lakshman* (1) was relied upon. But there the Court did not dismiss the claim entirely, but said that the parties could have recourse to arbitration under the provisions of section 15. Therefore, the appeal was remanded. That section has been repealed. Therefore, it is impossible to say that the Court would have made in that case, in the absence of an arbitration clause, a decree dismissing the whole of the plaintiff's claim. It is quite possible, on the facts of that case, that the Court would have found some way out of the difficulty to prevent injustice being done. It seems far more reasonable to come to the conclusion that the learned Joint Subordinate Judge, who has great experience in these matters, when dealing with the transactions between the parties, came to a very fair and reasonable decision that Rs. 600 should be allowed to the plaintiff. The appeal is allowed and the decree of the Trial Court restored. The appellants to get costs of the appeal.

FAWCETT, J.—I agree. My experience is that, in most cases under the Dekkhan Agriculturists' Relief Act, some guess work has to be done in drawing up an account under section 13 of the Dekkhan Agriculturists' Relief Act; and if (in the absence of data showing exactly how much principal has been received) the Court forms a reasonable estimate from the amount

(1) 19 B. 553; 10 Ind. Dec. (N. S.) 369.

of consideration stated in the bond as to the probable amount of actual principal, I can see no legal objection to that estimate being accepted and acted on.

Appeal allowed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 734 OF 1920.

December 1, 1920.

Present :—Mr. Justice Wilberforce.

PURAN CHAND, OFFICIAL RECEIVER OF THE ESTATE OF UMRAO SINGH —INSOLVENT—APPELLANT

versus

THE PUNJAB NATIONAL BANK, LIMITED, LUDHIANA AND ANOTHER —RESPONDENTS.

In the matter of the insolvency of UMRAO SINGH.

Registration Act (XVI of 1908), s. 17—Mortgage, equitable, by deposit of title-deeds—Memorandum recording deposit, whether requires registration—Provincial Insolvency Act (III of 1907), s. 37—Fraudulent preference—Transfer obtained under pressure, whether can be avoided.

Where an equitable mortgage is created by deposit of title-deeds, a memorandum recording the deposit and the purpose for which it is made does not require registration, for such a document does not create any interest in immoveable property the mortgage being complete independently of it. [p. 579, col 2.]

The test for determining whether a transfer or payment made by a debtor in favour of or to a creditor does or does not amount to fraudulent preference is, whether the transfer or payment is voluntary. [p. 579, col. 2.]

The law, however, regards only the motive of the debtor, and if the dominant motive of the debtor in making the transfer or payment is to save himself from exposure or from a criminal prosecution, it cannot be said that the transfer or payment is voluntary or amounts to fraudulent preference. [p. 579, col. 2.]

Miscellaneous first appeal from the order of the District Judge, Ludhiana, dated the 17th of January 1920.

Lala *Jagan Nath*, for the Appellant.

Mr. *Mukand Lal Puri* and Lala *Durga Das*, for Respondent No. 1.

JUDGMENT.—Umrao Singh, a Director of the Ludhiana Branch of the Punjab National Bank, became insolvent in 1917, on an application presented by creditors on the 17th January. His liabilities amount to over two lakhs, and his only assets appear to be a house at Delhi which has already been sold by the Receiver for Rs. 14,000 and a house at Ludhiana which is the subject of the present dispute. On this house the Punjab National Bank claims a prior lien as an equitable mortgagee, the deposit of title-deeds in its favour having taken place on the 31st December 1916. The other creditors have objected to this preference shown to the Punjab National Bank and wish to have it avoided under the provisions of section 37 of the Provincial Insolvency Act of 1907. The District Judge of Ludhiana has refused their application in a brief order in which he has held that the mortgage was a valid one and that it was owing to pressure put upon him by the Bank that Umrao Singh deposited the title-deeds of his house as security for the Bank's claim. For the decision of the case, on the arguments addressed to me, it is necessary to describe the facts in a somewhat greater detail than have been given by the lower Court.

The Bank has a claim of Rs. 41,000, odd, against Umrao Singh's assets. Of this amount Rs. 1,644 represents his personal debt and the remainder sums advanced by his authority to various other persons. The Bank apparently was ignorant of his financial position, and also of the nature of the loans to other persons which he had been authorising until the 26th December 1916. On the 29th December the Secretary of the Bank went to Ludhiana to inquire into the position. He found it unsatisfactory, but was not able to make any definite arrangement to secure the Bank's claim, but he persuaded Umrao Singh to accompany him to Lahore. On December the 30th, various conversations took place between Umrao Singh and the Directors of the Bank, and he eventually admitted that he had received some Rs. 41,000 himself and that he had merely utilised the names of other persons to obtain loans for himself. The Directors, including Lala Niranjan Das, Public Prosecutor, Lahore, Dr. Gokal Chand Narang, Barrister, and others, pointed out to him the criminality of his actions and threatened him with criminal proceedings unless he took immediate steps to secure the Bank against loss. As a result, he

promised to sell his house at Ludhiana and settle the Bank's claim within 15 days. The Directors, however, were not fully satisfied with this but insisted on the immediate deposit of the title deeds of the Ludhiana house as an equitable mortgage for the amount due. On the following day, therefore, December the 31st, Umrao Singh deposited his title-deeds as security for the whole amount for which he was liable and, at the same time, gave the Bank a letter acknowledging the claim against him and showing the purpose for which the deeds had been deposited. On these facts Counsel has addressed two main arguments to me, (1), that the equitable mortgage was effected by means of the letter of the 31st December and that it is invalid for want of registration of this letter; and (2) that the effecting of the equitable mortgage was a voluntary action on his part made with a view to give preference to the Bank over other creditors.

On the first point Counsel refers to *Behram Rashid Irani* v. *Sorabji Rustamji* (1) and Gour's Transfer of Property Act, Volume II, Page 594. In the Bombay case it must be noticed that a document setting forth the clear intention of the defendant that the deposit of title-deeds should be security for the loan was the only evidence available of the defendant's intentions in making the deposit of his title-deeds. In the present case, on the other hand, there was a verbal agreement made on December the 30th, that the title-deeds of the house would be deposited on the following day as security for the amount due, and the intention of the depositor of these deeds is amply clear and amply proved without the letter of December the 31st. The authorities quoted at page 894, *et seq*, of Gour's Transfer of Property Act and the opinion of the learned Author also do not appear to favour the contention of the appellant as he states: "The question of registration falls into the back ground if the title deeds are deposited with the declared intention to secure an antecedent debt or under such circumstances that the law will imply that they are so deposited." There are also many authorities to the effect that a memorandum recording the deposit and the purpose for which it was made, does not require registration, for such a document does not create any interest in immoveable property, since the mortgage is complete independently of it. These general principles of law apply exactly to the present case. I hold, therefore, that the lower Court was correct in holding that no question of the necessity of registration arose.

As for the second point, the general principles of law regarding transfers made in favour of one creditor with a view to giving that creditor preference over others have been well explained in the judgment of Rattigan, C. J., in *Labhu Ram* v. *Puran Chand* (2). The learned Chief Justice has shown that the criterion in such cases is, whether the transfer or payment is voluntary. The correctness of the law as laid down by him is not contested by Counsel for the appellant, but he urges that, in the present case, the debtor spontaneously made a distinction among his creditor and this in spite of the fact that for the greater part of the amount which he admitted he was under no legal obligation to the Bank. These arguments appear to me to have no force in the present case. Umrao Singh may not have been *prima facie* under any legal obligation to give security for the debts of others, but in this case apparently, after cross-examination by skilled lawyers, he had been driven to the admission that he had fraudulently obtained advances for himself in the names of others. His legal obligation was, therefore, clear and it was equally clear that he had rendered himself liable to criminal proceedings which were threatened by the Directors unless he took immediate steps to secure the Bank against loss. In these circumstances, it cannot be urged that the transfer to the Bank was voluntary. The dominant motive of the debtor in making the transfer was to save himself from exposure or from a criminal prosecution, and, in such a case, as the law regards only the motive of the debtor, it cannot be held that the transfer was voluntary or amounted to a fraudulent preference. The leading case on the subject is *Taylor, Ex parte, Goldsmid, In re* (3), in

(1) 23 Ind. Cas. 140; 38 B. 372; 16 Bom. L. R. 85.

(2) 53 Ind. Cas 421; 120 P. R. 1919; 59 P. L. R. 1920.

(3) (1887) 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148.

which the circumstances were very similar to those of the present case.

In ground No. 6 of the appeal Counsel urged that the Bank could, at the best, prove only for the amount which the various debtors, who had obtained advances from Umrao Singh, are unable to pay. This proposition is not contested by Counsel for the respondent who asserts, however, that the admission of Umrao Singh himself is correct, namely, that the debts admitted by Umrao Singh, for the payment of which he deposited his title deeds, are all of a bogus nature. Counsel for the respondent, however, admits that the Bank has not yet made any definite attempt to recover any money from the nominal borrowers. He also undertakes that the Bank will make proper inquiries whether any of these items are legally recoverable and, if so, will take steps to recover the amounts. He agrees otherwise to hand over the various documents to the Official Receiver. The Bank will, therefore, after making due inquiries, inform the District Judge, as soon as possible, of the results of these inquiries, and further questions connected with these debts will be settled by the District Judge.

I dismiss the appeal with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 619 OF 1920.

November 30, 1920.

Present:—Mr. Justice Martineau.

NIZAM DIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHADI—PLAINTIFF AND *Musammat* KHATUN—DEFENDANT—RESPONDENTS.

Custom—Alienation—Gift—Widow, whether can gift land in lieu of services.

Although in certain cases a male proprietor can make a gift of ancestral land in consideration of services rendered by the donee, a widow cannot, in the absence of a custom to the contrary, make a gift of land at all. She can ordinarily alienate only for necessity.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 2nd February 1920, reversing that of the Munsif, first Class, Hoshiarpur, dated the 6th November 1919.

Lala *Fakir Chand*, for the Appellants.

Sheikh Naiz Muhammad, for the Respondents.

JUDGMENT.—The plaintiff in this case contests the validity of a gift of land made by *Musammat* Khatun, the widow of his collateral Ditta, to her husband's nephew Nizam-ud-Din. The first Court dismissed the suit, finding that, after Ditta's death, his widow had been living with her nephews, who cultivated her land, and that she was in need of their services, and holding that the alienation in lieu of services rendered was valid. The lower Appellate Court has reversed the first Court's decision, as it has not been established that the gift was necessary. Nizam ud Din and his brother have appealed to this Court.

Although in certain cases a male proprietor can make a gift of ancestral land in consideration of services rendered by the donee, a widow cannot, in the absence of a custom to the contrary, make a gift of land at all. She can ordinarily alienate only for necessity. No custom to the contrary is shown in this case, and I agree with the learned District Judge that the services which Nizam-ud-Din had rendered to *Musammat* Khatun did not make it necessary for her to make him a gift of her land.

There is nothing to support ground No. 4 of the appeal. The plaintiff is not debarred from attacking the gift by the fact that a suit was at first brought by his grandson and was dismissed.

I dismiss the appeal with costs.

Appeal dismissed.

SOURENDRA MOHAN SINHA *v.* MURARI LAL SINHA.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 2 OF 1919.

June 15, 1920.

Present :—Sir Asutosh Mookerjee, Kt., Acting Chief Justice, and Justice Sir Ernest Fletcher, Kt.

SOURENDRA MOHAN SINHA—
APPELLANT
versus
MURARI LAL SINHA AND OTHERS—
RESPONDENTS.

Administration suit—Intervenor, costs of, liability for.

Where a third party, without sufficient reason, appears and defends an administration suit separately, he must bear the costs of so doing, even though the plaintiff be unsuccessful in the action. [p. 583, col. 1.]

Appeal from the judgment of Mr. Justice Beachcroft.

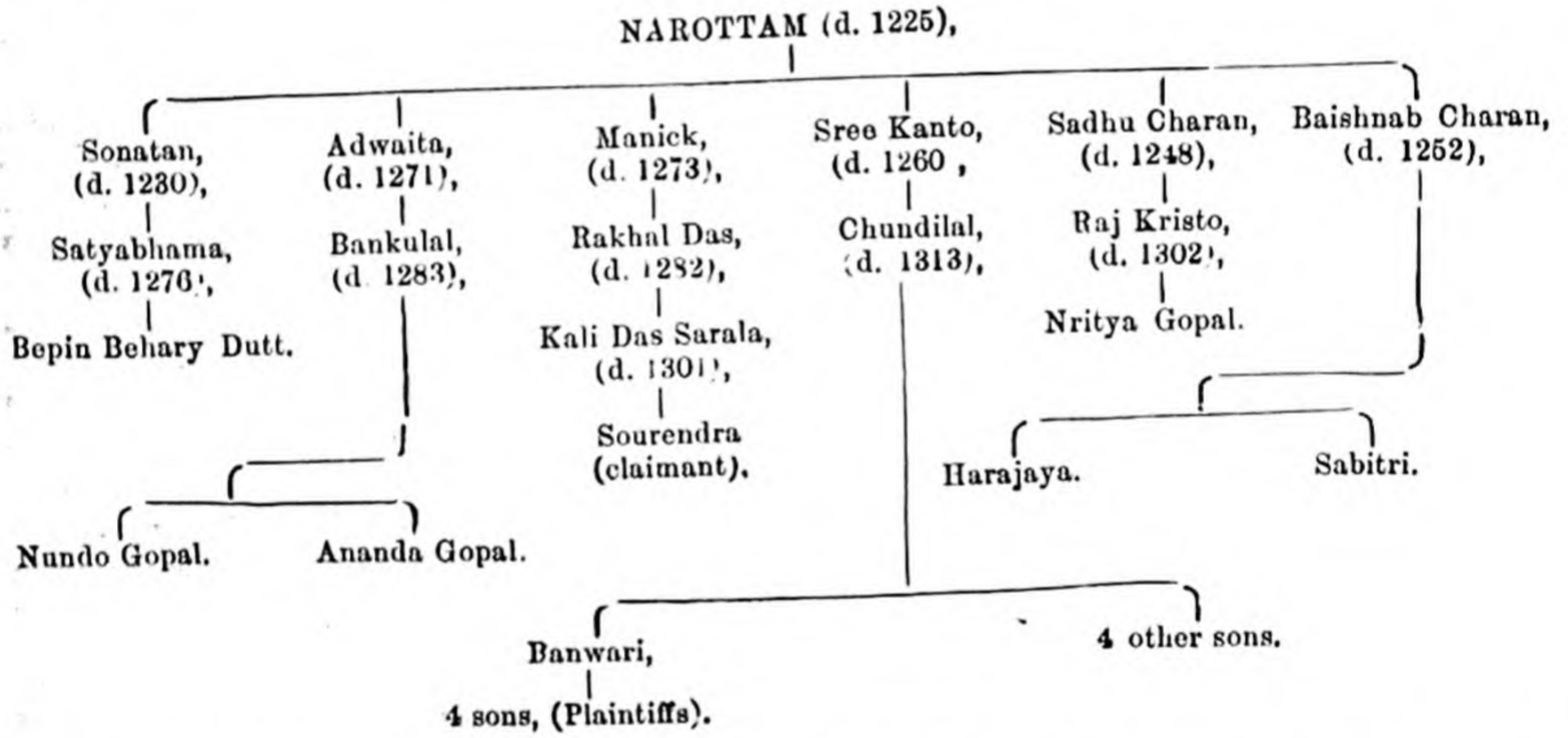
Mr. *H. D. Bose*, for the Appellant.

Mr. *S. K. Mullick*, for the Receiver.

Messrs. *P. C. Sen* and *B. K. Chaudhri*, for Prithichand.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal from the judgment of Mr. Justice Beachcroft on exceptions to a report of the Assistant Referee disallowing the claim of the appellant against the estate of his grand-uncle which is the subject-matter of an administration suit on the Original Side of this Court. The facts material for the determination of the question raised before us may be briefly narrated by reference to the annexed genealogical table :—



Chandi Lal Sinha who, in his lifetime, carried on an extensive business in Calcutta and other places, died on the 11th August 1906, and left an estate of considerable value, both moveable and immoveable. After his death, his business was continued by some of his sons who incurred various liabilities to outsiders in course of time. On the 13th June 1910, the present suit for the administration of his estate, for partition, and for incidental reliefs was commenced by his heirs. On the 20th January 1910, Mr. K. P. Basu, an Advocate of this Court was appointed Receiver of the estate of Chandi Lal Sinha, and, shortly thereafter, he proceeded to take possession of the properties. On the 16th August 1912, a preliminary decree was made whereby the suit was referred to the Assistant Referee with directions to take the usual administration accounts and to make the usual enquiries. The decree further directed that creditors be invited by public advertisement to prove their claims against the estate before the Assistant Referee within a specified time. In answer to the advertisements, four claims were filed, only one of which represented debts left by Chandi Lal. An adjudication was held by the Assistant Referee on the claim so filed and a report followed. On the 26th January 1915, the Assistant Referee sub-

mitted a report after the accounts had been taken and the enquiries directed by the administration decree had been made. The report was confirmed by a decree dated the 19th April 1915, whereby the Receiver was directed to satisfy the claims which had been allowed in the report. Meanwhile, on the 15th December 1915, the present appellant, Sourendra Mohan Sinha, a grand-nephew of Chandi Lal Sinha, had instituted a suit in the Court of the Subordinate Judge of Burdwan to enforce a claim against the estate of his grand-uncle. He obtained a Rule from the Burdwan Court to restrain the Receiver from dealing with the estate of Chandi Lal Sinha. On the other hand, the Receiver, on the 21st September 1915, obtained a Rule against the claimant with a view to restrain him from proceeding with his application in the Burdwan Court. On the 10th December 1915, an order was made by this Court at the instance of the claimant, giving him liberty to prove his alleged claim against the estate of his grand uncle in the administration suit. Accordingly, the claim was filed on the 17th December 1915. The substance of the claim was that he was entitled to realise from the estate of Chandi Lal Sinha a large sum of money, as the latter had, during his minority, taken possession of and managed the estate of his father Kalidas Sinha. On the 17th January 1916, liberty was given to the Receiver to appear before the Assistant Referee and to contest the claim. Some weeks earlier, a similar order had been passed on the 5th December 1915, on the application of one Prithishandlal Chaudhuri who claimed to be a creditor, not of Chandi Lal Sinha but of the heirs of Chandi Lal Sinha, against whom he had obtained a decree for money on the 20th June 1910 in a suit instituted by him in the Court of the Subordinate Judge of Purnea on the 5th June 1909. In the order made on the application of Prithishandlal Chaudhuri, it was explicitly stated that he was given liberty *at his own risk as to costs* to oppose the claim of Sourendra Mohan Sinha against the estate of Chandi Lal Sinha, deceased. In these circumstances, Prithishandlal Chaudhuri and the Receiver both appeared before the Assistant Referee and contested the claim of Sourendra Mohan Sinha. After a protracted investigation which, it is said, extended over 110 hearings, the Assistant Referee reported against the claim. Mr. Justice Beachcroft, after a hearing which lasted for 30 days, confirmed the report of the Assistant Referee and dismissed the claim with costs. On the present appeal, the decree made by Mr. Justice Beachcroft was intended to be assailed on a variety of grounds on the merits, and adjournments were repeatedly taken to enable the appellant to scrutinise the accounts. But, ultimately, Mr. Bose, who appeared on behalf of the claimant appellant, intimated that the grounds on the merits could not be pressed with any hope of success and that he would consequently confine himself to the question of costs which involved an important point of principle.

Mr. Justice Beachcroft has held, with regard to the hearing before the Assistant Referee, that both the creditor Pirthichand and the Receiver were entitled to their costs. As regards the hearing of the exceptions, he has allowed all costs of Pirthichand and the Receiver, subject to the reservation that there would be only one set of Counsel's fees, inasmuch as the main argument was that of the Counsel for the Receiver, and the Court had not been given any additional assistance by the presence of Additional Counsel because the defence of Pirthichand and the Receiver were identical. In our opinion, the order as to costs cannot be supported

Prithichand Lal, who is frequently described in these proceedings as one of the creditors, had really no *locus standi* to intervene. He was not a creditor of the estate of Chandi Lal Sinha which was under administration; he was merely a creditor of the heirs of Chandi Lal Sinha; even his application to attach any portion of the assets left by the latter had been unsuccessful. The way in which he is described as one of the creditors seems to indicate that this distinction was not realised, and he appears to have been treated as if he was a creditor of the estate under administration. It is not necessary for us to determine now whether he should have been at all allowed to intervene as a creditor of the heirs of Chandi Lal Sinha; this, at any rate, is clear that he was permitted to intervene

at his own risk as to costs and to oppose the claimant. His intervention was wholly unnecessary. The Receiver was quite competent to defend the estate from assailants who put forward stale or unfounded claims. As was ruled by the Court of Appeal in *Williams* v. *Buchanan* (1), where a third party with no sufficient reason appears and defends an action separately, he must bear the costs of so doing, even though the plaintiff be unsuccessful in the action. Lord Esher, M R, observed that, although the Court had a discretion in the matter [*Hanbury* v. *Upper Inny Drainage Board* (2)], the Court would refuse the third party his costs, as no one had a right unduly to increase the costs of litigation except at his own expense. He had no reason to think that the defendant would not fight the action to the uttermost, and it would certainly not be fair to make the plaintiff pay the costs of the appearance of the third party whom he did not want to see; he had no reason for going to the expense of a separate appearance and ought not, consequently, to have costs against any body: he had in fact chosen to indulge in a luxury for which he must pay. Bower, L. J, added that the third party might have gone to the defendant's Solicitors and got them to act for him, as his case and that of the defendant were identical The same principle was applied in *Salmon, In re, Priest* v. *Uppleby* (3). substance of the matter thus is, that the intervention of Prithiband, assuming it to have been proper, did not change the character of the proceeding or alter its scope; he voluntarily came into it as a prudent measure, not of immediate protection but of possible personal benefit hereafter, when upon the completion of the administration proceedings and the termination of the administration suit, the residue, if any, left of the estate of Chandi Lal might ultimately pass into the hands of his heirs. In these circumstances, it would be clearly unjust to compel the claimant to pay an additional bill of costs of the intervener. This view is substantially in accord with that adopted by Jessel, M. R, in *Watts*, *In re*, *Smith* v. *Watts* (4), and by Parker, J., in *Schwabacher, In re, Stern* v. *Schwabacher* (5).

The result is that the appeal is allowed in part and the decree modified only in respect of costs. The claimant will pay the Receiver his costs of and incidental to the reference and of the application to the Court; such costs will be assessed as of a hearing on Scale No. 2 and the fees of one Counsel only will be allowed. The claimant appellant will also pay the Receiver the costs of this appeal. Prithibhand Lal, as also other parties, will pay their own costs of the reference, of the application before Mr. Justice Beachcroft and of this appeal. The order as to costs will include all reserved costs.

FLETCHER, J.—I agree.

Appeal partly allowed.

(1) (1821) 7 T. L. R. 226.
(2) (1883) 12 L. R. Ir 27.
(3) (1889) 42 Ch. D. 351; 61 L. T. 146; 38 W. R. 130.
(4) (1882) 22 Ch. D. 5; 52 L. J. Ch. 209; 48 L. T. 167; 31 W. R. 262.
(5) (1907) 1 Ch. D. 719; 76 L. J. Ch. 392; 96 L. T. 534.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 994 OF 1917.

July 13, 1920.

Present:—Mr. Justice Shah and Mr. Justice Crump.

GANGABAI—PLAINTIFF—APPELLANT

versus

JANKIBAI—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Residence, right of, whether can be enforced against purchaser from husband.

A widow's right of residence cannot be recognised against an alienee claiming under a transfer effected by the husband during his lifetime. [p. 585, col. 1.]

Second appeal from the decision of the Additional First Class Subordinate Judge, A. P, at Sholapur, in Appeal No. 141 of 1916, varying the decree passed by the Second Class Subordinate Judge at Pandharpur, in Civil Suit No. 194 of 1915.

Mr. *H. C. Coyajee* (with him Mr. *S. S. Patkar* Government Pleader), for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

SHAH, J.—The plaintiff in this case sued to recover possession of a part of the

house conveyed under a sale-deed executed by defendant No. 1, Ramchandra, in the year 1904 in favour of the plaintiff's mother as his guardian, during the plaintiff's minority. The defendant No. 1 occupied the house as a tenant under a rent note, which expired in February 1909. At the date of the suit his wife, Jankibai, defendant No. 2, was in possession of a part of the house now in question. The suit was filed against both of them. The defendant No. 1 died during the pendency of the suit and ultimately the suit was defended by the wife, both in her own right and as the legal representative of her husband. She pleaded that the sale deed was a hollow transaction and that, in any case, she had the right of residence in that part of the house and that the purchaser must be taken to have purchased it subject to that right. There was also a plea of fraud. On a consideration of all the defences, the Trial Court found against her and decreed the plaintiffs' claim for possession of the house. Defendant No. 2 appealed to the District Court and the Additional First Class Subordinate Judge with appellate powers who heard the appeal, raised the following point for decision: "Whether the defendant has a right of residence in the plaint-house, and, if so, whether the plaintiff purchased the said house under the sale deed, Exhibit 62, with notice of the said right of hers?' It is stated in the judgment of the Appellate Court that the appellant gave up all the remaining contentions. The Appellate Court came to the conclusion that the defendant No. 2 had a right of residence in the house and that the sale in favour of the plaintiff must be taken to be subject to her right of residence. Accordingly, the decree of the Trial Court was varied and a part of the house indicated in the decree was allowed to remain in the possession of Jankibai.

The plaintiff has now appealed to this Court, and it is contended on his behalf that the lower Appellate Court is wrong in its view of law that the wife has a right of residance which can be enforced against the purchaser from her husband. On the other hand, it is contended that she has such a right and that, in any case, her position after the death of her husband must be treated on the same footing as that of a widow having a right of maintenance against the family property. It is also urged on behalf of the respondent that she should be allowed to raise the point as to the *benami* nature of the sale deed in favour of the plaintiff and that there should be a remand on that point.

It may be mentioned that the Trial Court decided on the evidence against her on the question of fact as to whether the sale-deed was hollow, and in the Appellate Court this question of fact appears to have been abandoned. The statement of the Appellate Court on this point is quite distinct; and I do not think that the respondent could now be allowed to raise the point relating to a question of fact which was expressly abandoned in the lower Appellate Court.

As regards the question of the wife's right of residence I am of opinion that the lower Appellate Court has taken an erroneous view. All the right which the wife has during her husband's lifetime is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or self-acquired. It is not suggested in the present case that her right of maintenance including the right of residence, was declared a charge on this property during her husband's lifetime. There was a suit by Jankibai against her husband for maintenance after the sale of 1904 and it is common ground that no charge was created in favour of Jankibai in respect of this house, and, indeed, it is difficult to see how it could be done in view of the sale by the husband in 1904.

Under these circumstances, it is difficult to understand how the wife could resist the claim of the purchaser based on a sale-deed executed by her husband during his lifetime. The lower Appellate Court has relied upon the case of *Manilal* v. *Bai Tara* (1). That case is really against the view taken by the lower Appellate Court. In that case the auction purchaser was allowed to take the house free from the plaintiff's right of residence as a Hindu

(1) 17 B. 398; 9 Ind. Dec. (N. S.) 259.

widow notwithstanding the fact that the purchaser had notice of her claim. The original mortgage was effected by the husband of the widow and the sale took place in execution of the decree on the mortgage after the husband's death. Mr. Shingne, however, has relied upon certain observations in the judgment, which were strictly not necessary for the purpose of the decision, and which suggest that if the alienation effected by the husband is not for the family advantage or is in any way in fraud of the rights of the wife, he may have a claim against the alienee. In that particular case there was no point as to whether it was not for the family advantage or whether the alienation was in fraud of the right of the wife. It seems to me that the opinion expressed about those observations in the case of *Jayanti Subbiah* v. *Alamelu Mangamma* (2) by Mr. Justice Bhashyam Ayyangar is correct. In that case, after referring to the observation in the case of *Manilal* v. *Bai Tara* (1), the learned Judge expressed his opinion as follows :—"It does not appear from the report of the case whether there was any male member of the family other than the husband. If, from the decision in that case, it is to be implied that, in the view of the learned Judges who decided it, the widow would have a right to continue to reside in the house after it has been sold in satisfaction of a debt owing by her husband, unless the debt was incurred for a purpose which would be beneficial to and binding upon his wife, I am unable to concur in that view". I do not think that, according to law, the wife's right to residence in this case could be recognized against the alienee claiming under a transfer effected by the husband during his lifetime.

I would, therefore, set aside the decree of the lower Appellate Court and restore that of the Trial Court with costs of this appeal and in the lower Appellate Court on the respondent, original defendant No. 2.

CRUMP, J.—I agree.

Decree set aside.

(2) 27 M. 45 at p. 51.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1129 OF 1918.

March 26, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

SOORATHA SINGA—PLAINTIFF—APPELLANT

versus

KANAKA SINGA—DEFENDANT—RESPONDENT.

Hindu Law—Custom—Adoption—Kshatriyas *of South Kanara—Brother's daughter's son, adoption of, validity of—Custom, existence of, admitted in adoption deed—Burden of proof.*

According to the custom prevailing among *Kshatriyas* in South Kanara, in the Madras Presidency, the adoption of a brother's daughter's son is valid. [p. 587, col. 2.]

The admission of an adoption in a deed amounts to an admission both of the fact and the validity of the adoption, and the burden of proving the contrary lies upon the person making the admission. [p. 587, col. 2; p. 588, col. 1.]

Second appeal against the revised decree of the District Court, South Kanara, dated the 4th March 1918, in Appeal Suit No. 189 of 1915, preferred against the decree of the Court of the District Munsif, Kasargod, in Original Suit No. 7 of 1914.

This second appeal coming on for hearing on 5th August 1919, the Court (Bakewell and Odgers, JJ.) delivered the following

JUDGMENT.—The general rule of Hindu Law is against the validity of the adoption in this case [*Minakshi* v. *Ramanada* (1)], but this rule may be varied by custom, and such a custom has been held to obtain in the southern districts of the Madras Presidency [*Vayidinada* v. *Appu* (2), *Appayya Bhattar* v. *Vengu Bhattar* (3)] The lower Appellate Court has not found upon the evidence whether such a custom exists in the caste of plaintiff and defendant or in South Kanara, which does not form part of the southern districts. The appellant is responsible for all the costs of this litigation, and we direct him to pay all costs incurred up to this day before the 15th September 1919. Upon payment of the costs before that day, we direct the District Judge to record a finding upon the following issue :—

Is the adoption in this case valid according to the customs observed by the parties ?

(1) 11 M. 49 at p. 55 (F. B.); 11 Ind. Jur. 449; Ind. Dec. (N. S.) 35.

(2) 9 M. 44 (F. B.); 8 Ind. Dec. (N. S.) 427.

(3) 15 M. L. J. 211.

No additional evidence will be taken. In default of payment the appeal will stand dismissed with costs.

The finding is to be returned before the 15th of October 1919, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of South Kanara submitted the following

FINDING:—In this case, I am asked to submit a finding on the evidence on record on the following point :—

"Is the adoption in this case valid according to the customs observed by the parties ?"

2. Before considering the evidence, which is meagre, in this case I think that it is necessary to refer to the circumstances under which the evidence was adduced.

The issue framed by the Munsif is worded thus:—whether the defendant has not been truly and validly adopted by the plaintiff ? Thus, it is seen that the burden of proof is thrown on plaintiff and, therefore, the defendant must have thought that if there is not much evidence on plaintiff's side he need not adduce much evidence.

The adoption deed is a registered document which contains a special reference to the custom. It is a deed executed by plaintiff himself and, when he himself admits the custom in the registered document, it is strong evidence against him and, unless he proves that he made the statement under a mistake or other justifying circumstance, it may very well be presumed that it is a correct statement of facts. In this case it is not shown that there is any justifying circumstance. Therefore, Exhibit A affords a strong piece of evidence against plaintiff.

3. Apparently, therefore, it is for plaintiff to shift the burden on defendant but he has not succeeded in doing so. P. W. No. 1 is plaintiff himself and he is interested. Further, he contradicts Exhibit A. The next witness is P. W. No. 2 who is the natural father of defendant. His evidence has been disbelieved by all the Courts in this case on other points. So, he cannot be relied on on this point also. Further, it must be remarked that he is also a party to Exhibit A as an attestor. He was the person who gave away defendant in adoption and it was then that Exhibit A was executed and the attestation of this witness taken, and so he may be presumed to have known the contents of Exhibit A when he attested it. So, his present evidence must be received with very great caution.

It is argued that he gives evidence against his own interest, but I am not certain of that, because we do not know whether he admits the existence of any ancestral property in his hands. Probably, he may say that the properties in his hands are all his self-acquisitions and that his sons have no right to claim them as a matter of right.

Defendant's mother died and afterwards P. W. No. 2 married a second wife and has children by her and he does not care for defendant at all after the death of his (defendant's) mother.

4. Another fact to be considered in weighing the evidence in this case is the impression which the parties and the Munsif were under when the trial of the case began. They were apparently under the impression that the decision in *Vayidinada* v. *Appu* (2) applied. This accounts for the paucity of evidence on this point on both sides. Until the High Court pointed out that the decision applied to southern districts and not to western districts, no body concerned with this case seems to have thought that there is that way of distinguishing the case.

With the above remarks, I must examine the evidence. The burden of proof of the issue sent out is on defendant.

5. There is only the evidence of D. W. No. 3 on the point and he is no doubt interested, but the question is, whether he cannot be believed under the circumstances of the case.

6. In the usual course, I have no doubt that this evidence will be considered not sufficient to prove a custom, but, under the peculiar circumstances, I am inclined to consider the evidence true and sufficient. There is Exhibit A which is executed by plaintiff (P. W. No 1) and attested by P. W. No. 2 and P. W. No. 3 (*purohit*) in which the custom is mentioned.

D. W. No. 2 does not help us much because he does not know any instance of the custom. Here, it must be mentioned that, though this witness was asked in cross-examination

whether he knew of any instance, D. W. No. 3 was not asked that question. Apparently the cross examining Vakil avoided the question because he knew that the witness would be able to give instances. Otherwise, he would not have left out that question which he put specially to the previous witness.

Taking the circumstances into consideration, I must find that the custom is proved.

7. Seeing that the custom is prevalent in southern districts it is probable that it is prevalent here also. The defence Vakil quoted the foot notes to *Minakshi* v. *Ramanad* (1), in the reprints of Indian Law Reports by Subramaniam and Krishnaswami, to show that the Bombay High Court has decided that the custom prevails in Gowd Sareswat Brahmins of South Kanara, but the book referred to therein is not here and I am, therefore, unable to say whether it was so decided or not.

On the whole, I find that the adoption is valid according to the custom observed by the parties.

This second appeal came on for final hearing, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial.

Messrs. *S. Srinivasa Ayangar*, *K. P. Madhava Rao* and *K. P. Lakshmana Rao*, for the Appellants :—The adoption of a brother's daughter's son is, under the texts of Hindu Law, invalid The texts forbidding adoption where the mother cannot be warned by the adopter apply. There is no custom amongst the Kshatriyas favouring such adoptions. The fact that such a custom prevails among the Gowd Saraswat Brahmins of the place does not warrant its extension to the Kshatriyas who have migrated from the north. The oral evidence adduced by defendants is far too scanty to deduce a custom having the force of law.

Messrs. *K. Sadasiwa Rao* and *K. Sundara Rao*, for the Respondent.—There is proof of the existence of the custom among the Kshatyrias of South Kanara. The plaintiff admits that the usages of the Kshatriyas are not different from those of the Gowd Saraswats among whom the usage prevails. Even the adoption of a sister's son is valid among them. See *Vayidinada* v. *Appu* (2), *Manjunath* v. *Kaveribai* (4).

Again, the plaintiff has admitted the adoption in Exhibit A. That means he does not dispute its validity also.

JUDGMENT.—We think that the plaintiff's admission in Exhibit A was an admission both of the fact and of the validity of the defendant's adoption [See *Ramalinga Pillai* v. *Sadasiva Pillai* (5) . The burden of proving that it was not valid was, therefore, shifted on to the plaintiff's shoulders. Even if it is not so, the custom against the supposed rule based on the text relating to the reflection of a son is so widespread that very little evidence will turn the scale against that rule. The plaintiff admitted in his evidence that the usages of his community did not differ from those of the Gowd Saraswat Brahmins. He being a Kshatriya (presumably not very pure in extraction, clans of pure Kshatriyas being very rare), the customs of his community could not be more strict than those of Saraswat Brahmins. In *Manjunath* v. *Kaveribai* (4) it was held that the custom among Gowd Saraswat Brahmins of Kanara (both north and south which were situated near the Dravida country) allowed the adoption of a sister's son (see, as regards Dravida custom, *Vayidinada* v. *Appu* (2)]. The case of a brother's daughter's son (against whose adoption there is no direct text, as in the case of daughter's son, sister's son and mother's sister's son) stands on a more favourable footing. The community of the parties to the suit migrated from Rajputana and have settled in South Kanara for long. The law which they brought with them did not evidently prohibit the adoption of a brother's daughter's son [See *Madhu Sudan Sinha* (*Biswanath*) v. *Kali Charan* (6) and *Yamnaia Govind Appaji* v. *Laxuman Bhimroo* (7)].

Though the oral evidence on defendant's side in this case is meagre, we think that that evidence, being corroborated by the probabilities by the decision in *Manjunath* v. *Kaverbai* (4), and by the admission of the plaintiff as to the customs and usages of his community not differing

(4) 4 Bom. L. R 140.

(5) 9 M. I. A. 503 at pp. 510, 515; 1 W. R. P. C. 25; 1 Suth P. C. J. 538; 2 Sar. P. C. J. 5 ; 19 E. R. 830.

(6) 46 Ind Cas 216 27 C. L. J. 119.

(7) 16 Ind. Cas. 180; 36 B. 533; 14 Bom. L. R., 543.

rom those of Saraswat Brahmins, can be treated as sufficient under the circumstances to establish the custom which allows the adoption of a brother's daughter's son.

In the result, we accept the finding and dismiss the second appeal with costs.

M. C P.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 228 OF 1920.

November 30, 1920.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

THE DOABA BANK, LIMITED, IN LIQUIDATION, THROUGH OFFICIAL LIQUIDATOR, LAHORE—PLAINTIFF—APPELLANT

versus

KUNDAN LAL AGARWAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Companies Act (VI of 1882), ss. 144 (a), 150—Payment order, who can obtain—Third party, whether can take advantage of provision.

Section 150 of the Companies Act, 1882, confers certain special privileges of which a third party cannot take advantage. [p. 589, col 1.]

The Liquidator of the Doaba Bank transferred, with the sanction of the Court, certain book debts and calls due by the contributories of the Bank to certain persons on the 24th March 1918. On the 19th August he entered into an agreement with the vendees whereby he undertook to execute powers-of-attorney in their favour in order to enable them to obtain a payment order, and sanction of the Court was obtained in respect of this agreement also. The vendees then applied under section 150 of the Companies Act, 1882, for an order of payment :

Held, that, inasmuch as the application was made in the interest and for the benefit of third parties, it could not be said to have been made 'in the name and on behalf of the Company' as contemplated by clause (*a*) of section 144 of the Act, and was, therefore, incompetent. [p. 588, col 2.]

Miscellaneous first appeal from the order of the District Judge in charge of Liquidation work, Lahore, dated the 19th January 1920.

Babu *S. K. Mukerjee*, for the Appellant.

Mr. *Jai Gopal Sethi* and Lala *Fakir Chand*, through Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—This appeal arises out of a proceeding taken in the matter of liquidation of the Doaba Bank, Limited. The facts as stated in the judgment of the lower Court are as follows :—

On the 24th of March 1918 a sale-deed was executed in favour of certain persons transferring to them certain book debts and calls due from certain contributories of the Doaba Bank. The price paid being Rs. 1,05,000. The transferees are described as being either the partners or the respresentatives of the partners of the Phagwara Flour Mills. The sale was effected by the Liquidators with the sanction of the Court and the consent of the share holders and the contributories. On a subsequent date, namely, the 19th of August 1918, an agreement was entered into between the Liquidator and the vendees, one of the provisions of which was that the Liquidator would execute powers of-attorney in favour of the vendees to enable them to apply, under section 150 of the Indian Companies Act of 1882 on behalf of the Liquidator, to recover the debts and the calls due from the contributories. Sanction of the Court was obtained in respect of this agreement also. The vendees accordingly presented an application under section 150 as the attorneys of the Liquidator praying for an order of payment. This application was resisted by the respondents to this appeal on various grounds; one of which being that such an application was incompetent inasmuch as, in reality, it was not made "in the name and on behalf of the Company" as contemplated by clause (*a*) of section 144 of the Act. This contention found favour with the Court below and the application was disallowed. The present appeal has been preferred by the Liquidator himself and it is contended by him that, having regard to the terms of the agreement, he was in honour bound to help the vendees to recover the debts and calls due from the contributories, and that, therefore, the application must be treated as one made "in the name and on behalf of the Company." On the face of it, no doubt, the application purports to have been made in the name of the Company, but, as held by the Court below, it has been made in the interest and for the benefit of

third parties. Section 150 of the Companies Act confers certain special privileges, of which apparently a third party cannot take advantage. The clear wording of clause (*a*) of section 144 presents no difficulty as to its interpretation. Power is given to the Official Liquidator with the sanction of the Court "to bring or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the Company." The present application is certainly not one which can be said to be on behalf of the Company or for its benefit. Under the terms of the sale deed no duty is cast on the Company to recover the debts for the vendees. The agreement was an afterthought by which the transferees tried to get round the clear provisions of sections 144 and 150 of the Act, in order to take proceedings for their benefit which a Liquidator is empowered to take for the benefit of the Company in liquidation. This, in our opinion, was never contemplated by the Legislature. No decided case has been cited by either party dealing with the precise question arising in this appeal, but, having regard to the clear provisions of the Companies Act, we see no reason to hold that the view taken by the lower Court is wrong. We accordingly uphold the decision of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 102 OF 1919.

April 21, 1920.

Present :- Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

BROJENDRA CHANDRA SARMA —PLAINTIFF—APPELLANT

versus

PROSUNNA KUMAR DHAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XLI, r. 22, applicability of, to Letters Patent Appeal—Limitation Act (IX of 1908), Sch. I, Art. 44—Alienation by guardian of ward's property—Suit to set aside alienation—Limitation.

Rule 22 of Order XLI of the Civil Procedure Code is not applicable to an appeal under clause 15 of the Letters Patent, consequently, a memorandum of cross-objections filed therein cannot be entertained. [p. 591, col. 2.]

A transfer by the natural guardian of a minor of his ward's property is voidable and not void, and a suit to set aside such transfer must be brought within the period of limitation prescribed by Article 44, Schedule I of the Limitation Act. [p. 592, col. 2.]

Letters Patent Appeal under clause 15 from the following judgment of

NEWBOULD, J.—The plaintiff in this case sued for recovery of possession on declaration of his title to one third share of a certain *taluk*. The facts of the case are as follows: There were four brothers, Joy Chandra, father of the plaintiff; Brindaban; Sarat who had two sons Atul and Udoi, and Ishan. Joy Chandra died leaving a widow, defendant No. 7, and a son, the plaintiff. The case turns on the effect of a document executed on 7th Bhadra 1311 B. S. At that time the two brothers Sarat and Ishan were also dead. Sarat having left the two sons named above who were both minors, and Ishan having died without any issue. By this document the plaintiff's mother, as his guardian, and Brindaban for himself and as guardian of his minor nephews, Atul and Udoi, transferred the property in suit to the principal defendants. The plaintiff brought this suit to recover possession on the allegations that the property had been purchased by his father alone; that his father's brother had no interest in it, and that the sale referred to did not affect his interest as it was not made for any legal necessity. In both the lower Courts the case was fought out on the issues, *first*, whether the property which was purchased in the name of the plaintiff's father was purchased for himself or for the benefit of the four brothers; and, *secondly*, whether there was any legal necessity for the sale to the principal defendants. Both Courts found on these issues against the defendants. The issue of limitation was raised and argued in the first Court only on the ground that the suit was not brought within 12 years from the date of the plaintiff's dispossession; but the point was not pressed as the suit was evidently brought within that period. Be-

fore the lower Appellate Court no plea of limitation appears to have been raised at all.

Before me, however, on behalf of the appellants it is contended that Article 44 of the Limitation Act applies and the plaintiff cannot succeed as he has not come within three years of the date of his attaining majority. It is conceded on behalf of the respondent that, if this Article applies, the suit must be barred, and that the plaintiff attained majority more than three years before the institution of the suit. On behalf of the appellants great reliance is placed on a case [*Krishna Dhone Bhattacharjya* v. *Bhagiban Chandra Bhattacharjya*] Appeal from Appellate Decree No. 3132 of 1914, decided on 24th May 1916 by Mr. Justice D. Chatterjee and myself, not reported in any of the recognized Law Reports.* In that case we held: "A sale by a guardian is only voidable and is valid until avoided. This avoidance must be by a suit within three years under Article 44 of Schedule I of the Limitation Act. As the ward cannot recover possession without avoiding the sale, his right to recover possession is also gone"; and then reference is made to the decision of the Privy Council in the case of *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(1), where their Lordships of the Privy Council said: "Chokalinga attained majority in 1880 and had, by Article 44 of the Act, three years for suing to set aside the sale by his guardian. He did not do so and, by section 28 of the Limitation Act, his right became extinguished." Of the other rulings cited on behalf of the appellants, I do not think it necessary to refer to any except the case of *Sham Chandra Dafadar* v. *Gadadhar Mandal* (2). There, at page 282,† it was held: "In so far, however, as the case of an alienation for consideration by the natural guardian of an infant is concerned, the decision of the Judicial Committee in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1) supports the view that the transaction is voidable and has to be avoided within the period prescribed by Article 44."

On behalf of the respondent reliance is placed on the decision of the Privy Council in the case of *Mata Din* v. *Sheikh Ahmad Ali* (3). But that was a case in which it was held that the persons who made the sale purporting to be guardians of the minors were not in law guardians and had no legal power to sell, and that Article 44 of Schedule I of the Limitation Act had no application to a case where the sale was effected by a wholly unauthorized person. It cannot be said that the mother of the plaintiff in this case, the plaintiff being a Hindu, was wholly unauthorized to sell. The case of *Sidhu Sahu* v. *Gopi Charan Das* (4) has also been cited. But that case only supports the proposition, that is not disputed in this case, that where a deed is *ab initio* void it is not necessary to set it aside. Here the whole contention on behalf of the appellants is, that the deed in suit is voidable and not void. Lastly, reliance is placed on the decision of the Allahabad High Court in *Bachan Singh* v. *Kanta Pershad* (5). In that case the following remarks of the Madras High Court in *Unni* v. *Kunchi Amma* (6) are quoted and followed: "Such are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a divided Hindu family. In these cases, as was argued by the appellant's Vakil, it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up, because, as between the parties to it, it may be a perfectly valid instrument. All that is needed is a declaration that the plaintiffs' interest is not affected by the instrument, and that declaration is merely ancillary to the relief which may be granted by delivery of possession." That case, and other cases cited in the judgment of the Allahabad High Court, seem to be in the respondent's favour; but, as there appears to me to be direct authority to the contrary in the decisions of this Court, I cannot adopt the view taken by the Allahabad High Court on this point. I must, therefore, hold that, so far as this deed of 23rd August 1904

(1) 23 M. 271 (P. C.); 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591.

(2) 9 Ind. Cas. 377; 13 C. L. J. 277.

(3) 13 Ind. Cas. 976; 15 C. L. J. 270; 16 C. W. N. 333; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 14 Bom. L. R. 192; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6; 39 I. A. 49 (P. C.).

(4) 18 Ind. Cas. 960; 17 C. L. J. 233.

(5) 5 Ind. Cas. 585; 32 A. 392; 7 A. L. J. 337.

(6) 14 M. 26; 5 Ind. Dec. (N. S.) 19.

*Since reported in 34 Ind. Cas. 182—*Ed.*

†Page of 13 C. L. J.—*Ed.*

is voidable, the plaintiff's suit is barred by limitation.

As regards the last point, to what extent the dead is voidable, I think the contention of the respondents should be accepted. The *kobala* treated the property as if it had been the joint property of the four brothers; and though it did not expressly say so, having regard to the fact that the appellant's case throughout was that this was a property of the four brothers and that Brindaban had a right to transfer his own share and the share of Sarat's sons as their guardian, the defendants cannot now say that the plaintiff's mother purported to transfer by this deed more than one-third as the property of the minor. Taking this view, and having regard to the finding of fact as to title, the deed, so far as it purports to transfer more than the plaintiff's share, is void since neither Brindaban nor Sarat's sons had any interest in the property. So far as the mother purported to transfer the plaintiff's one-third share, the deed is voidable and, in respect of that share, the plaintiff's claim is barred by limitation, for the reasons mentioned above.

The result is that this appeal is decreed and the decrees of the lower Court modified to this extent that the plaintiff's title to and right to get possession of two thirds share of the property in suit will be declared. As this plea of the appellants was not taken in either of the lower Courts, I make no order as to costs of this appeal.

Babu *Ramgati Sarcar*, for the Appellant.

Babu *Sudhar Roy*, for the Respondents.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Newbould, in a suit brought by the appellant to recover possession of a property conveyed during his minority by his mother and uncle on the 23rd August 1904.

The case for the plaintiff is, that the property belonged to his father, and that there was no occasion for its transfer by his mother who was his natural guardian. The case for the purchasers is that the property belonged to the joint family and that there was legal necessity for the alienation.

The Court of first instance and the Subordinate Judge have concurrently found that the property did not belong to the family but was owned exclusively by the father of the plaintiff. The Courts have also found that there was no necessity for the sale. In this view, the Subordinate Judge, in affirmance of the decree of the Court of first instance, has decreed the suit.

Upon appeal, Mr. Justice Newbould has held that, in respect of a one third share, the suit is barred by limitation under Article 44 of the Schedule to the Indian Limitation Act. In this view, he has dismissed the suit with regard to a one-third share, and maintained the decree as regards the remaining two-thirds share.

The plaintiff has contended, in support of this appeal, that the suit is not barred under Article 44, inasmuch as the transfer was not voidable but void, and he was consequently entitled to recover possession within twelve years from the date of alienation. The respondents have preferred a memorandum of cross objection with regard to the two-thirds share, and have argued that the entire claim is barred by limitation. We are of opinion that the memorandum of cross-objection cannot be entertained. Rule XX of Order XLI of the Civil Procedure Code is not applicable to an appeal under clause 15 of the Letters Patent. *Kausalia* v. *Gulab Kuar* (7). The cross-objection must therefore, be dismissed.

As regards the appeal, we are of opinion that the conveyance of the 23rd August 1904, in so far as it was a conveyance by the mother of the plaintiff, was voidable and not void. This view is supported by the authorities reviewed in the case of *Sham Chandra Dafadar* v. *Gadadhar Mandal* (2) where reference is made, amongst others, to the earlier decision of the Judicial Committee in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1). The same view has subsequently been adopted in Bombay in the case of *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (8) and in Madras in the case of *Muthukumara Chetty* v. *Anthony Udayan* (9).

Our attention, however, has been drawn to the decision of the Allahabad High Court in *Bachan Singh* v. *Kamta Pershad* (5) which

(7) 21 A. 237; A. W. N. (1899) 72; 9 Ind. Dec. (N. S.) 898.

(8) 21 Ind. Cas. 350; 33 B. 94; 15 Bom. L. R. 882.

(9) 24 Ind. Cas. 120; 38 M. 867; 15 M. L. T. 361; 29 M. L. J. 617.

is in favour of the contention put forward by the appellant ; but we are not prepared to follow it, as it makes no reference to Article 44 of the First Schedule to the Limitation Act.

Reference has finally been made to the decision of the Judicial Committee in the case of *Mata Din* v. *Sheikh Ahmad Ali* (3), where the alienation was by a *de facto* guardian who had no legal *status* as guardian. Lord Robson pointed out that, in such circumstances, Article 44 (which prescribes a period of three years within which a ward who has attained majority may set aside a sale by his guardian, the time running from the date of the ward's majority) had no application because the sale was effected, not by a guardian but by a wholly unauthorized person. In the case before us, as the transfer was effected by a guardian, Article 44 is applicable. We do not, however, express an opinion on the question, whether, in the view adopted by Mr. Justice Newbould, he should not have dismissed the entire suit. We need only hold on the appeal by the plaintiff that the decree, in so far as it has been made against him, is well founded and must be upheld.

As the appeal has failed, and the cross-objection has been rejected, there will be no order as to costs.

FLETCHER, J.—I agree.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1230 OF 1919.

December 3, 1920.

Present:—Mr. Justice Broadway.

GHAMANDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BUTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Necessity, proof of—Small item not accounted for—Transaction, old—Silence, long, effect of.

In a suit by a reversioner to contest a sale, if the amount found to be not for necessity is only a fractional part of the total consideration (in this case Rs. 150 out of Rs. 800) the sale should not be disturbed. [p. 593, col. 1.]

Where the sale took place over forty years prior to suit the long silence of the plaintiff may be taken into account and strict proof of necessity should not be expected or required. [p. 593, col. 2]

Second appeal from the decree of the District Judge, Lahore, dated the 20th of April 1920, affirming that of the Senior Subordinate Judge, Lahore, dated the 31st December 1919.

Mr. *Mukand Lal Puri* for Dr. *Nand Lal*, for the Appellants.

Mr. *M. N. Mukerjee*, for the Respondents.

JUDGMENT.—On the 17th May 1878, one Allah Ditta sold 193 *kanals* of land to Karam Chand for Rs. 800. In 1888 he sold some more of his land to the same Karam Chand and Narain Das. It is said that he died somewhere about 1900. In 1903 his reversioners, the present plaintiffs, instituted a suit for possession on the ground that these alienations were not for necessity but as his widows were alive the suit was dismissed as premature so far as possession was concerned. A declaratory suit was not brought. In May 1918 the suit giving rise to this appeal was instituted by the reversioner seeking to set aside the sale of 1878 only and claiming possession of 162 *kanals*, 11 *marlas*. Karam Chand is dead and in these proceedings has been represented by his sons and grandsons. Narain Das is alive. It was pleaded that the plaintiffs were not Allah Ditta's reversioners and that the property was not ancestral, also that the plaintiffs had acquiesced in the sale. The Trial Court converted the sale into a mortgage charging the property with Rs. 650. On appeal by the vendees, the learned District Judge maintained that decree, and the defendants-vendees have now come up on second appeal to this Court and on their behalf I have heard Mr. Mukand Lal Puri while Mr. M. N. Mukerji has addressed me on behalf of the plaintiffs-respondents.

Mr. Puri contended :—

(1) that the plaintiffs had no *locus standi* because the property was not ancestral ;

(2) that acquiesence had been established owing to the fact that the plaintiffs had taken no action for such a long period, and

(3) that inasmuch as out of Rs. 800 Rs. 650 had been found as a valid charge,

the sale should not have been converted into a mortgage.

As to the first point whether or not the property is ancestral is a question of fact. There is evidence on the record which, if accepted, warrants the conclusion arrived at. In second appeal, therefore, I am unable to examine this question further.

As to the second point, *viz.*, that of the acquiescence, I am unable to take a view different to that of the Court below. No suit for possession of the land was possible during the lifetime of Allah Ditta. On his death the plaintiffs attempted to get possession but were met with the defence that Allah Ditta's widows were alive. Their subsequent inaction during the lifetime of the widows cannot, I consider, be regarded as acquiescence. I, therefore, see no force in this contention.

There remains the question as the correctness of the conversion of the sale into a mortgage. It has been repeatedly held by this Court that, when the amount found to be not for necessity is only a fractional part of the total consideration, the sale should not be disturbed. In the present case Rs. 150 out of Rs. 800 have been found to be without necessity and the fraction is a small one.

The real difficulty in the case is, that the learned District Judge has not come to a clear finding on the question of the necessity for the balance of the consideration money, *i.e*, Rs. 650. As he has allowed this sum it may safely be presumed that he had, at the back of his mind at least, an idea that some necessity existed for this amount. The transaction took place as far back as 1878; Karam Chand is now dead, his brother Narain Das is not a man of too bright an intellect as is evident from the remarks made regarding him by the Trial Court. In a case where an alienation is challenged after so long a period strict proof of necessity can scarcely ever be expected. The Trial Court appears to have been influenced by certain views found by it regarding the method in which the 1888 transaction was entered into and there appears to have been an idea in the mind of the learned Subordinate Judge that the vendees in this case had been guilty of some fraud or sharp practice. I have been unable to discover any indication of such fraud or sharp practice so far as the transaction of 1878 is concerned. The plaintiffs have not challenged in this suit the transaction of 1888, although they have referred to it. Even assuming that the latter transaction was tainted with fraud, it does not follow that the earlier one was similarly tainted. The plaintiffs might have brought a declaratory suit, although they were not bound to do so, and although their failure to do so cannot be regarded as acquiescence, I think their long silence can be taken into account when the question of necessity is concerned in a transaction which took place nearly half a century ago. In these circumstances, it seems to me that the Courts below exercised their discretion in an injudicious manner when they converted this ancient sale into a mortgage.

I accordingly accept this appeal and dismiss the plaintiff's suit with costs.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 86 OF 1920.

July 22, 1920.

Present:—Mr. Daniels, A. J. C.

Musammat SUGHRA—PLAINTIFF—APPLICANT

versus

RAM LAL MISRA—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit for compensation for mental worry and expenses incurred in criminal prosecution for breach of trust, whether cognizable by Court of Small Causes.

Where the defendant was charged with criminal breach of trust and convicted by a Criminal Court and plaintiff filed a suit for damages—for mental and physical worry, cost of criminal prosecution and other expenses and loss:

Held, that under Article 35 (*ii*) of the Second Schedule of the Provincial Small Cause Courts Act, the suit was not cognizable by a Small Cause Court.

Revision against the order of the Judge, Small Cause Court, Lucknow, dated the 7th June 1920.

Mr. *C. F. S. Oehme*, for the Applicant.

JUDGMENT.—This is an application in revision from an order passed by the Judge

MALUKA *v.* SUNDAR SINGH.

the Small Cause Court on the 6th June returning a plaint to the applicant for presentation to the proper Court on the ground that it was excepted from the jurisdiction of the Small Cause Court under Article 35 (*ii*) of the Second Schedule of the Provincial Small Cause Courts Act, 1887. There can be no doubt that the case comes within that Article which runs "(35) a suit for compensation— * * * *

* * * *

"(*ii*) for an act which is, or, save for the provisions of Chapter IV of the Indian Penal Code, would be, an offence punishable under Chapter XVII of the said Code." The case was one against a servant, who committed criminal breach of trust and has been convicted under section 406, Indian Penl Code, to recover compensation for the value of the property, costs incurred by the plaintiff in those proceedings and Rs. 100 on account of mental trouble. I must, therefore, reject this application. No order as to costs is necessary as the applicant has appeared himself.

It should be added that the plaint had previously been presented in the Court of the Munsif who, thinking that it was a Small Cause Court matter, returned it for presentation to the Small Cause Court by an order dated 20th May 1920. In view of the present order, it will be open to the applicant to ask for a review of that order.

Application rejected.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1086 OF 1920.

December 7, 1920.

Present :—Mr. Justice Martineau.

MALUKA—JUDGMENT DEBTOR—APPELLANT

versus

SUNDAR SINGH AND ANOTHER—DECREE-HOLDERS AND SUNDAR SINGH AND OTHERS—JUDGMENT DEBTORS—RESPONDENTS.

Execution of decree—Decree for demolition of wall—New wall erected after demolition—Remedy, proper.

Where a decree directs the demolition of a wall as being an obstruction to a right of way to which the decree-holder is entitled and the wall is demolished in execution of the decree, but the judgment-debtor erects another wall obstructing the right of way, the proper remedy of the decree-holder is to file a suit for an injunction restraining the judgment-debtor from obstructing his right of way. He is not entitled to get the second wall demolished in execution of the first decree. [p. 595, col. 2]

Miscellaneous second appeal from the order of the District Judge, Ludhiana, dated the 24th January 1920, confirming that of the Munsif, First Class, Ludhiana, dated the 4th June 1919.

Mr. *Maqsudan Bhagat*, for the Appellant.

Messrs. *Jai Gopal Sethi* and *Badr-ul-Din Kureshi* for the Respondents.

JUDGMENT.—This appeal arises out of proceedings taken in execution of a decree obtained by respondents Nos. 1 and 2. There were 20 defendants in the suit, and the respondents asked for a declaration of a right of way over certain land, shown as *A. C. Q. R.* in the plan, which was alleged to be used as a thoroughfare by the proprietors of the *patti*, and for an injunction against the first three defendants for the removal of a wall and a wicket which obstructed the way. The suit was contested by defendants Nos. 1 to 3 and by Maluka, defendant No. 5. who is the appellant in the present appeal.

The first Court passed a decree as asked for by the plaintiffs. On appeal the District Judge, while granting a decree declaring that the plaintiffs had a right of way over *A. C. Q R.* and restraining defendants Nos. 1 to 3 from preventing them from passing over that land, dismissed the claim for the injunction for the removal of the wall and the wicket. On second appeal by the plaintiffs this Court granted an injunction directing the defendants to demolish the structure *B C. D.* so as to make their wall *A. B.* in one straight line up to the main road.

The plaintiffs then applied for execution, and the executing Court appointed a Commissioner to give effect to the decree. The Commissioner accordingly had the structure *B. C. D.* demolished as ordered by this Court.

Subsequently, other walls at *C. Q.* and *A R.* were erected and it is apparently not disputed that it was the appellant who erected them. On the application of the decree-holders the

Munsif ordered that those walls should be demolished, and a space 5 feet, 7 inches wide, from Sundar's wall towards the west, be left open. His order has been upheld by the District Judge, and Maluka has now come to this Court in second appeal.

It is contended for the appellant that the executing Court was *functus officio* and was not competent to order the removal of the walls *O. Q.* and *A. R.* which were found to have been newly built This contention appears to be correct. All that this Court ordered was the demolition of the wall *B. O. D.* and that order has been carried out. It is true that the new walls *O Q* and *A. R.* hinder the decree holders from passing over the land *A. O. Q. R*, in respect of which an injunction was granted by the District Judge and was not set aside by this Court, but that injunction was granted only against the first three defendants and not against the appellant, who is not affected by it.

The only decree against the appellant was the decree declaring that the respondents had a right of way over *A. O. Q. R*, and a declaratory decree is not capable of being executed. Counsel for the respondents has referred to the 5th clause of Order XXI, rule 32, Civil Procedure Code, but that clause applies only where a decree for an injunction has not been obeyed. In the present case the injunction was not disobeyed by the persons against whom it was granted.

The order for the demolition of the walls *O. Q.* and *A. R.* built by the appellant is, therefore, *ultra vires*. The respondents may bring a suit for an injunction to the appellant to demolish them, but they cannot get them demolished in the execution proceedings.

I accordingly accept the appeal and set aside the order of the District Judge and the order of the Munsif for the demolition of the walls *O. Q.* and *A. R* and for a space 5 feet, 7 inches wide from Sundar's wall to be left open. The decree holders-respondents will pay the appellant's costs in this Court and the lower Appellate Court.

Appeal accepted.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 173 OF 1919.

April 29, 1920.

Present :—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

JATINDRA MOHON LAHIRI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

ABDUL AZIZ MEAH AND OTHERS— DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 102—Suit to recover grazing fee, nature of—Appeal, second, whether lies

A person who is allowed to graze his cattle on the land of another upon payment of a fee *per capita* has no interest in the land and is not a tenant. Consequently, the grazing fee is not in the nature of rent [p. 596, col. 1.]

A suit for recovery of money claimed as grazing fee is of the nature cognizable by a Court of Small Causes and, under section 102 of the Code of Civil Procedure Code, no second appeal lies in such a suit if the amount in dispute is less than Rs. 500. [p. 596, col. 1.]

Letters Patent Appeal against the following decree of Justice Sir Syed Shamsul Huda, KT., dated the 12th of August 1919, in Appeal from Appellate Decree No. 1691 of 1918 :—

SHAMSUL HUDA, J.—This was a suit for realisation of grazing fee at one rupee per head of cattle. Plaintiffs are the Zamindars and allow their tenants to graze cattle on their *khas* lands. Plaintiffs' case is, that the defendants grazed their cattle on their *khas* lands but failed to pay their rent which the plaintiffs had fixed at one rupee per head of cattle. The first Court decreed the plaintiffs' claim at the rate of 12 annas per head of cattle with damages at 25 per cent. On appeal a decree has been passed at the rate of 4 annas per head of cattle with compensation at 25 per cent. Before considering the merits of the case, I have to deal with the preliminary objection that the suit is one of the Small Cause Court nature and, therefore, no second appeal lies. I think this contention must prevail.

The suit, in my opinion, is not for rent at all. The grazing fee is not rent as defined in the Bengal Tenancy Act or in the Transfer of Property Act. The license to graze cattle does not amount to a lease. It creates no right to the land and, not being a lease, the fee payable is not rent. This view is supported by the decision of

the Allahabad High Court in *B. & N. W. Railway Co.* v. *Bandhu Singh* (1), and also by the decision of this Court in *Deb Nath Ghose* v. *Pachoo Mollah* (2), in which it was held that, where plaintiff agreed to let defendant tap certain date trees and appropriate the proceed that this was not rent. The head-note is, perhaps, slightly misleading. The fee is also not anything payable or deliverable in respect of any right of pasturage within the meaning of section 193 of the Bengal Tenancy Act and, even if it were so, there would be no right of appeal under section 153 of the Act. No question of right of pasturage arises in the case.

The appeal is, therefore, dismissed with costs.

Babu *Girija Prasanna Sanyal*, for the Appellants.

Babu *Bimal Chandra Das Gupta*, for the Respondents.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—Mr. Justice Shamsul Huda has correctly held that the appeal presented to him was barred under section 102 of the Civil Procedure Code, which provides that, "no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed five hundred rupees." The suit was for recovery of money claimed as grazing fee and the amount in dispute was less than five hundred rupees. *Prima facie*, ther, the suit was of a nature cognizable by a Court of Small Causes. But, it has been contended that, the suit was not so cognizable, because the fee was in the nature of rent, and in support of this argument reliance has been placed upon the decision in *Bandi Ali Fakir* v. *Amud Sarkar* (3). That case is manifestly destructive of the contention of the appellant, because it is there pointed out that there can be no claim for rent unless there is a tenancy, and there can be no tenancy unless a right to the land has been given to the grantee. In the present case, the defendants have no interest in the land on which they are allowed to graze their cattle upon payment of a fee *per capita*, and by no stretch of language can they be deemed tenants: *B. & N. W. Railway Co.* v. *Bandhu Singh* (1), *Deb Nath Ghose* v. *Pachoo Mollah* (2). The decision in *Manohar Lal* v. *Gauri Rautain* (4) depended on the special terms of the lease between the parties, and the same remark applies to *Fitzpatrick* v. *Wallace* (5) and *Latifar Rahaman* v. *Forbes* (6), as explained in *Helayet Ali* v. *Kamalanand Singh* (7).

We hold accordingly that the appeal was rightly dismissed as incompetent and this appeal must be dismissed with costs.

FLETCHER, J.—I agree.

Appeal dismissed.

(1) 2 Ind. Cas. 223; 31 A. 342; 6 A. L. J. 400.
(2) 6 W. R. Civ. Ref. 8.
(3) 26 Ind. Cas. 380; 19 C. W. N. 415; 20 C. L. J. 227.
(4) 22 Ind. Cas. 16; 12 A. L. J. 36.
(5) 11 W. R. 231.
(6) 5 Ind. Cas. 783; 14 C. W. N. 372.
(7) 20 Ind. Cas. 332; 17 C. L. J. 411.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 44 OF 1919.

July 22, 1920.

Present :—Mr. Wazir Hasan, A. J. C.

JAGRUP SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM KISHAN DAS *alias* BACHCHU LAL—DEFENDANT—RESPONDENT.

Principal and agent—Agent authorised to transfer property in his own name—Deed of transfer signed by agent not as such, whether binding on principal—Agent exceeding his authority, effect of.

The omission on the part of an agent to describe in a deed that he is acting for and on behalf of a principal is immaterial. The question whether an agent is to be taken to have contracted personally or on behalf of his principal depends on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances. [p. 600, col. 2; p. 601, col. 1.]

Where an agent is given power to execute deeds of transfer in his own name and he executes a deed relating to the property of his principal without describing himself as the latter's agent, the omission is immaterial and the deed is binding on the principal and his representatives. [p. 601, col. 1.]

Where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities and fraudulently appropriates the difference (the lender acting *bona fide* and in ignorance of the limitation) the principal cannot

JAGRUP SINGH *v.* RAM KISHAN DAS.

redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry. [p. 601, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Unao, dated the 16th May 1919.

Mr. *H. K. Dhaon*, for the Appellant.

Messrs. *A. P. Sen* and *Tara Shankar*, for the Respondent.

JUDGMENT.—The appellants, Jagrup Singh and others, brought the suit out of which this appeal arises, for possession of a 2-annas, 8 pies share in *Mauzah* Hajipur Tireha, in the district of Unao, against Ram Kishan Das, minor, son of Lala Sri Kishan Das, resident of the city of Lucknow. The facts are as follows:—

One Lalta Singh owned, *inter alia*, the property in suit. He was tried on a charge of murder and was convicted and sentenced by the Sessions Judge of Lucknow on the 15th of August 1893 to transportation for life. An appeal was preferred to the Court of the Judicial Commissioner from the decision of the Sessions Judge but no success attended it. On the 23rd of December 1896 Lalta Singh executed a general power-of-attorney in favour of Bikram Singh, his wife's brother, which was registered on the 24th of December 1896. Presumably, for the purpose of his defence, Lalta Singh had incurred debts to a large amount. Accordingly, we find that Bikram Singh and *Musammat* Rukmin, wife of Lalta Singh, executed a deed of mortgage on the 29th January 1902 in favour of Beni Ram and Balgobind, money lenders of Lucknow, hypothecating—

(1) a 2-annas, 8 pies share in the village of Hajipur Tireha (now in suit).

(2) a 5 pies, 6 *kirants*, 10-decimal share in *Mauzah* Ambawan; both belonging to Lalta Singh; and by way of additional security,

(3) a 2 annas share in the village of Mowra, belonging to Bikram Singh. It is quite clear from the evidence on the record that the money raised by this deed was not enough to cover all the liabilities of Lalta Singh. On the 28th of September 1904 Bikram Singh and *Musammat* Rukmin executed another deed of mortgage in favour of Sri Kishan Das, father of the minor defendant, hypothecating the same properties as in the earlier deed for a sum of Rs. 2,375. Part of this amount, *i. e.*, Rs. 1,156-12-9 was ostensibly intended for the repayment of the loan incurred under the earlier deed and I am satisfied, on the evidence, that it was actually utilized towards the avowed object. The original deed of 1902 has been produced in this case by the defendant, and Beni Ram has given evidence in proof of the repayment. It is not sought in this case to enforce the hypothecation under the deed; for the collateral purpose of proving the loan and its repayment it is amply proved by the evidence of Beni Ram, Gajraj Singh and Chhedi Lal.

Lalta Singh died in prison, perhaps in the Andaman Islands, in March 1910. Early in 1912, the present defendant brought a suit on foot of the mortgage, dated the 28th of September 1904, against Bikram Singh and *Musammat* Rukmin and obtained a decree on the basis of compromise on the 12th of March 1912. The decree provided that the properties belonging to *Musammat* Rukmin will be sold in the first instance and the property belonging to Bikram Singh would be sold to realise the balance, if any. Accordingly, the share in Hajipur Tireha was sold on the 20th of September 1914 and purchased by the defendant in complete satisfaction of the decree and has since been in his possession. *Musammat* Rukmin died on the 19th of January 1915. The appellants, claiming as reversioners of Lalta Singh, instituted the present suit on the 16th of January 1918. The suit has been dismissed by the learned Subordinate Judge of Unao: hence this appeal.

The grounds upon which the suit failed are the following:—

(1) That the mortgage of the 28th of September 1904, so far as it related to Lalta Singh's properties, must be deemed to have been executed by Bikram Singh in the capacity of his agent and is consequently binding on the plaintiffs.

(2) That in the litigation of 1912 *Musammat* Rukmin represented the whole estate of Lalta Singh, that the debts sued for were the debts due from Lalta Singh and that, therefore, the decree and the sale in pursuance of it are binding on the plaintiffs.

JAGRUP SINGH v. RAM KISHAN DAS.

(3) That the suit is barred by Article 91, Schedule I of the Indian Limitation Act (IX of 1908).

All the three grounds above-mentioned were attacked before me by the learned Pleader for the appellants. In this judgment I will deal with the first ground only because, on a careful consideration of the real merits of it, I have come to the conclusion that the finding of the learned Subordinate Judge is right.

The power-of attorney which Lalta Singh executed in favour of Bikram Singh on the 23rd of December 18 6 (Exhibit A 11) confers plenary powers upon the donee of it and, in view of the circumstances in which it was executed, it was only natural that he should have conferred such powers. Lalta Singh recites in it that the need for executing the instrument has arisen on account of the sentence of transportation for life having been passed against him. After providing for various other matters, the document provides as follows :—

"Bikram Singh may execute and get them registered, deeds such as a mortgage-deed, a sale deed, a deed of gift and a Will et cetera in his own name and under his own signature ; .....all such acts of the above-mentioned general agent are equivalent to acts personally done by me and in all events I give my consent to them and accept them."

In the deed of the 29th of January 1902 Bikram Singh appears as a party to the deed along with *Musammat* Rukmin ; in the body of the document reference is made in express words to the powers of alienation conferred by the *mukhtarnama* and in his signature Bikram Singh describes himself as the agent of Lalta Singh. When we come to the mortgage of the 28th of September 1904, we again find Bikram Singh as a party with *Musammat* Rukmin to the deed. But there is no mention either in the body of the document or in the signature of Bikram Singh's position of an agent of Lalta Singh. It is upon this omission that the argument addressed to me on behalf of the appellants rests. I am of opinion that the omission does not affect the substance of the transaction. That Bikram Singh was the agent of Lalta Singh is undisputed and it is equally undisputed that he had, as such, powers of alienation. The first two properties mortgaged by the deed in question undoubtedly belonged to Lalta Singh who was alive on the date of the document and consequently his wife had no authority in law to make any sort of alienation in respect of them. Further, we find that the hypothecation clause with regard to all the three items of properties stands in the joint names of Bikram Singh and *Musammat* Rukmin. It is not that Bikram Singh mortgages his two annas share of village Ambawan and *Musammat* Rukmin mortgages the shares belonging to Lalta Singh. The document in this respect is to the following effect :— "We, Bikram Singh, executant No. 1, and *Musammat* Rukmin, executant No. 2, mortgage and hypothecate (*rahan rakkhe aur giro rakkae*) 2-annas, 8 pies share of village Hajipur Tircha, 5-pies, 6 *kirants* and 10 decimal *zemindari* share of village Ambawan, owned and possessed by the husband of the executant No 2 and 2-annas share situate in village Mowra owned by the executant No. 1" It is true that by paragraph 11 of the deed the security of the 2 annas share of village Mowra is made available to the mortgagee only in the event of the failure of the security of the first two properties ; but this condition, in my opinion, does not in the least detract from the original character of the hypothecation noted above. The matter does not rest here. The almost conclusive evidence of the fact that Bikram Singh was acting in the character of an agent in relation to the alienation of Lalta Singh's property is, to my mind, furnished by the reference in the deed in question to the deed of the 29th January 1902 which, as I have shown above, was intended to be, and, as a matter of fact, was paid off by a substantial portion of the consideration of the mortgage of September 1904. On these grounds I have come to the conclusion that Bikram Singh and not *Musammat* Rukmin was the primary party to the mortgage of 1904, he executed the deed in the capacity of Lalta Singh's agent and the mortgagee accepted the deed from him on the basis of Bikram Singh's authority to execute it under the power-of-attorney dated the 23rd of December 1896. But this finding, says the learned Pleader for the appellants, would not be sufficient to dispose of the appeal. He argues, as a matter of law, that, (1) where an agent, and not the principal, is

party to a deed, and (2) where an agent does not expressly sign as acting in the capacity of an agent, the principal is not liable on the deed. Many extracts were read at the Bar from Pearson's Tagore Law Lectures on Agency in India, with special reference to pages 158 to 161 and page 173, paragraph 2. Reference was also made to the following cases: —

Soopromonian Setty v. *Hoilgers* (1), *Koneti Naicker* v. *Jatu Gopala Aiyar* (2), *Yinuganti China* v. *Katagiri Venkata* (3) and *Sadasuk Janki Das* v. *Maharaja Sir Kishen Pershad* (4).

I do not think that the law is what the learned Pleader contends for. It is of utmost importance that the law relating to liability on negotiable instruments should not be confused with the law bearing upon liability arising out of other contracts. It is not necessary to discuss in this appeal what the law in the former case is, but it is enough to say that it is not exactly the same as in the latter case. The cases of *Koneti Naicker* v. *Jatu Gopala Aiyar* (2), *Yinuganti China* v. *Katagiri Venkata* (3) and *Sadasuk Janki Das* v. *Maharaja Sir Kishen Pershad* (4) all relate to negotiable instruments. I do not, therefore, propose to discuss them. The case of *Soopromonian Setty* v. *Hoilgers* (1) is not against the view which I am presently going to express.

It is necessary to point out that the first proposition advanced by the learned Pleader rests upon the Common Law rule that 'a right of action upon a deed is restricted to those who are parties to it or persons who claim under them.' This doctrine is based upon the special characteristics of a 'deed' the origin of which is traced back to the reign of Edward I by the learned authors of 'History of English Law, by Pollock and Maitland'. "Before the end of Edward I's reign the King's Court had established the rule that the only *conventio* that can be enforced by action is one that is expressed in a written document sealed 'by the party to be charged therewith '.....The man who relies upon a covenant must produce in proof some 'speciality' (*especialte aliquid speciale*); the production of 'suit' is not enough. Thenceforward, however, it is only a short step to holding as a matter of law that a 'deed'—and by a deed (*fet factum*) men are beginning to mean a sealed piece of parchment—has an operative force of its own which intentions expressed, never so plainly, in other ways have not. The sealing and delivering of the parchment is the contractual act. Further, what is done by 'deed' can only be undone by 'deed'." (Volume II, pages 219 and 220). Bovill, C. J., in the case of *Reg.* v. *A. H. Morton* (5) said: "It seems to me that the meaning of the legal definition of a deed, to be gathered from the authorities, is a document under seal and delivered as a deed." In the case of *Berkeley* v. *Hardy* (6) the rule of Common Law was stated as follows: —"1. No man can bind another by deed, unless he has authority, by deed, to do so. 2. A person, acting by power-of-attorney, to execute a deed for another, should not be a party to the deed, even though he describe himself as acting under the power-of-attorney. The deed should run in language as if the principal himself intended to execute the deed. 3. No one but a party, or one who claims through a party, can maintain any action on a deed." Amongst later cases, the decision in *International Contract Company, In re* (7) may be referred to and the observations of Lord Esher, M R., in the case of *United Kingdom Mutual Steamship Assurance Association* v. *Nevill* (8) may be quoted: "I think that, in the case of such a contract as this under seal, it is not allowable to go behind the instrument to make undisclosed principals responsible, because they are not parties and have not attached their seals to the contract under seal". An instrument of mortgage executed under the provisions

(1) 5 C. 71; 4 Ind. Jur. 517; 4 C. L. R 377; 2 Ind. Dec. (N. S.) 657.

(2) 21 Ind. Cas. 417; 25 M. L. J. 425; 38 M. 482; 14 M. L. T 414.

(3) 21 Ind. Cas. 650; 14 M. L. T. 502; (1913) M. W. N. 1005.

(4) 50 Ind Cas. 216; 46 I. A. 33; 21 C. L J. 340; 17 A. L. J. 405; 25 M. L. T. 253; 38 M. L. J. 420; 21 Bom. L R 605; 10 U P L. R. (P. C.) 37; (1918) M. W. N. 310; 28 C. W. N. 937; 10 L. W. 143; 46 C. 653; 12 Bur. L. T. 160 (P. C.).

(5) (1873) 28 L. T. 452; 42 L. J. M. C. 58; 2 C. C. 22; 21 W R 629; 12 Cox C. C. 456.

(6) (1826) 8 D. & R 102; 4 L. J. (o s.) K. B. 184; 5 B & C 355; 29 R. R. 261; 108 E. R. 132.

(7) (1871) 6 Ch. App 525.

(8) 1887, 19 Q. B. D. 110 at p. 115; 56 L. J. Q. B. 522; 35 W. R. 746; 6 Asp. M. C. 226.

of section 59 of the Transfer of Property Act, 1882 (Act IV of 1832) is not a 'deed' within the meaning of the Common Law rule. I am not aware of any case except the one to which I will presently refer, nor was any cited at the Bar, in which the law as enunciated in the case of *Barkeley* v. *Hardy* (6) was applied in this country. The decision of Mr. Justice Farran in the case of *Ragoonathdas Gopaldas* v. *Morarji Jutha* (9) was expressly dissented from in *Chinnaramanuja Ayyangar* v. *Padmanabha Pillaiyan* (10). In the latter case reference was made to the decision of the Privy Council in *Juggeewundas Keeka Shah* v. *Ramdas Brijbookundas* (11) which fortifies the view that I am taking in the present case.

A contract under seal executed by an agent in his own name is treated in England as an exception to the general rule:—"any contract made by an agent with the authority of his principal may be enforced...by or against the principal whether or not his name or existence was disclosed to the other contracting party at the time when such contract was made." (Halsbury's Laws of England, Vol. I, page 206, paragraph 439). I am of opinion that the exception being based, as shown above, upon a technical rule must be disregarded and the general rule be given effect to. Further, the rule of Common Law must be taken to have been materially modified by the provisions of section 46 of the Conveyancing and Law of Property Act, 1881 (44 and 45 Vict., C. 41) though no case seems so far to have decided the point. That section is as follows:—"46.—(1) The donee of a power-of-attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. (2) This section applies to powers-of-attorney created by instruments executed either before or after the commencement of this Act." Similar law was enacted by the Indian Legislature in the Powers-of-Attorney Act, 1882 (Act No. VII of 1882) to which my attention was drawn by the learned Pleader for the appellants. Section 2 of this Act is almost identical with section 46 of the English Statute and is as follows:—"The donee of a power of-attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument and thing so executed and done shall be as effectual in law...as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. This section applies to powers of-attorney created by instruments executed either before or after...this Act comes into force." Whatever view may hereafter be taken as to the scope of these two sections, they would certainly apply to a case where the donee of the power has authority to contract in his own name. I have already shown that the power-of-attorney, dated the 23rd of December 1893, conferred such an authority upon Bikram Singh.

In a recent case decided in England it was held that where a person, although an agent for another, signed a contract in his own name, and described himself throughout as a principal, in an action against the real principal, parol evidence to show that the person was agent only was inadmissible, as such evidence would have contradicted the written contract See *Formby Brothers* v. *Formby* (12)]. This view is in harmony with the provisions of section 92 of the Indian Evidence Act, 1872, and must, accordingly, be respected. In the present case no infringement of the provisions of section 92 is attempted. The first part of the learned Pleader's argument must, therefore, be rejected.

As to the second part, I have already considered it in an earlier part of this judgment and it is sufficient to say here that there is no substance in the argument. I think the omission on the part of an agent to describe in the deed that he was acting for

(9) 16 B. 568; 8 Ind. Dec. (N. S.) 557.

(10) 19 M. 471; 6 M. L. J. 115; 6 Ind. Dec. (N. S.) 1033.

(11) 2 M. I. A. 487; 6 W. R. P. C. 10; 1 Suth. P. C. J. 109; 1 Sar. P. C. J. 222; 18 E. R. 386.

(12) (1910) 102 L. T. 113; 54 S. J. 269.

and on behalf of a principal is immaterial. The question whether an agent is to be taken to have contracted personally or on behalf of his principal depends on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances. (Bowstead on Agency, Sixth Edition, page 388). This rule of construction is not in the slightest degree affected by the provisions of section 230 of the Indian Contract Act, 1872 (Act IX of 1872). Also see the case of *Indian Companies Act*, 1882, *In the matter of* (13).

In have already, on the interpretation of the deed of mortgage of the 28th of September 1904, held that Bikram Singh executed it in the capacity of an agent for Lalta Singh and it is also clear, in fact it is not disputed, that Bikram Singh acted within and not beyond the authority which he derived under the power-of-attorney, dated the 23rd of December 1896. In a case like this, where immoveable property is transferred as security for the debt, there is no room for the question as to whom, the principal or the agent, credit was given by the other party. The property which was primarily charged for the debt belonged to Lalta Singh; it is the property, therefore, which is liable. It follows that the mortgage was binding upon Lalta Singh and is consequently binding upon the plaintiffs as well. See the case of *Hambro & Son* v. *Burnand* (14).

It was also argued by the learned Pleader for the appellants that a portion of the consideration of the mortgage in question was debt really due from Bikram Singh. Assuming, but not deciding, that the contention advanced by the learned Pleader is correct, the plaintiffs who are the heirs of Lalta Singh cannot escape liability for the whole debt. In the case of *Brocklesby* v. *Temperance Permanent Building Society* (15) it was held that "where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities and fraudulently appropriates the difference (the lender acting *bona fide* and in ignorance of the limitation)

(13) 18 C. 31; 9 Ind Dec. (N. S.) 21.

(14) (1904) 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803; 52 W. R. 584; 9 Com Cas. 251; 20 T. L. R. 398.

(15) (1895) A. C. 173; 64 L. J. Ch. 433; 11 R. 159; 72 L. T. 477; 43 W. R. 606; 59 J. P. 676.

the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry."

The appeal fails and is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 77-B OF 1919.

November 17, 1919.

Present:—Sir Henry Drake Brookman Kt., J. C.

MOTIRAM AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

BHIKAN RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Berar Land Revenue Code, 1893, *ss.* 206 (1), 209 (2) —*Pre-emption—Share held by all members of joint Hindu family—Notice to manager, whether sufficient—Co-parceners in joint family, whether have independent rights of pre-emption—Presumption—Several co-parceners having equal rights of pre emption —Procedure.*

Where a share in a Survey Number is held by all the members of a Hindu joint family, notice to the manager of the family will ordinarily suffice for the purposes of section 206 (1), Berar Land Revenue Code. This course would be an obvious one where all members other than the manager are minors, but where the would-be vendor chooses to depart from the procedure laid down in the Code and to rely upon a consent which would more properly be described as a definite expression of a determination not to exercise the right of pre-emption, he and his vendees should be careful to see that the substituted precaution is such as will bind all concerned [p. 603, col. 2.]

There is no presumption that where a manager does a certain act he does it in the capacity of manager. [p. 603, col. 2.]

Damodhar Vithal v. *Damodhar Hari*, 1 B. H C. R. 182, followed.

There is nothing in the Berar Land Revenue Code to militate against the view that every co-parcener in an undivided Hindu family has an independent right of pre-emption which he can exercise by himself [p 604, col 1.]

All the co-parceners should be considered as having equal rights of pre-emption until the contrary is shown. [p. 604, col. 1.]

MOTIRAM *v.* BHIKAN RAO.

Where two or more co-pre-emptors are equally entitled to the right of pre-emption the person to exercise it should be determined by lot. [p. 604, col. 1.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 123 of 1918, dated the 10th December 1918, arising out of Civil Suit No. 445 of 1917, dated the 12th July 1918, before the Munsif, Malkapur.

Messrs. *M. V. Abhyankar* and *A. C. Roy*, for the Appellants.

Mr. *G. V. Kukde*, for Respondents Nos. 1 and 2.

JUDGMENT.—The plaintiffs in the suit out of which this second appeal arises are brothers, the younger being a minor. They are co-occupants with their paternal uncle, Bhawan Rao, of a 5-annas, 4-pies share of Survey No. 2 in Mouza Jamune. The rest of the field belonged to the third defendant, Narayan Rao, and he sold it on the 1st January 1917 to the first and second defendants who are the appellants in this Court. Bhawan Rao attested the sale deed which is Exhibit D1 of the Trial Judge's record.

The plaintiffs sued to pre-empt the share sold by the third defendant on the ground that notice of the price at which the said defendant was willing to sell was not given to them as required by section 20[illegible] (1), Berar Land Revenue Code. The vendees pleaded as follows :—

"The plaintiffs are the brother's son of Bhawan Rao and they three form a joint family and Bhawan Rao is the *karta*. The sale in question was effected with the express consent of Bhawan Rao. He was asked at the time of settling the bargain whether he would like to purchase the field in dispute. He gave the defendants to understand that he did not want to purchase the field in dispute and he had no objection if the defendants were to purchase the same. Accordingly, the sale-deed in question was effected and the signature of Bhawan Rao was obtained on it as an attesting witness. Bhawan Rao being the manager of the family his consent to the sale in favour of the defendants and his refusal to purchase the same himself bind the present plaintiffs and they cannot, therefore, claim the right of pre-emption against the present defendants and they are thus estopped from pleading want of notice. The claim is denied *in toto*."

They were supported by their vendor who made the following statement :—"At the time the *sowda* was settled with the defendants Nos. 1 and 2, Bhawan Rao, paternal uncle of the plaintiffs, was present. He did not put forth his claim to purchase the field in dispute. Bhawan Rao and the plaintiffs are joint and all of them have got joint 5-annas, 4 pies share in the field. The plaintiffs have, therefore, no right to bring this suit."

The plaintiffs, in reply, denied that Bhawan Rao gave any consent to the sale or was present when its terms were settled. They alleged that they were separate from Bhawan Rao in mess, though joint in cultivation, and did not form a joint family with him. They added that, in any case, Bhawan Rao's consent did not benefit the minor plaintiff and so could not be binding on him.

The following issues were framed :—

"1. Whether the *sowda* or the sale of the field in dispute between the defendants, was done with the consent of Bhagwan Rao, plaintiff's paternal uncle, as alleged?

"2. Did Bhawan Rao represent that he did not want to purchase the field in dispute and whether the consent and the representation of Bhawan Rao as alleged estop the plaintiffs from bringing this suit?

"3. To what reliefs are plaintiffs entitled?"

The Trial Judge found that Bhawan Rao was present when the sale was negotiated and declined to purchase the share as he had only sufficient money to purchase another field which the third defendant was desirous of selling. He also held that Bhawan Rao and the plaintiffs were still joint in estate Bhawan Rao being the manager of the joint family, but that Bhawan Rao's consent to the sale could not bind his nephews, inasmuch as his action was not justified by legal necessity and did not benefit either of them. The claim for pre-emption was, therefore decreed.

The vendees appealed to the District Court complaining that the question of legal necessity or benefit was not put in issue and should not have been made a ground of the Trial Judge's decision and contending that the plaintiffs were bound by the so called consent which Bhawan Rao gave to the sale by declining to buy himself. The Additional District Judge held that no ques-

tion of legel necessity or benefit arises in the matter, inasmuch as each member of the joint family has a right of pre-emption which he can exercise independently, and relied on *Sonaji* v. *Radhika* (1) as authority for this view. He went on to hold that the question, if it arose, must be decided in favour of the plaintiffs as the vendees had not shown that Bhawan Rao's action was expressly taken in the capacity of manager of the joint family and was for his co sharers' benefit. He considered that the question of benefit or no benefit was understood by the parties to be in issue though not expressly covered by the terms of any of the issues framed and, in this connection, cited *Muthuraman Chetty* v. *Krishna Pillai* (2). He also held, on the authority of *Bapu* v. *Anand* (3), that the plaintiffs could not be estopped from claiming pre-emption inasmuch as they were not served with the notice prescribed by section 206 (1), Berar Land Revenue Code: he cited *Bollaprogada Ramamurthy* v *Thanmanna Gopayya* (4) and *Mahamaya Debi* v. *Huridas Haldar* (5) as authorities for the proposition that there can be no estoppel against the express provisions of a Statute. The appeal was, therefore, dismissed and the vendees have preferred this second appeal.

In this Court it is conceded for the appellants and the plaintiffs respondents that no question of legal necessity arises. In the circumstances it is, therefore, unnecessary to consider whether the findings of the Courts below on the point of necessity are justified. The contention for the appellants that the plaintiffs did not deny that if Bhawan Rao led the vendor and vendees to understand that he would not buy the share, he did so in his capacity of manager of the joint family and that the assurance must, therefore, be taken to have been given in that capacity and so to amount to an estoppel. For the plaintiffs-respondents, on the other hand, it is contended that they were entitled to notice of the price at which the vendor was willing to sell and that the appeal is incompetent, inasmuch as it does not challenge the lower Appellate Court's finding to this effect. In my opinion, the appellants did not in their pleadings set up a case sufficient to deprive the plaintiffs of their right of pre-emption. It may well be that where a share in a Survey Number is held by all the members of a Hindu joint family notice to the manager of the family will suffice for the purposes of section 206 (1), Berar Land Revenue Code. This course would be an obvious one where all members other than the manager are minors, and in the present case one of the plaintiffs is still a minor, but where the would-be vendor chooses to depart from the procedure laid down in the Code and to rely upon what is termed in this case a consent but would more properly be described as a definite expression of a determination not to exercise the right of pre emption, he and his vendees should be careful to see that the substituted precaution is such as will bind all concerned. It does not follow from the fact that when a manager does a certain act he does it in the capacity of manager: see *Damodhar Vithal* v. *Damodhar Hari* (6). Nor do I find in the evidence recorded in the present case any indication that Bhawan Rao was addressed or purported to act for any one but himself when he attested Exhibit D1 and intimated that he had no intention of buying the share which was being sold. It is doubtless true that no member of the joint family could predicate that he had a definite share in the family part of the field, but it is no less true that, under section 209 (2), Berar Land Revenue Code, where there are two or more co-occupants equally entitled to the right of pre emption, the person to exercise the right must be determined by lot. The person interested in shutting out the right of pre-emption should, therefore, have been careful to have the position of Bhawan Rao made clear and this was evidently not done.

I do not feel much pressed by the decision in *Sonaji* v. *Radhika* (1), that having been delivered in August 1896, *i. e.*, nearly five months before the present Berar Land Revenue Code came into force. The judgment gives no reasons for holding that

(1) 2 Berar L. J. 114.
(2) 29 M. 72.
(3) 21 Ind. Cas. 287; 9 N. L. R. 143.
(4) 85 Ind Cas. 575; 40 M. 701; 4 L. W. 48; 20 M. L. T. 129; 31 M. L. J. 231.
(5) 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183.
(6) 1 B. H. C. R. 182.

every co parcener in an undivided Hindu family has an independent right of pre-emption which he can exercise by himself, but there is authority in *Gandharp Singh* v. *Sahib Singh* (*i*) for the view expressed and I am unable to find anything in the present Berar Land Revenue Code to militate against it. In the words of Petheram, C. J., all the co-parceners should be considered as having equal rights until the contrary is shown. Section 209 (2) of the Code lays down that where two or more co-parceners are equally entitled to the right of pre-emption, the person to exercise it should be determined by lot and Bhawan Rao having precluded himself from pre-empting it would seem that the plaintiffs should in this way settle, who is to pre-empt. No objection, however, has been taken to the form of the Trial Judge's decree which enables both the plaintiffs together to pay the requisite money and I shall, therefore, not interfere on this ground.

The appeal accordingly fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

(7) 7 A. 184; A. W. N. (1884) 323; 4 Ind. Dec. (N. S.) 394.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 41 OF 1919.

July 20, 1920.

Present :—Mr. Daniels, A. J. C.

THE OUDH COMMERCIAL BANK, LIMITED, LUCKNOW—PLAINTIFF—APPELLANT

versus

GUR DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 64 – Hundi—Presentation for payment, whether necessary to charge acceptor—'Other parties,' meaning of.

Under section 64 of the Nogotiable Instruments Act presentation for payment is necessary in order to charge the acceptor of a *hundi*. The words "other parties" in the section mean parties other than the holder. [p. 60[a], col 2; p. 607, col. 1.]

Phul Chand v. *Ganga Ghulam*, 21 A. 450; A. W. N. (1899) 167; 9 Ind. Dec. (N. S.) 994 and *Ardeshir Sorabsha Moos* v. *Khushaldas Gokuldas*, 32 B. 247; 10 Bom. L. R. 268, not followed.

Appeal against the decree of the Subordinate Judge, Lucknow, dated the 25th April 1919.

Messrs. *A. P. Sen* and *Hari Kishen Dhaon*, for the Appellant.

Messrs. *Bisheshwar Nath Srivastava* and *Ishwari Prasad*, for Respondent No. 3.

Mr. *Daya Kishen Seth*, for Respondents Nos. 4 and 8.

Mr. *Mohammad Ayub*, for Respondent No. 5.

Mr. *H. N. Misra*, for Respondents Nos. 6 and 7.

Messrs. *Niamat-Ullah* and *Anant Prasad Nigam*, for Respondents Nos. 9, 10 and 11.

JUDGMENT.—The issues in this appeal lie within a very narrow compass. The suit was filed on the basis of a *hundi* by the plaintiff in whose favour it was drawn against four sets of defendants:

(*i*) Gur Din and Rama Adhin (defendants Nos. 1 and 2) the drawers;

(*ii*) certain persons alleged to be members of the same Hindu joint family with the drawers (defendants Nos. 5 to 9);

(*iii*) Nanhe Mal the acceptor (defendant No. 4);

(*iv*) Bansidhar, Jagannath and Bachcha (defendants Nos. 10 to 12) as members of a Hindu joint family trading in partnership styled 'Nanhe Mal Gulzari Mal.'

The *hundi* was not paid at maturity; hence the suit. A number of defences were raised but were decided in favour of the plaintiff bank. Two of these findings are attacked by the respondents in this appeal but, as I should be prepared to hold, unsuccessfully. The contesting respondents plead payment and deny that defendant No. 4 accepted the bill on behalf of defendants Nos. 10 to 12.

Three points were decided against the plaintiff: *First*, the liability of the defendants Nos. 5 to 9. The appellant accepts this finding and there is an end to the case as far as these defendants are concerned. *Second*, that the *hundi* was not presented for payment to the acceptor and this discharges all parties to it from liability. The appellant accepts the finding of fact but denies that the acceptor and the drawers are discharged thereby. *Third*, that no notice of dishonour was given to the drawers and they are thereby discharged,

The principal issue, therefore, is :—

"Is presentation for payment necessary in order to charge; (1) the drawer, and

(2) the acceptor?"

The appellant's learned Counsel admits that the case against the drawers is weaker than that against the acceptor. After acceptance the drawer, under section 37 of the Negotiable Instruments Act, ceases to be a principal debtor and occupies the position of surety for the acceptor. The argument to be considered below does not, therefore, apply to him. A feeble attempt was made to suggest that there was a contract in the deed dispensing with presentment but the phrase relied on is not sufficiently definite to be pleaded as a contract, and even if it were, there is nothing in the language of the Act to suggest that its provisions are subject to any special contract contained in the instrument. In one or two cases where they are so subject there is an express provision to that effect in the Act, as in the last paragraph of section 61, which was added by the Negotiable Instruments Act, 1881. Usage is expressly reserved by section 1 of the Act, but there is no evidence on the record of any special usage affecting presentment for payment. The absence of notice of dishonour under section 93 is also a fatal defect in the case against the drawers. The appellant cannot bring the case within any of the clauses of section 98.

The case against the acceptor depends on the construction of section 64 of the Act. The opening paragraph of the section says:—

"Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof, respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder."

The question at issue depends on whether the words "other parties thereto" include or exclude the acceptor. Two constructions are possible. The first, and what seems at first sight the more natural construction, is to read "other parties" as meaning parties other than the person to whom the bill must be presented for payment. A promissory note must be presented to the maker, a bill of exchange to the acceptor, and a cheque to the drawee. Failing such presentment the maker of the promissory note, the acceptor of the bill of exchange and the drawee of the cheque may still be liable but no other party to the instrument will be. The other construction is to read "the other parties thereto" as meaning parties other than the holder. It is objected to this construction that, as the holder himself could never be liable, the phrase "other parties" is out of place. But, obviously, the holder is a party to the bill, so that there is nothing strained or unnatural in using the words "other parties" to convey the meaning suggested.

A third suggested construction, namely, that it was intended to exclude any person falling under the denomination of maker, acceptor, or drawee, whether of a bill, note or cheque, is ruled out by the word "respectively" in the first sentence. Moreover, except in Chapter II the word "maker" is used only of a promissory note, and the word "acceptor" only of a bill. "Drawee" is common to both bills and cheques but the drawee of a bill as such is under no liability. His liability only accrues when he accepts the bill.

The arguments for the appellant may be summed up as follows:—

(*i*) The Negotiable Instruments Act closely follows English Law on the subject, and under English Law presentment for payment is not necessary to charge the principal debtor.

The argument is not, of course, conclusive. There are admitted differences between the two, and English Law is only a guide when the construction of the Act is doubtful.

(*ii*) Mr. Chalmers in his commentary on the Law of Negotiable Instruments in British India supports this view. He refers (4th Edition, page 241) to the rule of the Common Law that a debtor must seek out his creditor and pay him, and then says:

"The maker cannot take advantage of any informality in the presentment to him..... Section 66 which requires that a promissory note or bill made payable at a specified period after date or sight thereof must be presented for payment at maturity, may seem to be an exception to the general rule as to the liability of the principal debtor; but the object of this section is to specify the time for payment (when such is necessary) and not to relieve the maker or acceptor from liability in the event of default."

(*iii*) Such authority as there is is in favour of the appellant's view. The cases are not very numerous but there are, as it happens, cases in three High Courts, namely:

Ramakistnayya v. *Kassim* (1), *Ihul Chand* v. *Ganga Ghulam* (2) and *Ardeshir Sorabsha Moos* v. *Khushaldas Gokuldas* (3).

On the other side I have been referred to the case of *Nanhey Mal* v. *Chait Ram* (4).

That case is not directly in point but it does contradict the view that acceptance is never necessary to render the principal debtor liable. In this case the bill had never been presented for acceptance, so that the drawer was the principal debtor. It was, however, held that the drawer was not liable unless the plaintiff could bring the case within one of the exceptions contained in section 76. The view of section 64 taken by the Court is stated in the following passage:—

"Section 64 of the Negotiable Instruments Act provides that a bill of exchange must be presented for payment in the manner mentioned in that and subsequent sections. Section 76 provides that no presentment for payment is necessary in certain circumstances."

(*iv*) An argument is drawn from the differences between the languages of sections 61 and 62 ("no party thereto is liable") and the expression "other parties" in section 64. This point will be considered later.

(*v*) Section 32 has been referred to as laying down, in the widest term, the liability of the acceptor to meet the bill at maturity. It is clear, however, that this liability is subject to any conditions imposed by special sections of the Act (*e. g.*, under section 68 with reference to a bill of exchange or promissory note drawn and accepted at a particular place).

The argument on the other side is based on the language of the Act. The respondents' construction is the only possible construction if the latter portion of the section is to have any meaning at all. The last paragraph of the section consists of an exception and is worded thus:—

"*Exception.*—Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof."

If the exception is that in one particular case presentment is not necessary to charge the maker of a promissory note the general rule must be that presentment is necessary. If, however, "other parties" in the first part of the section means "parties other than the maker of a promissory note or the acceptor of a bill" presentment is never necessary in order to charge them and it is immaterial whether the note is payable on demand or at a specified place or otherwise. The exception is no exception at all but an illustration of the rule, and an illustration which serves no useful purpose but merely tends to confuse the mind of the reader. In order to make it an exception, the rule must be that in other cases presentment for payment is necessary in order to charge the maker of the note. In short, according to this construction, the rule to be deduced from the first part of the section is that presentment of a promissory note is only necessary in the case of persons other than the maker; the rule to be deduced from the second part is that presentment is necessary to charge the maker except in one particular case which is stated as an exception.

This argument seems to me conclusive. A construction of the earlier part of the section which makes nonsense of the later part cannot be correct. But the maker of a note and the acceptor of a bill stand precisely on the same footing. If "other parties" has reference to the persons mentioned in the first sentence of the section it excludes them both. If it means parties other than the holder it excludes neither of them. I should have felt considerable hesitation in differing from the authorities which have been cited, but the point has never really been discussed. It seems to have been taken for granted that the section merely reproduces English Law.

The inclusion of cheques in the section furnishes a further argument in favour of the respondents' view. It can hardly have been the intention of the Legislature that the banker on whom a cheque is drawn should be bound to pay it without its being presented to him for payment. He has no means otherwise of knowing of its

(1) 13 M. 172; 4 Ind. Dec. (N. S.) 832.
(2) 21 A. 450; A. W. N. (1899) 167; 9 Ind. Dec. (N. S.) 994.
(3) 32 B. 247; 10 Bom. L. R. 268.
(4) 48 Ind. Cas. 364; 41 A. 40; 16 A. L. J. 899.

existence. In the case of a cheque not the drawee but the drawer is the principal debtor (section 31). Moreover, the Act contains a special provision, section 31, defining the liability of the drawee, which is to pay "when duly required to do so" provided he has funds of the drawer in his hands.

The argument drawn from the language of sections 61 and 62 carries little weight. The use of the words "parties" or "other parties" in the Act is not always consistent. Thus, in section 8—a section which the appellant might have cited in his favour—the holder is defined as the person entitled to recover the amount due on the bill from the parties thereto. On the other hand, there are many sections of the Act in which "parties" is used as including the holder, *e. g.*, section 43, Exception II and the second paragraph of section 47; and in section 36 the holder is contrasted with prior parties. In section 93 the words "all other parties" are used in contrast to the holder in exactly the sense contended for by the respondents ("The holder thereof... must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally able thereon"). It will be noticed that in this section a separate provision is inserted to exclude the maker of the dishonoured note or the drawee or the acceptor (not the acceptor only) of the dishonoured bill.

For the above reasons, it appears to me that the lower Appellate Court was right in construing the words "other parties" as meaning parties other than the holder, and I decide accordingly. The result is that the appeal fails and it is accordingly dismissed with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 28 OF 1916.

January 28, 1919.

Present:—Mr. Kincaid, A. J. C.

BAHADUR, SON OF DINO—

APPELLANT

versus

GELOMAL AND OTHERS—

RESPONDENTS.

Instalment decree—Instalments, default in payment of—Acceptance by decree-holder, whether amounts to waiver—Waiver—Question of fact—Appeal, second—Question whether can be raised—Limitation.

On 31st August 1910 *R.* obtained an instalment decree against *A.* the amount being payable by yearly instalments on the 15th February of every year. *A.* made default and paid the first instalment on 2nd June 1912 and further sums were paid on 29th April and 17th November 1914. On 18th May 1915 *R.* applied to execute his decree for the balance due, but was met with the objection that the right to execute having accrued to him on 15th February 1912, and more than three years having elapsed since then, the application was barred by limitation. On appeal it was held that the application was within time on the ground that the acceptance by *R.* of the instalment on 2nd June 1912 amounted to a waiver of his right to enforce execution for the whole amount due under the decree. In second appeal it was urged that the question of waiver not having been raised in the Original Court the Appellate Court erred in going into it, and that that Court was wrong in finding that *R.* had waived his right:

Held, 1) that the question whether or not there was a waiver was a question of fact and the finding on that question could not be challenged in second appeal: [p. 609, col. 1.]

2 that, in any case, *R.* from the moment of his acceptance was barred from enforcing the right which was his by reason of *A.*'s default, and *A.* became barred from pleading that limitation ran from 15th February 1912. [p. 608, col. 2.]

JUDGMENT.—The facts of this appeal are, shortly, as follows:—

Respondents obtained an instalment decree on the 31st August 1910 against the appellant for the sum of Rs. 4,150-0-0. The sum was payable in yearly instalments of Rs. 300 with interest at 6 per cent. Each instalment was due on the 15th of February of every year. The first instalment fell due on the 15th of February 1911. The second instalment fell due on the 5th of February 1912. On neither of these dates, however, were the instalments paid to the judgment-creditor. But on the 24th July 1911 the judgment-debtor paid and the judgment-creditor accepted the sum of Rs. 300

on the 2nd June 1912, in the same way the judgment-debtor paid and the judgment-creditor accepted the sum of Rs. 300. Further sums were paid by judgment-debtor and accepted by the judgment-creditor on the 29th April and on the 17th of November 1914.

On the 18th of May 1915 the judgment-creditor applied to execute his decree to the amount of Rs. 415 the balance due according to the calculation mentioned in the execution application. The judgment-debtor resisted the execution upon the ground that the judgment-creditor's right to sue for the full amount under the decree accrued to him on the 15th February 1912. As more than three years had elapsed that application, according to the judgment-debtor, was time-barred. This objection commended itself to the learned Judge of the First Court and on the 18th of September 1915, he dismissed the application for execution as time-barred. Against this order the judgment-creditor appealed to the District Court of Larkana. On the 29th of May 1916 the learned District Judge reversed the order of the lower Court finding that the application was in time and directed the lower Court to re-admit it and to dispose of it according to law. The view of the learned District Judge was that acceptance by the judgment-creditor of the sum of Rs. 300 on June 2nd, 1912, amounted to a waiver of his right to enforce execution for the whole amount due under his decree. In view of this waiver of the 2nd June 1912, the judgment-creditor was not time-barred on the 18th of May 1915, when he filed his application to execute his decree.

Against this order of the learned District Judge the judgment-debtor has appealed to this Court. Two main points were urged by the learned Pleader for the appellant. The first was, that the learned District Judge erred in going into this question of waiver when it had not been taken in the first Court. In any case, he should have given to the judgment-debtor an opportunity of calling evidence on the point. I am not of opinion that there is any good ground for this objection. There was no reason why the judgment-debtor should have been allowed to call fresh evidence. The facts were there before the learned District Judge and admitted by both sides, namely, that the instalments were not paid by the judgment-debtor on the 15th of February 1911 and 1912 but were paid by him and accepted by the judgment-creditor on the 24th of July 1911 and on the 2nd of June 1912. Nor was there any reason why the learned Judge should not have considered the point whether or not there had been a waiver. It was a question of fact, as was held in *Bhagwandas Feroomal* v. *Menghraj* (1). The first Appellate Court is empowered to go into questions of fact.

The second argument of the learned Pleader is that the lower Court was wrong in finding that the judgment-creditor had waived his right to sue. As I have already observed, it has been held in *Bhawandas Feroomal* v. *Menghraj* (1) that the question whether or not there has been a waiver is a question of fact. As the District Judge, Larkana, has found that there was a waiver in this case we are precluded from questioning that finding.

At the same time, we think that it is only fair to say that we consider that finding perfectly justified by the facts of this case. When the judgment-debtor went to the judgment-creditor with the instalment due by him on the 15th of February 1912 it was open to the judgment-creditor to say that he would not accept in June what should have been paid in February; that he intended to enforce the right which was his by law, that is to say, that he intended to apply for execution for the whole amount due under his decree. He did not choose to follow that course. He accepted the moneys tendered to him by the judgment-debtor. What then became the position of the parties? The judgment-creditor, from the moment of his acceptance, was barred from enforcing the right which was his by reason of the judgment-debtor's default. In the same way, the judgment-debtor became barred from pleading that limitation ran from the 15th of February 1912. This view of mine finds support in the Full Bench case of *Kashiram* v. *Pandu* (2). Therein Sir Lawrence Jenkins, C. J., observed: "The true view appears to me to be, that,

(1) 45 Ind. Cas. 824; 11 S. L. R. 120.
(2) 27 B. 1; 4 Bom. L. R. 688.

though there may be failure to pay punctually under an instalment decree, still the subsequent conduct of the parties may preclude either of them from afterwards asserting that payment was not made regularly and in satisfaction of the obligation under the decree." The learned Pleader for the appellant argued that in *Bhawandas Feroomal Menghraj* (1) there was a similar acceptv. ance of an overdue instalment but there the learned Judges declined to accept this as conclusive proof of waiver. The learned Judges, however, merely based their decision upon the finding of the fact of the lower Court that there was no waiver. The circumstances, too, of that case were distinguishable from the present. There the judgment debtor had paid Rs. 300 0 0 and these Rs. 300 0 0 has not been paid in sums equivalent of any one instalment or multiple of one instalment. It was, therefore, impossible to say that, at any given time, the judgment-creditor was accepting any particular instalment and that, therefore, he waived his right to apply for exe cution for the whole decree. Here, however, the learned Judge had found that the payment of 2nd June 1912 of Rs. 33 10 0 wiped off within an anna of two what was due by the judgment debtor on the 15th February 1912. The learned Pleader for the appellant has questioned the accuracy of this finding. But we must be bound by the decision of the learned District Judge who had materials before him which have not been supplied to us. We, therefore, find that the decision of the learned Judge of the District Court on the question of the fact whether or not there was a waiver by the judgment creditor was a decision fully justified by the facts before him. That being so, it is a finding of fact which is binding on us.

We, therefore, confirm the order of the lower Court and dismiss this appeal. In view of the importance of the questions of law involved in this matter, we think it is only right that the parties should bear their own costs in this appeal.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 41 OF 1917.

April 29, 1920.

Present :—Mr. Justice Oldfield and Mr. Justice Phillips.

Sri VADREVU RANGANAYAKAMMA GARU (DEAD) AND ANOTHER—DEFENDANTS —APPELLANTS

versus

RYALI SOMASUNDARA RAO—PLAINTIFF—RESPONDENT.

*Hindu Law—Widow—Adoption—Consent of kinsmen to adoption—Court, right of, to interfere—Husband's daughter's son, whether should be consulted—*Upanayanam *ceremony, performance of, when valid—Irregular performance of ceremony, whether bar to adoption—Custom—Adoption—*Andhra *or* Telugu Brahmins—*Daughter's son or sister's son, adoption of, whether valid.*

Inasmuch as the law imposes a responsibility upon kinsmen in granting their consent to an adoption the Court cannot interfere with their exercise of it, the right of the Court to scrutinize the kinsmen's reasons extends only to those cases in which consent is refused. [p. 614, col. 1.]

The son of the daughter of a deceased Hindu is not one of the *gnatis* whom it is necessary for the deceased's widow to consult regarding an adoption, and the absence of such consultation would not render invalid an adoption made by the widow. [p. 618, col. 2.]

In order to render the *Upanayanam* ceremony of a boy valid, it must be performed by the father, or, in his absence, by another kinsman in the family to which the boy concerned actually belongs, the performance of the ceremony in a family which the boy has not entered is invalid, and the irregular performance of the ceremony in a family into which the boy is wrongly believed to have entered is a nullity, and is no bar to the subsequent adoption of the boy into that family. [p. 619, col. 2.]

The custom of adopting a daughter's son or a sister's son obtains among Brahmins of the *Andhra* or Telugu portion of the Madras Presidency. [p. 630, cols. 1 & 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Rajahmundry, dated the 11th August 1916, in Original Suit No. 81 of 1914.

This appeal came on for hearing on the 15th, 16th and 17th of April 1919, and the case stood over for consideration till the 29th of April 1919.

FACTS.—The *propositus* left a widow who adopted her second daughter's son in 1900. The adoption, alleged to be made under authority, was set aside on the ground that the authority was not made out. Then, the 2nd defendant, that daughter's son, was again adopted, alleging consent of

sapindas. The question was whether the adoption was valid for the following reasons:— (1) A daughter's son cannot be adopted. (2) There was corruption in getting the consent of *sapindas*. (3) The plaintiff (a daughter's son) should have been consulted as the next reversioner. (4) The *upanayanam* of the adopted boy was performed in the natural family in effect.

The Hon'ble Mr. *S. Srinivasa Ayyangar* (Advocate-General, with him Messrs *A. Krishnaswamy Aiyar* and *S. Aravamudu Ayyangar*), for the Appellants.—The first question I shall argue is, 'whether the consent of the daughter's son is necessary to validate the adoption." "*Sapinda*" in reference to adoption means only agnatic *sapinda*, the consent of a majority of whom is sufficient. The daughter's son is only a cognate. The word in the texts is *gati* (*gnati*) and the object of adoption itself is to introduce a *gnati* or agnate into the family. This very purpose of adoption is denied if the consent of a person who is the nearer heir to property were required. The daughter's son is only a *bhinna gotra sapinda*. See Vyavahara Mayukha (page 57 of the translation of Dr. Mandlik). *Veerabasavara u Pantulu* v. *Balasurya Prasada Rao* (1).

Adusumalli Krishnayya v. *Adusumalli Lakshmipathi* (2) refers to the text of Yajnavalkya.

Mandlik's Hindu Law, page 57, 2 Strange's Hindu Law, page 115, Mayne.' Hindu Law, Article 211. If the theory that the consent of *sapindas* is required because they are the protectors of the widow is accepted, it is obvious that a member of another family, *e. g.*, a daughter's son, cannot be the protector. See *Ramnad case* [*Collector of Madura* v. *Moottoo Ramalinga Sathupothy*] (3) and *Subrahmanyam* v. *Venkamma* (4). The consent of the nearest *gnatis* is sufficient. See *Rao Rama Rao* v. *Narasimha Nayanini Varu* (5), *Veerabasavarazu Pantulu* v. *Balasurya Prasada Rao* (1). See the text explained in *Adusumalli Krishnayya* v. *Adusumalli Lakshmipathi* (2). According to the texts the father of the husband, if alive, is the person to be first consulted. But if the right to the property is taken as the text, the daughter's son should have preceded the father but it is not so in the texts.

If interest in property is the test, the whole body of reversioners will have to consent. (A reversioner's suit is held to be a representative suit).

Upanayanam being a purely religious affair cannot interfere with affiliation because it was in a wrong family except in the case of Brahmins. See *Parvatibayamma* v. *Ramakrishna Rau* (6). If an adoption is invalid it is as if it never took place and anything done thereunder shares the same fate, *Bowani Sankara* v. *Ambabay Ammal* (7).

The presumption of law is that consent is proper. *Venkatakrishnamma* v. *Annapurnamma* (8). The *bona fides* or motive of the widow is quite immaterial.

Mr. *V. Narayanamoorthy* (with him Mr. *P. Somasundram*), for the Respondent referred to *Ramnad case* [*Collector of Madura* v. *Moottoo Ramalinga Sathupathy*] (3), and *Adusumalli Krishnayya* v. *Adusumalli Lakshmipathi* (2), and said that the test is, who are the persons interested in the property and so a daughter's son who is the nearest presumptive heir is a person to be consulted, for the object of adoption is mainly secular and only secondarily spiritual.

[PHILLIPS, J.—Has the daughter's son any interest in substituting an heir to the deceased *propositus* ?]

Yes, he has.

[PHILLIPS, J.—Apart from his interest in the property ?]

The daughter's son is a *sapinda* and he would succeed in preference to the agnates.

[PHILLIPS, J.—What interest has he in the adoption in its spiritual aspect ?]

He gives three *pindas*, one of which goes to the maternal grandfather.

Sunkuru Suryanarayana v. *Sunkuru Ramadoss* (9). It is interest in the property

(1) 48 Ind. Cas. 706; 41 M. 995; 25 M. L. T. 1; 17 A. L. J. 34; 36 M. L. J. 40; 28 C. W. N. 251; 29 C. L. J. 184; 9 L. W. 243; 21 Bom. L. R. 238; 1 U. P. L. R. (P. C.) 18; 45 I. A. 265 (P. C.).

(2) 32 Ind. Cas. 253; 20 M. L. J. 265 at p. 269; 19 M. L. T. 286.

(3) 12 M. I. A. 397; 10 W. R. P. C. 17; 1 B. L. R. P. C. 1; 2 Suth. P. C. J. 135; 2 Sar P. C. J. 361; 20 E. R. 389; 3 Mad. Jur. 298; 1 Ind. Dec. (N. S.) 1.

(4) 26 M. 627 at p. 635; 13 M. L. J. 239.

(5) 28 Ind. Cas. 892; 28 M. L. J. 363; 2 L. W. 286.

(6) 18 M. 145; 5 M. L. J. 44; 6 Ind. Dec. (N. S.) 450.

(7) 1 M. H. C. R. 363.

(8) 23 M. 486; 10 M. L. J. 73; 8 Ind. Dec. (N. S.) 741.

(9) 43 Ind. Cas. 526; 41 M. 604 at p. 605; 22 M. L. T. 501; 34 M. L. J. 87 at p. 92; 7 L. W. 72; (1918), M. W. N. 208.

that is the primary criterion. The spiritual question comes only next.

Sirkar's Hindu Law of Adoption (Tagore Law Lectures), page 259, quoted with approval in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (10), (where the comparison between adoptions and alienations is dealt with).

[OLDFIELD, J.—This is practically overruled by *Rangasami Gounden* v. *Nachiappa Gounden* (11).]

Not on the present question, but only upon surrender and estoppel.

The daughter's son is a *gnati*. The word '*gnati*' means ordinarily 'relative.'

Manu, Chapter V, page 148. (West and Buhler, 1005). Yajnavalkya, Chapter I, pl. 85 [translated in *Adusumalli Krishnayya Adusumalli* v. *Lakshmipathi* (2)].

The only word used is '*gnati*', for after the '*gnatis*' in the rank of protectors of the woman comes the King. So, unless the word means and covers all relations, how can the King come in? I submit that it is not used in the restricted sense of agnatic relations.

[PHILLIPS, J.—What is its primary meaning?]

[Mr. *A. Krishnaswamy Aiyar*.—Apte in his Dictionary gives the meaning as 'agnates' collectively].

Manu, Chapter IX, pl. 3.

Narada (Ghose's Hindu Law, Volume I, page 323). "The relations of her husband" are the words.

Advocate-General.—The words are "*satya tesham.*" [*Ramnad case*] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (3).

These texts are quoted also in case of alienations by the widow.

1 Strange's Hindu Law, at pages 244, 246, 247.

Collector of Masulipatam v. *Cavaly Vencata Narrainapah* (12), (where the question of a woman's powers to alienate is discussed.)

Musammat Bhoobun Moyee Debia v. *Ram Kishore Acharaj Chowdhury* (13).

The immediate reversioner is the first person to be consulted. Here it is the daughter's son.

[PHILLIPS, J.—Suppose the father-in-law is alive, the texts place him as the first person to be consulted.]

In an undivided family, the father-in-law is the immediate reversioner. The decisions hold the texts as applying only to undivided families. When a new coparcener is sought to be introduced. In such a case, the daughter's son cannot come in at all and the agnates alone come in.

In the case of divided families, the daughter's son is the most concerned and so he must be consulted. The texts do not exclude him.

Sham Sundar Lal v. *Achhan Kunwar* (14). The assent of the daughter and daughter's son alone was held sufficient.

Vinayak v. *Govind* (15) and *Debi Prosad Chowdhry* v. *Golap Bhagat* (16).

On the effect of upanayanam.

The law is that a boy whose *upanayanam* is performed in one *gotra* is unfit for adoption into a different *gotra*. Even though the *upanayanam* is by a stranger or preceptor. It is a purely religious ceremony and has nothing to do with *gotra*.

[OLDFIELD, J.—How can it be said then that it bars a subsequent adoption?]

So say the texts. *Parvatibayamma* v. *Ramakrishna Rau* (6). Bhattacharja's Hindu Law, Volume I, page 454. The *upanayanam* is, no doubt, good. In no circumstances can it become invalid.

[PHILLIPS, J.—Muthuswamy Aiyar, J., seems to think differently.]

But it was not necessary to decide that point in *Parvatibayamma* v. *Ramakrishna Rau* (6). At best, it is only an *obiter dictum*.

As to the nature of the *upanayanam*, see Manu, Chapter II, pl. 28, *Viraraghava* v. *Ramalinga* (17) and *Ganga Sahai* v. *Lekhraj Singh* (18).

Upanayanam is a bar. See Mayne, page

(10) 35 I. A. 1 at pp. 14, 15; 30 A. 1; 12 C. W. N. 74; 9 Bom. L. R. 1045; 6 C. L. J. 766, 3 M. L. T. 1; 5 A. L. J. 1; 17 M. L. J. 605; 11 O. C. 78 (P. C.).

(11) 50 Ind. Cas. 495; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R, 640; 28 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66

(12) 8 M. I. A. 529; 2 W. R. P. C. 61; 1 Suth. P C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

(13) 10 M. I. A. 279; 3 W. R. P. C. 15; 1 Suth P. C. J. 574; 2 Sar. P. C. J 111; 19 E. R. 978.

(14) 21 A. 71 at pp. 79, 81 (P. C.); 2 C. W. N, 729; 25 I. A. 183; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. S.) 755.

(15) 25 B. 129 at pp. 133, 134; 2 Bom. L. R. 820.

(16) 19 Ind. Cas 273; 40 C. 721 (F. B.) at pp. 766, 783; 17 C. W. N. 701; 17 C. L. J. 499.

(17) 9 M. 148 at pp. 161, 165; 3 Ind. Dec. (N. S.) 500.

(18) 9 A. 253 at pp. 292, 304; 5 Ind. Dec. (N. S.) 604.

179. *Viraragava* v. *Ramalinga* (17), *Ganga Sahai* v. *Lekhraj Singh* (18).

Dattaka Mimamsa (Ghose, Volume II, pages 30 36).

As to the consent obtained

Consent must be obtained *bona fide*. (The evidence was dealt with by Mr. P. Somasundaram).

The Hon'ble the Advocate General in reply.—There is no analogy between an alienation which is a purely secular act and an adoption which is both spiritual and secular, *Kannepalli Suryanarayana* v. *Pucha Venkataramana* (19). The essential object of adoption is continuance of the spiritual benefits, *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (20) (to discharge the obligations of a pious Hindu). The only resemblance is that the assent of *sapindas* within certain degrees is required for both. But the consent is not a condition precedent to an alienation while express assent is to an adoption. For an alienation the nearest *sapindas* of the same degree must all consent. It is not so far an adoption.

In the Marriage Chapter of the Mitakshara, no doubt, '*sapindas*' is used to include both *gotraja* and *bhinna gotra sapindas*. But in the Chapter on Inheritance, the former alone are included.

Mitakshara, Chapter II, section 5, pl. 5 (Stoke's Translation).

Mayne's Hindu Law, page 711. See (*Ramnad case*) [*Collector of Madura* v. *Moottoo Ramalinga Sathupathy*] (3). The right of giving assent is confined to *gotraja sapindas* and does not extend to *bandhus*.

[Mr. *Narayanamoorthy* referred to *Ramchandra Martand* v. *Vinayak Venkatesh* (21) where the *bandhus* are held to be included under *sapindas*.]

Bandhus are *sapindas* except in matters of inheritance. A daughter's son is only of the same kind as a sister's son or an aunt's son, Mayne, page 789. See also Mandlik's Mayukha, page 57, West and Buhler (page 1006). '*Gnati*' refers to the 'gentile' relatives. *Vithoba* v. *Bapu* (22) (a case of adoption); Sabdasthooma Mahanidhi, page 197; Ghose, Volume I, pages 677 and 182 (*gnati* agnate).

Gnati is a term of art and does not include a *bandhu*.

The texts are collected in Colebrooke's Volume II, pages 107-109, *re* the disabilities of the woman, and it is quite plain that the agnates alone are referred to, the words being "*tesham jatya*" (their *gnatis*).

Stoke's Hindu Law Books, page 579, gives the text that *upanayanam* is a bar, (Dattaka-Mimamse, section 4, pl. 30). The view is that *upanayanam* is a part of affiliation. Assuming it is right, the present case is different, in that *upanayanam* was performed in the adoptive family though wrongly. See also *Viraragava* v. *Ramalinga* (17). If the affiliation is by giving and taking alone, then *upanayanam* is not material to it. See per Shephard, J., in *Parvatibayamma* v. *Ramakrishna Rau* (5). See also Samskara Ratnamala and Dharmasindhu. It is essential that the investiture must be by the father, if alive, or at least by a *gotraja*. See also Nirnaya Sindhu, Smriti Chandrika. The *upanayanam*, if vaild, no doubt fixes the *gotra*. If invalid, it can be performed again, The *upanayanam* as it was performed in the adoptive family under an invalid adoption is of no binding force. The correct view is given in *Parvatibayamma* v. *Ramakrishna Rau* (6). There is no authority for the position that an *upanayanam* performed in a wrong *gotra* must be taken to be as if it was performed in the natural father's *gotra*. In order to be efficacious, it must be performed in the right *gotra* by the right person.

Dattahomam is not necessary in the case of a daughter's son.

See Mandlik, page 472. Even a valid *upanayanam* is no bar. Ghose's Hindu Law, page 652. The earlier view must be regarded as considerably affected by the later decisions. Sarcar (Adoption) takes the same view. See at page 365.

(19) 29 M. 382 at pp. 388, 389 (P. C.); 10 C. W. N. 921; 4 C. L. J. 171; 16 M. L. J. 276; 1 M. L. T. 260; 8 Bom. L. R. 700; 3 A. L. J. 702; 33 I. A. 145.

(20) 46 Ind. Cas. 481; 41 M. 855 at p. 859; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 20 Bom. L. R. 1041; 23 C. W. N. 177; 45 I. A. 156 (P. C.).

(21) 25 Ind. Cas. 290; 41 I. A. 290; 18 C. W. N. 1154; 27 M. L. J. 333, 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447, (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 42 C. 384 (P. C.).

(22) 15 B. 110 at p. 133; 8 Ind. Dec. (N. s.) 75.

VADREVU RANGANAYAKAMMA GARU v. RYALI SOMASUNDARA RAO.

JUDGMENT.

OLDFIELD, J.—The question in this case is, generally, whether 2nd defendant is the adopted son of the late Zamindar of Vegayammapeta. Plaintiff originally denied that any adoption ceremony had been performed but he abandoned that position at the trial. There and here he has pressed only four objections, two to the consents of the kinsmen, which, in the absence of authority from her deceased husband, 1st defendant, the widow required to enable her to make a valid adoption, and two to the capacity of 2nd defendant to be adopted. I deal with them in order.

Of the kinsmen, two, Bhimasankara Row and Suryaprakasa Row, died during the trial. Neither informed 1st defendant of his reasons for not consenting to the adoption. *Vide Venkatakrishnamma* v. *Annapurnamma* (8). The former in fact did not refuse his consent explicitly. Part of the lower Court's judgment is occupied with their failure to consent. But nothing has been said regarding it by plaintiff in this Court and I, therefore, turn at once to his attack on the four kinsmen who consented.

The allegation is, first, that the consents of these four were obtained by corrupt means. Defendants before the trial naturally asked for particulars, but the lower Court in its order, Exhibit CXLII, did not insist on them on account of the delay in making the request, which may have been correct although it also gave the remarkable reason that, plaintiff having stated that the corruption was by payments of money, defendants were entitled to nothing more and could not expect plaintiff to disclose his evidence. In fact plaintiff, in Exhibit CXLII (*b*), had said that he could not give any particulars of the money payments alleged, until he had inspected the defendants' accounts; and his case must, therefore, start under the strongest suspicion that the detailed story he attempted to prove was invented for the trial. It was that Rs. 500 were paid to the four kinsmen concerned; and there was also evidence to show that they were poor and would easily be corrupted, that they were in funds more or less shortly after the alleged payments, and that 1st defendant's accounts contained a fictitious entry, by which the withdrawal of so large a sum from her treasury could have been covered. It is, however, unnecessary to pursue this in detail, because, after we had intimated our opinion as to the evidence regarding one of the four, Akkiraju, Mr. P. Narayanamurthy for plaintiff said that he would not argue against the finding in respect of the others. As regards Akkiraju the evidence of his poverty may be accepted. That relating to his sudden accession of funds showed only that he made a purchase seven months after the alleged payment; and there is no necessary or probable connection between the two. The entry in 1st defendant's accounts was made in June, whereas the bribe was paid, if at all, in the previous January and, as the large payment entered is described as representing previous disbursements made from time to time for a school, there is no reason why the closure of the school very shortly afterwards should justify suspicion of it. But all this is of very little moment, when the direct evidence regarding the payment of the money is considered. To leave out of account the uncorroborated evidence of the 3rd witness for the plaintiff, a person of no particular credit who said that in a conversation on an unspecified date Akkiraju told him of the receipt of the money, there is only the evidence of the 8th witness for the plaintiff regarding its actual payment, described as having taken place in the afternoon at so public a place as a Sub-Registrar's office. He is a servant by profession and deposed, with a certain amount of prevarication, that Akkiraju's share was kept by his master, one Buchiraju, who is now dead, Akkiraju's co son in-law and creditor. There is the evidence of the 14th witness for the plaintiff, a person who had to borrow petty sums from his master Buchiraju for his wife's funeral and the medical treatment of his wife, that seven months later this money was used to settle a debt due by Akkiraju and to obtain a re sale of property previously sold for its discharge. That evidence is improbable in its details, especially in the statement that, when Rs. 1,553.0 0 were tendered by the witness to Buchiraju as provided by the first sale deed, Exhibit A A, the latter refused it. Akkiraju no doubt was not examined. But there is no reason for believing this evidence or holding that the payment of any part of the five thousand rupees to him is in any degree corroborated

by it. I agree with the lower Court that the payment is not proved and that there is no ground for a conclusion that the consents of these four kinsmen were obtained by corruption.

The lower Court, however, in a portion of its judgment, which it is not possible to understand, has nevertheless held that these consents were not such as to show that the adoption was made by the widow, not for corrupt or capricious motives, but on a fair consideration of what may be called the family council, although it afterwards found that "1st defendant's motive is not very material in itself and that plaintiff can question the 1st defendant's motive in so far as it can be inferred from the conduct of the *sapindas*, who gave their consent." If this means, firstly, that the consent of the *sapindas* is material as guaranteeing the propriety of the widow's action and, secondly, that nothing can be deduced from the consent owing to the circumstances in which it was given, the first conclusion may be endorsed. But, as regards the second, it has been found that consents were given, which are not shown to have been obtained by fraud, coercion or corruption; and that is sufficient, for the Court's right to scrutinize the kinsmen's reasons extends only to cases, in which consents are refused, not to those in which they are granted. The responsibility is imposed by the law on the kinsmen and the Court cannot interfere with their exercise of it. We have here, subject to the argument to be next considered, the consents of the four nearest *sapindas* and if plaintiff's next objection cannot be sustained the authority thus conveyed will be sufficient.

That objection is that plaintiff, as the daughter's son of the widow's deceased husband, was entitled to be consulted and that the adoption made without consulting him was bad.

There is no explicit decision that a daughter's son is to be considered a kinsman or *gnati* or should be consulted regarding an adoption. But plaintiff relies on, and the lower Court has found for him on consideration of, certain cases, in which consultation with or consent of the reversionary heirs of the deceased, to whom the adoption is made, is referred to as essential, and that he is such an heir there is no doubt. *Contra*, however, it is argued that in those cases the position of the daughter's son was not in question and that the reference to the reversionary heirs was made loosely, nothing in the circumstances turning on the distinction between them and the agnates, whose right to be consulted arises only from their responsibility for the spiritual welfare of the deceased. Plaintiff's contention has been supported by reference to principle and to authorities.

It is first material that in the earliest authority, the decision in the *Ramnad case* [*Collector of Madura* v. *Mootoo Ramalinga Satupathy* (3)] by the Judicial Committee in 1868, the doctrine of the widow's power to adopt with the consent of the kinsmen was recognized, not so much with reference to anything explicit in early texts as because it had been received by the particular school of Hindu Law, which governed the district in question. Accordingly, after reference to such reception as evidenced by the works of Mr Colebrooke and of Sir Thomas Strange and the opinions of the Pandits the Committee observed that the assents of the kinsmen seem to be required by reason of the presumed incapacity of woman for independence rather than the necessity for procuring the consent of all those whose possible and reversionary interest would be defeated by the adoption. That this was the basis of the Committee's conclusion is material in connection with the texts on which plaintiff has relied, as indicating the basis on which the doctrine is really founded. For it will be seen that the portions of them on which plaintiff's argument depends, is not that which the Committee had in mind.

The earliest of the texts is Manu, Ch. V, pl. 148, which runs in Sir W. Jones' translation: "In childhood must a woman be dependent on her father; in youth on her husband, her lord being dead, on her sons.....A woman must never seek independence." This is repeated in Ch. IX, pl. 3 and its last sentence may be supposed to be the earliest appearance of the foundation for the Committee's conclusion, so far as texts were in question. Plaintiff, however, relies on the gloss of the well-known commentator—Kulluka Bhatta, printed by Sir W. Jones upon sentence just quoted:—"If she has no sons, on the near kinsmen

of her husband ; if he left no kinsmen, on those of her father ; if she has no paternal kinsmen, on the sovereign ;" and it is on this and similar references to the widow's dependence that the theory of the right of the agnates to concern themselves with her adoption rests. Another such reference is to be found in Yagnavalkya Ch. I, verse 85: "Let a female be taken care of by her father, while a maiden ; by her husband when married; and by her sons in old age. If none of these exist, let other *gnatis* take care of her. A woman is never fit for independence;" and this, as appears from *Adusumalli Krishnayya* v. *Adusumalli Lakshmipathi* (2), is interpreted by Viramitrodaya as follows:— "But, when the husband is dead, the assent of those only is necessary, on whom she is dependent." Again, in Narada, Ch. XIII, verse 28, quoted in Ghose's Principles of Hindu Law, 3rd Edition, Vol. 1, page 323, "after the death of her lord, the relations of the husband shall be the guardian of the woman, who has no son. They shall have full authority to control her, to regulate her manner of life and maintain her. When the husband's family is extinct or contains no male or is reduced to poverty, or when no one related to it within the degree of a *sapinda* is left, the father's relations shall be the guardians of a woman." And there is, lastly, the statement of Mr. Colebrooke in his commentary on the Mitakshara, Ch. I, section XI, Pl. 9, that whilst the author of the Vyavaharamayuka admits the right of the widow to adopt without her husband's authority he requires that she shall have the express sanction of his kinsmen, and there are certain cases to the same effect in Strange's Hindu Law and Hindu Law Cases. Plaintiff argues that the reference to kinsmen in those cases include cognates as well as agnates, not only because this is entailed by the words used but also because it is involved in the underlying principle.

The term "Kinsmen" is, of course, ambiguous ; and reference is necessary to the words used in the Sanskrit texts, "*sapinda*" and "*gnati*". But the former may or may not include *bhinna ghotra* as wall as *ghotraja sapindas*, the daughter's son being included only in the former; and we have not been shown authority for holding that Kulluka Bhatta in his gloss was using it in the one sense rather than the other. Similarly, as regards the reference to the exhaustion of the husband's *sapindas* in Narada. The difficulties in the way of adoption of one invariable rendering for the term in the case of one text, the Mitakshara, are illustrated by reference to *Ramchandra Martand* v. *Vinayak* (21). It is, however, significant that in the *Ramnad case* (3) one Muthusami, a Samanodaka, was excluded from the category of *sapindas*, and that the Judicial Committee may, therefore, be supposed to have used the term in its strictest sense. It is possible to say only that plaintiff has not established the inclusion of *bhinna gotra sapindas* in it, and I, therefore, turn to the other expression which is in question.

The word *gnati* in its primary significance is no doubt limited to agnates. *Vide* Apte's Dictionary. Mr. Ghose, in one passage in his Principles of Hindu Law at Volume 1, page 183,dealing with inheritance, has no doubt translated it *sapinda*, but in connection with an argument limiting *sapindas* to agnates, and elsewhere in connection with adoption (page 677) he translates it as agnate directly. In Mr Mandlik's Hindu Law, at page 57, the word is rendered in the passage from Yagnavalkya already quoted as Clansmen and in West and Buhler (A Digest of the Hindu Law of Inheritance, Partition and Adoption, etc.,) at page 1,006 as the Gentile relatives, the agnatic significance being clear. In *Adusumalli Krishnayya* v. *Adusumalli Lakshmipathi* (2) the decision in *Chinnakimidi case* [*Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (23)] was read as showing that the text of Yagnavalkya should be understood as limiting the expression "*gnatis*" to those who are in the line of heirs to the last holder and to this decision I shall return. But in *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (1), the Judicial Committee at page 1004* itself explaind the *Ramnad case* (3) as deciding that the widow might adopt with the consent of the male agnates. All this is against and nothing has been adduced in favour of this part of plaintiff's argument. It is in fact on the theory as deduced from the underlying principle that he relies.

(23) 1 M. 69; 3 I. A. 154; 11 Mad. Jur. 188; 25 W. R. 291; 3 Sar. P. C. J. 583; 3 Suth. P. C. J. 263; 1. Ind. Dec. (N. S.) 45 (P. C.).

*Page of 41 M.—*Ed.*

Before examining that theory I refer to one form, in which it has been supported, that the daughter's son's consent is required to validate the widow's adoption, because it is required, in the case of her alienations, his heirship being the reason in both cases; and there is no doubt that this argument is referred to, although it does not appear to have been pursued in *Sunkuru Suryanarayana* v. *Sunkuru Ramadas* (9) and *Vinayak* v. *Govind* (15) where the extract given above from Narada is quoted, and by the Judicial Committee in *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (1) and it may by admitted that, so far as the character of the consent is considered in them as presumptive evidence, to use the words of Seshagiri Aiyar, J., in the first of these authorities, of the goodness of the widow's act, the analogy may be instructive. It does not, however, follow and it is not the case that a general argument from the persons who must give and the motives recognised for requiring consents in the one class of cases to the persons and motives appropriate in the other is admissible. For to contrast them, consultation with the kinsmen, if not, their consent, is a condition precedent to a valid adoption, one consenting person may be regarded as representing others; and the consent of all who have to be consulted is not necessary. But in the case of an alienation the law, as stated recently in *Rangasami Gounden* v. *Nachiappa Gounden* (11), is that an alienation can be supported on its merits with reference to necessity and independently of consent; that consent, not merely consultation, is essential, and that the consent of every person who may fairly be expected to be interested to dispute the transaction, is required. And in view of these differences it would be unsafe to assume, what has never statedly been decided, that the principle underlying the validation of the widow's act by consent of or consultation with other presons is the same in the two cases. The view of the necessity for the consents, for which plaintiff contends, is that they are required as a guarantee for the widow's motives in adopting, which should be, not only the promotion of the spiritual interests of her deceased husband, with which admittedly the daughter's son is not concerned, but also the protection of his estate for his heirs, and that the daughter's son being among those heirs is entitled to a voice in deliberations which affect his interests. It is no doubt not a valid objection to this theory that no similar claim is made for the daughter, who is a nearer heir, since, as a woman, she must be regarded as equally incompetent with the widow and as incapable of advising her. But it is a practical consideration that, ordinarily, the daughter's son will be a minor and his advice will be useless, when the adoption is under discussion. Another difficulty arises in connection with the position of the daughter's son, in the order of heirs before the parents and other agnates, since it is impossible to reconcile the right of the first mentioned to express a decisive opinion with the observations in the *Ramnad case* (3) which have also been quoted in later decisions on the exceptional value to be attached to "the consent of the father-in-law to whom the law points as the natural guardian and venerable protector of the widow," as in itself a sufficient justification for her action. In that case the purpose for which the assent of the kinsmen is insisted on is stated solely and unambiguously and in terms never subsequently repudiated as being to show that the act was done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive; "and the religious obligation to adopt" in order to complete or fulfil defective religious rites is mentioned. Again, in the *Chinnakimidi case* (23) there was a reference to the principle that the validity of an adoption is to be determined rather by spiritual than temporal considerations, that the substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property an accessory of it. This statement is no doubt made by way of an *argumentum ad hominem* in respect of a previous judgment of Holloway, J., and it is followed by the observation that, while it may be the duty of a Court of justice administering Hindu Law to consider the religious duty of adopting a son as the essential foundation of the law of adoption and the effect on the devolution of the property as a mere legal consequence, it is impossible not to

see that there are grave social objections to making the succession to property and, it may be, in the case of collateral succession the right of persons actually in possession dependent on the caprice of a woman. But the only inference drawn was that the Court should keep the power strictly within the limits which the law has assigned to it apparently in the particular case under disposal by refusing to extend it, as Holloway, J., proposed, to authorise an adoption made with the consent of any one *sapinda*. The *Ramnad case* (3) was further explained in the *Guntur case* [*Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (24) and in connection with the requirement in the former that "the adoption should be made by the widow in the proper and *bona fide* performance of a religious duty and not capriciously or from a corrupt motive", it was observed that it "would be dangerous to introduce questions as to the particular motives operating on the mind of the widow" and that only proof of "such assent on the part of the *sapinda* was required as should be sufficient to support the inference that the adoption was made, not from a capricious or corrupt motive, but upon a fair consideration by what may be called a family council of the expediency of substituting a son by adoption to the deceased husband." These cases are the foundation of the doctrine of the consent of kinsmen as the widow's authority. Throughout them the religious motive insisted on in *Ramnad case* (3) is not abandoned; and if in the *Chinnakimidi case* (23) it is recognised that temporal considerations cannot be lost sight of, that can be explained consistently with the language used on the ground that reference to them will be a safeguard against the caprice or corrupt intention of the widow, as in many cases involving the disintegration of the estate. *Adusumali Krishnayya* v. *Adusumi Ali Lakshmpathi* (2) supplies an actual instance of the entertainment by her of such an intention, in case one is required.

It is in fact only after a considerable interval and in the case last cited that plaintiff can find anything directly supporting his contention. There Seshagiri Aiyar, J., after agreeing that the motive which should guide a widow, should be to minister to the spiritual wants of her husband, said that the assent of the *sapindas* should not necessarily be regarded as a religious act, because the text of Yagnavalkya already referred to implied that her protection by them in temporal affairs alone was contemplated. So far this is in plaintiff's favour. But it is not clear in what shape the argument from the existence of the religious motive was relied on or how its rejection influenced the decision, that the assent of a mere majority of *sapindas*, without reference to their character as mere reversioners was insufficient. For the learned Judge was dealing with a case, in which the consent of only one out of the six nearest *sapindas* had been obtained and the question was whether the other five should have been ignored. And he, therefore, had not to consider whether consultation with a more remote reversioner such as the present plaintiff, was obligatory or whether heirship, apart from spiritual responsibility, was material. He, in any case, proceeded to hold with reference to the interpretation placed on the text of Yagnavalkya by the Viramitrodaya that the guardianship of the widow did not vest in the whole body of *gnatis*, the natural interpretation being that she was dependent on those nearest to her husband; and he regarded the judgment in the *Guntur case* (24) as negativing the plea that the widow in obtaining the consents did not act on spiritual considerations. Nothing then was actually decided against the view that the spiritual should be the dominant consideration and much was said in favour of its being so; and there is no departure from that view in the observation of the same learned Judge in *Sunkuru Surayanarayana* v. *Sunkuru Ramadoss* (9) that the powers of consent had been given to the *sapindas*, as they were interested in the property and were expected to see that the spiritual welfare of the deceased was not jeopardized. Plaintiff relied lastly on the decision in *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (1). In this Court the question of spiritual motive was not dealt with, because the Bench, of which I was a member, reached a conclusion against the widow's authority

(24) 1 M. 174; 4 I. A. 1; 1 Ind. Jur. 63; 26 W. R. 21; 3 Sar. P. C. J. 669; 3 Suth P. C. J. 353; 1 Ind. Dec. (N. S.) 116 (P. C.).

on other grounds. But in appeal the Judicial Committee, confirming this Court's decision, referred to it at some length and undoubtedly specified the possession of an interest in the protection of the estate as a qualification for inclusion in what was described in the *Guntur case* (24) as the family council. They, moreover, quoted the opinion expressed in Golapchandra Sirkar Sastri's Hindu Law of Adoption that adoption is more a temporal than a spiritual institution and that, the requisites for a valid adoption being all temporal, the spiritual considerations should not be allowed to influence the judgment regarding the secular essential. If it were clear that this opinion had been adopted by their Lordships, it would go far towards supporting plaintiff's contention, that a daughter's son, on whom no spiritual responsibility rests and whose temporal interest in the reversion is comparatively close, is entitled to be consulted. But in fact the judgment does not either before or after this quotation express approval, either comprehensive or qualified, of the views contained in it, and there is no attempt to reconcile or contrast them with the references to religious duty contained in extracts from the *Ramnad case* (3) occurring elsewhere in the judgment, except a statement with reference to it and the *Guntur case* (24) that rights of property cannot be left out of consideration, when the question what *sapinda's* consent is primarily requisite is under consideration. It may be added that the learned author in the sentence prior to that cited by their Lordships (Op. cit. page 259), apparently describing the opinion of this Court in language taken from the judgment in the *Chinnakimidi case* (23), admitted that it does not share his views; and I would observe with all respect that this reasoning, as it appears in earlier passages of his work (pages 43, 45, 142, 145), seems to be rather influenced by his own experience of the actual sentiments or conduct of particular sections of the public than by the origin and development of the doctrine of adoption by consent of kinsmen in the authorities usually relied on.

On these authorities the conclusion must, in my opinion, be that the spiritual motive is at least dominant and consultation with those, who can appreciate it is essential. That the protection of the deceased's estate should be excluded from consideration as a motive is, as the authorities recognize, not to be expected or desired; and the extent to which it should be or in particular cases has been considered with reference rather to an estimate of the purity of the widow's motives than to the reversioner's prospects, is incapable of precise definition. But the conclusion must be that it is of secondary importance; and that corroborates the construction placed on the actual wording of the texts by which the daughter's son, to whom, it is not disputed, only the temporal motive can be supposed to appeal, is not one of the *gnatis*, whom it is necessary for the widow to consult.

This conclusion entails that the consents obtained by the widow were a sufficient authority for her action and I therefore, turn to the first of plaintiff's objections to the capacity of 2nd defendant for adoption. The facts on which it is based are that 1st defendant originally went through the ceremony of adopting him in 1900. A suit similar to that now before us was brought and the adoption was declared invalid by the lower Court on one ground, that he was incapable of adoption, being her daughter's son. She, however performed the ceremony of his *upanayanam* whilst an appeal to this Court was pending. After its decision against her on a different ground and the consequent failure of the adoption already made, she again on 24th January 1907 adopted 2nd defendant, that being the adoption with which we are concerned. The plaint averment regarding it was that, the ceremony of adoption having been performed with regard to 2nd defendant, although that adoption was found invalid, he was ineligible for any further adoption. On this the issue framed, it would seem without objection, was "whether the adoption of a daughter's son" (meaning apparently a person of a different *gotra*) "after his *upanayanam* is invalid?" and although there is some divergence from the pleadings that, it is agreed, is what we have to decide. It has been necessary to state the point thus fully, because it has been dealt with by the lower Court, not, as it apparently was presented to it and is presented here with reference to the general incapacity of a person, whose *upanayanam* has been performed, for adoption, but with reference to the effect of the *upanayanam* as

introducing him into *gotra* of his adoptive family and the impossibility of his acqiring any further rights in it, in case a subsequent adoption should be made. To such an argument the answer would be simple, that either the *upanayanam* did introduce him into the new *gotra* and fix his position there, a new adoption being superfluous, or that it did not and there would be no obstacle to an adoption, which would do so,

The argument, as it is put forward here, involves, it is plain, firstly, that the *upanoyanam*, although celebrated by 1st defendant on the incorrect assumption that 2nd defendant had entered her family and become her son, was a valid performance of the ceremony, and secondly, that no person, who has undergone *upanayanam*, can be adopted into another *gotra*, inasmuch as his undergoing the ceremony in the *gotra* "in which his spiritual duties are to be performed is an indispensible qualification for their performance." On both points we have been referred to the opinion expressed in Bhattachary's Hindu Law, 3rd Edition, Volume I, page 456, that "even if the *upanayanam* and marriage are performed in the family of the adoptor, the informally adopted boy will not loose his rights in the family of his natural father", and that "the ceremony of *upanayanam* performed by the adoptive father would be valid, as if performed by a volunteer priest." On the 2nd point above specified this cannot be accepted since the decision in *Viraraghava* v. *Ramalinga* (17) proceeds on the assumption which apparently was not and has not since been contested, that a boy who has received *upanayanam* outside the *gotra*, cannot enter it by adoption. On the first point, which alone remains, the opinion of the learned author, in support of which he adduces no authority, is contrary to the decision of Colville, C J., quoted by him in *Sreemutty Rajcoomaree Dossee* v. *Nobo Coomar Mullick* (25) and also to the view taken in Sanskrit texts of good repute, of which we have been supplied with private translations, accepted by both sides. Thus, in the Dharma Sindhu, Nirnaya Sagara Press Edition, (a work referred to as authoritative in Mandlik's Hindu Law. Introduction LXA), at page 161, reference is made to one kind of *upanayanam* as that which is re-done on account of the first ceremony being inefficacious by reason of a defect in any of its parts such as the time; and again at page 150 and in the Nirnaya Sindhu (a work cited in Trevelyan's Hindu Law, page 17) at p. 244 there is the *dictum*: "The father alone should perform the *upanayanam* of his son or in his absence the grandfather and in his absence the elder brother." In the Vaithianatha Dikshitiyam, Varnasrama Kanda Kumbakonam Grandha Edition, a work referred to in *Viraraghava* v. *Ramalinga* (17) it is said at page 179*: "The father is the primary or principal person entitled to perform *upanayanam*." and at page 172 (for the performance of *upanayanam*) only in the absence of any *sagotraja* (person of the same *gotra*) is a person of a different *gotra* to be sought for." Lastly, and this is important with reference to the last portion of Mr. Bhattachary's opinion, the Smriti Chandrika, Mysore Government Edition, lays down at page 88 that, "he is called Guru, who does all the Samskaras (ceremonies) beginning with the Nisheka (nuptials) and ending with *upanayanam* and gives him (the boy) instruction in the Vedas. Here Guruhood belongs to the father alone and to nobody else. Thus, it is established that the father alone is a competent person to perform *upanayanam* and other ceremonies.....But that which is said that an Acharya (voluntary priest) performs the *upanayanam* is only applicable, when there is no father or when he is disqualified. For there is no reason for leaving out a competent father."

Plaintiff has not met these extracts by citation of others and their result, which I find no difficulty in accepting, seems to me to be that an *upanayanam* will not be valid unless performed by the father or in his absence another kinsman in the family to which the boy concerned actually belongs, that his *upanayanam* performed in a family which he had not in fact entered, would be invalid; and that such an *upanayanam* can and should be performed again. This entails that the irregular performance of an *upanayanam* in a family into which the boy is wrongly believed to have entered, is a nullity and is no bar to his subsequent adoption.

The result is that the lower Court's decision cannot stand and that we must, in order to the disposal of the case, call on it to return findings on the issues not yet dealt with, Nos: 9, 10, 12, 13, 16. The findings

(25) 1 Boulnois 127; 3 Ind. Dec. (o. s.) 82.

*Page of 9 M.—*Ed.*

will be returned on the evidence on record within two months after the re opening of the lower Court. Seven days will be allowed for filing objections.

PHILLIPS, J.—I agree, and have nothing to add.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Rajahmundry submitted the following

FINDINGS.—The suit has been remitted by their Lordships of the High Court for findings on the following issues:—

(9) Whether the adoption of a daughter's son is illegal and invalid according to Hindu Law?

(10) Whether the custom of adopting a daughter's son or a sister's son obtains among Brahmins throughout the Madras Presidency or whether, as contended by plaintiff, it obtains only in the southern districts of the Presidency and does not obtain in the Andhra or Telugu portion of this Presidency?

(11) Whether the circumstances in paragraph 6 of the plaint are true, and, if so, whether they render the 2nd defendant's adoption invalid?

(12) Whether the succession to the estate of Vegayammapeta is governed by the law of lineal primogeniture?

(16) Whether the adoption is contrary to the provisions of the Impartible Estates Act?

2. *9th issue.*—In the case in *Bhagwan Singh* v. *Bhagwan Singh* (26) their Lordships of the Privy Council held that the adoption of a mother's sister's son by a Hindu of any of the three regenerate classes (Brahmins, Kshatriyas and Vaisyas), equally with the adoption of a daughter's son or a sister's son, is contrary to Hindu Law, that the ancient texts condemning such adoptions are not merely monitory but have been judicially decided by all the Courts to be positive prohibitions, and that their effect is to make such adoptions wholly void. Their Lordships also held that the law on the subject has been settled in such a way and for such a length of time as to make it incompetent to a Court of justice to treat the question now as an open one. The decision of their Lordships is quite imperative and conclusive on the point, and it must accordingly be held on the 9th issue that the adoption of a daughter's son among the three regenerate classes is illegal and invalid according to Hindu Law. It is of course admitted for both the parties that such adoptions are not prohibited by law among the *sudras*.

3. *10th issue*:—This issue relates to the question of the custom among Brahmins of adopting a daughter's son or a sister's son set up by the defendants. The defendants' contention is that the custom prevails generally throughout the Madras Presidency as in several other parts of India. For the plaintiff it is, on the other hand, asserted that, though the custom obtains among Brahmins in the southern districts of this Presidency, it is not in vogue in the Andhra or Telugu portion of the Presidency. The parties to the adoption in the present case are Niyogi Brahmins of the Godavari District in the Andhra country.

4. In reference to the question of the custom involved in the issue, the learned Vakil for the defence raises a preliminary point of law as affecting the burden of proof. His contention on the point is that, in the Full Bench case reported in *Vayidinada* v. *Appu* (27) the custom of adopting a sister's son or a daughter's son among Brahmins in southern India was recognised by the High Court as being a valid one, and that that decision must, in the usual course, govern the Brahmins in the whole of the Madras Presidency, including also those in the Andhra districts. The arguments in support of the contention are categorically set forth in paragraphs 6 to 11 of the 2nd defendant's affidavit, Exhibit 146-L, and it is hardly necessary to reiterate them here. On the other hand, it is pointed out for the plaintiff that, though the issue and the finding in the 9 Madras case purport to have reference to the prevalence of the custom in Southern India, the case arose among the Brahmins of the Tanjore District, that the instances of custom adduced in the case were

(26) 21 A. 412 (P. C.); 1 Bom. L. R. 311; 3 C. W. N. 454; 26 I. A. 153; 7 Sar. P. C. J. 476; 9 Ind. Dec. N. S.) 971.

(27) 9 M. 44 (F. B.); 3 Ind. Dec. (N. S.) 427

limited to the Tamil Districts of Tanjore, Trichinopoly Madura and Tinnevelly and that, though their Lordships in the course of the judgment incidentally adverted to an instance among the Telugu Brahmins of Madras and to Strange's Hindu Law in reference to a case from the Cuddapah District, there are indications in the judgment itself that the actual finding related in particular to the southern Districts in the Presidency. In support of this contention, reference is made in particular to the observations of their Lordships at page 53 of the report, where they expressed themselves as follows :—

"We are satisfied that the practice of making such adoptions have prevailed among Brahmins in what are now the southern districts of this Presidency from time immemorial."

The learned Pleader for the plaintiff has also referred to Bhattacharya's Hindu Law, 3rd Edition, page 75, *Narasammal* v. *Balaramacharlu* (28), *Ganga Sahai* v. *Lekhraj Singh* (18) and Ganapati Aiyer's Hindu Law, pages 55 and 56, where the Andhra country or Telingana is recognised as a distinct unit of territory apart from the Dravida proper or Tamil country, though both of them, for purposes of general law, come under the main Dravida classification, in which are comprised Andhra, Carnataka, Ghurjhra, Dravida (Tamil) and Maharashtra as sub-classifications. The Pleader also refers to the ruling in *Ohain Sukh Ram* v. *Parbati* (29) where the ruling in *Vayidinada* v. *Appu* (27) has been understood as recognising the custom only among Brahmins in the southern districts of this Presidency, *i. e.*, Tanjore, Trichinopoly and Tinnevelly. Southern India, as generally understood, includes not only the Madras Presidency, but also Hyderabad, Mysore and part of the Bombay Presidency, south of the line joining Cuttack with the Gulf of Cambay; and it could not possibly be that their Lordships in the 9 Madras case intended to find the existence of the custom in all said countries. In the course of the report, their Lordships observe as follows at page 50 in reference to a case from the Cuddapah District cited in Strange's Hindu Law :—

"The case was, it is true, one from the more northern part of the Presidency. But the learned Judge in his remarks speaks of the custom as prevalent generally."

This reference to Cuddapah as the more northern part of the Presidency and the doubt expressed by their Lordships in a way as to the importance of the case on that ground, also seems to afford some indication that the expression "Southern India" may have been used by their Lordships in the ruling in its restricted sense as applying to the southern part of this Presidency, *i. e.*, the portion south of Madras (city). It cannot, of course, be seriously disputed that, for purposes of general law, there are only two main recognised schools, the Benares or Mitakshara School and the Bengal or Daya Bhaga School ; but it cannot, I think, be on that ground contended that the customary law obtaining in the different territories comprised in a particular school must always be uniform and identical. It is also true that in the 9 Madras case their Lordships did not confine the scope of their enquiry to the Tamil Districts alone, but proceeded on broader lines ; but it does not appear that their Lordships intended to find the existence of the specific custom among Brahmins of the Andhra District in particular, though Mayne, and some other authors on Hindu Law, seem to have understood the ruling as applicable to Southern India in general.

5. I, therefore, hold that the burden of proof as to the custom has been correctly set forth in the issue. Further, both the parties having actually adduced all available evidence on the question raised, the discussion under notice must be said to be of purely academic importance at this stage.

6. Then, in reference to the law as to the essentials of a valid custom and the sort of evidence that is necessary in proof thereof, their Lordships of the Privy Council ruled in the case *Ramnad case* [*Collector of Madura* v. *Mootoo Ramalinga Sathpathy* (3)] that under the Hindu system of law clear proof of usage will outweigh the written text of the law. In the cases in *Sivananaja Perumal* v. *Muttu Ramalinga*

(28) 1 M. H. C. R. 420.
(29) 14 A. 53 [at p. 57; A. W. N. (1891) 222; 7 Ind. Dec. (N. s.) 406.

Sethurayar (30) it was laid down as follows:—

"What the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage so long and invariably acted on in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty."

In the case in *Gopalayyan* v. *Raghupatiayyan* (31), which related to the adoption of a sister's son, it was ruled as follows:—

"The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it that they were acting in accordance with law and this conviction must be inferred from the evidence."

"Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of *panchayats* upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible, but it is obvious that,...evidence of this...kind, will be of little weight if unsupported by actual examples of the usage asserted."

Again, in *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri* (32), which related to the adoption of a sister's son among the Nambudri Brahmins of the west coast, it is stated thus:—

"At the same time such a usage as is asserted must be proved by clear and unambiguous evidence; and it must be shown that it is exercised in pursuance of a custom understood to have the force of law and not to be a merely repeated violation of law."

In the Full Bench case in *Vayidinada* v. *Appu* (27) their Lordships adhere to the rule in *Sivananaja Perumal* v. *Muttu Ramalinga Sethurayar* (30) and *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri* (32), and refer to the ruling of the Privy Council in *Ramalakshmi Ammal* v. *Perumal Sethurayar* (33), where it was decided that it is the essence of special usages modifying the law that they should be ancient and invariable, and it is further essential that they should be established by clear and unambiguous evidence. [See pages 45 and 46 of the report]. In reference to the case in *Gopalayyan* v. *Raghupatiayyan* (31), in the course of which it was said that the Court was not prepared to recognise the existence of any customary law in the case of Brahmins of which no trace appears in any written authority of the place to which they belong, their Lordships of the Full Bench in the 9 Madras case observe as follows, at page 45:—

"All that the Court intended by the observations, from which this inference is drawn, was that strong proof of usage must be produced to establish a customary law at variance with the law declared in written treatises."

In *Mirabivi* v. *Velloyinna* (34), their Lordships of the Madras High Court, in distinguishing a practice from a custom, remark that, though a practice might be more or less common, it does not become a custom unless it was consciously accepted as having the force of law.

7. In reference to the inter-relation between a custom and a rule of law, Mayne in his learned work on Hindu Law, 8th Edition, observes thus, at pages 56 and 57:—

"The next question is as to the validity of customs differing from the general Hindu Law, when practised by persons who admit that they are subject to that law. According to the view of customary law taken by Mr. Austin, a custom can never be considered binding until it has become a law by some Act, legislative or judicial, of the sovereign power. Language pointing to the same view is to be found in one judgment of the Madras High Court. But such a view cannot now be sustained. It is open to the obvious objection that, in the absence of legislation, no custom could ever be judi-

(30) 3 M. H. C. R. 75 at p. 77.
(31) 7 M. H. C. R. 250 at p. 254.
(32) 7 M. 3 at p. 10 (F. B.); 2 Ind. Dec. (N. S.) 588.
(33) 14 M. I. A. 570 at p. 595; 12 B. L. R. 396; 17 W. R. 552; 3 Sar. P. C. J. 103; 2 Suth. P. C. J. 603; 20 E. R. 893.
(34) 8 M. 464; 4 Ind. Jur. 267; 3 Ind. Dec. (N. S.) 317.

cially recognized for the first time. A decision in its favour would assume that it was already binding. The sounder view appears to be that law and usage act, and re act, upon each other. A belief in the propriety, or the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it and a uniformity of behaviour in following a particular course of conduct produces a belief that it is *imperative* or *proper*, to do so. When, from either cause, or from both causes, a uniform and persistent usage has moulded the life, and regulated the dealings, of a particular class of the community, it becomes a custom, which is a part of their personal law. Such a custom deserves to be recognised and enforced by the Courts, unless it is injurious to the public interests or is in conflict with any express law of the ruling power."

8. To summarise the foregoing, a custom, before it can be recognised by the Court as valid, must have these essentials:—

(*a*) It must be ancient and immemorial.

(*b*) It must be uniform and continuous.

(*c*) It must be shown to have, by common consent, been submitted to as the established governing rule of the particular family or community: or that the persons following it were convinced that they were acting in accordance with law; or that the custom was understood to have the force of law, but not (understood) to be merely repeated violation of the law. Or, in the words of Mayne, who sums up the whole matter, there must be a belief in the propriety or imperative nature of the particular course of conduct culminating in a custom.

(*d*) The custom must be made out by clear and unambiguous evidence.

(*e*) It should not be immoral or opposed to public policy.

9. While at this stage, it will be convenient to advert briefly to the authorities as to the prevalence of the alleged custom in other parts of this Presidency and elsewhere.

10. In the case in *Vayidinada* v. *Appu* (27), already cited, the custom of adopting a daughter's or a sister's son among Brahmins has been upheld at least in reference to the Southern or Tamil Districts of the Presidency. And, following that case, the adoption of a brother's [daughter's son by custom was upheld in *Appayya Bhattar* v. *Vengu Bhattar* (35). In the Full Bench case in *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri* (32), the validity of a custom of adopting a sister's son among the Nambudri Brahmins of Malabar was recognised. A similar custom has been judicially recognised among the Bobra Brahmins of the northen districts of the North-Western Provinces in *Chain Sukh Ram* v. *Parbati* (29). In Pondicherry a man may adopt his daughter's or sister's son or any one of his wife's relations, though he may not adopt his own brother (Mayne's Hindu Law, 175). Strange in his Manual of Hindu Law, at page 22, rule 88, states that the custom of making such adoption (of a daughter's or sister's son) even without emergency prevails in the Presidency of Madras, the opinion being based on the proceedings of the Sudder Court, dated 4th and 25th June 1836, though in an earlier edition of his book he seems to have thought the custom did not prevail in the northern country (See Exhibit KK 26). Their Lordships of the Madras High Court in *Vayidinada* v. *Appu* (27) also refer to another case in Strange's Hindu Law, Appendix II, page 100, in which, in the year 1806, it was said that "in practice the adoption of a sister's son by persons of all castes is not uncommon." It is in reference to that case that their Lordships said it was from Cuddapah. In the course of the ruling, their Lordships also refer to the unreported case of *Inguva Brahmani* v. *Venkatalakshmi Ammal* between Telugu Brahmins (as the name of the parties indicate) of Madras (Town) on the Original Side of the High Court, in which the adoption by a Brahmin of a sister's son was upheld. In that case, which was of 1859, evidence had also been given of the practice amongst Brahmins of making adoptions of daughter's and sister's sons and Pandits also were examined as witnesses (pages 50 and 51 of the report). At pages 52 and 53 of the report their Lordships advert to the practice of the adoption of daughter's sons in its relation to the affiliation of *Putrika Putra* (appointed daughter's son), recognised [by Hindu Law, in these terms:—

(35) 15 M. L. J. 211.

"The practice of making an appointed daughter whose son, if she had one, became the son of the father making the appointed daughter, if he had no male issue, was a mode of affiliation prevalent from the earliest time, even before the widow and daughter had a place assigned to them by the Mitakshara in the line of heirs.....Whatever doubt we may have as to how far the adoption of a daughter's son is inconsistent with the theory as to the invalidity of the adoption of a son within the prohibited degrees of connection, the usage may still be fairly referred to those texts which recognise the practice of creating a daughter's son heir by appointment, the only difference being one of form and not of principle, the consent being given in the one case at the time of marriage, and in the other at the time of adoption."

In support of that conclusion, their Lordships also quote with approval a passage from West and Buhler's Digest of Hindu Law, Volume II, pages 884 to 883. See also *Minakshi* v. *Ramanada* (36) where the adoption of a daughter's son is justified on the old doctrine of *Putrika Putro*. In the case in *Narasammal* v. *Balaramacharlu* (28), which was from the Ganjam District, the adoption of a sister's son was held to be invalid on the opinion of a Pandit of the Northern Division. In that case, no custom was pleaded by the parties and it was in that case that the High Court ruled that no custom, how long so ever continued, which has never been judicially recognised, can be permitted to prevail against distinct authority (Hindu Law Texts), an opinion which has since been held to be erroneous.

11. It will thus be seen that the custom as to the adoption of a daughter's son is traceable in its origin to the old Hindu Law itself, which recognised the affiliation of an appointed daughter's son though now obsolete. It cannot, therefore, be seriously doubted that the custom, where it is found to exist, is referable to a legitimate source, and the authorities cited above establish the existence of the custom not only in the Southern Districts in this Presidency but also in some of the Andhra tracts like Cuddapah and Madras Town, and generally in other parts of India also.

12. Then, coming to the question of the existence of the alleged custom in the Andhra or Telugu portion of this Presidency in particular, the evidence in the case being of a voluminous character, both the parties have for facility of reference, been permitted to put in printed statements prepared on the basis of the oral and documentary evidence bearing on the point. The defendants' statement, which sets forth 65 instances of adoption relied on for them is marked as "Statement A" and the plaintiff's statement, which analyses the oral and documentary evidence on his side as "Statement B." The instances relied on by the defendants will first be taken up *seriatim*, and then reference will be made to the rebutting evidence adduced by the plaintiff.

[The Court here discussed and considered the effect of 65 specific instances of adoption of daughter's and sister's sons.]

55. With these remarks, I hold that the custom of adopting a daughter's son or sister's son prevails generally among the Uriya Brahmins of the Ganjam District, and that instances Nos. 44 to 65 adduced by the plaintiff cannot be otherwise than true.

56. In addition to the aforesaid 65 instances of specific cases of adoption, reliance is placed for 2nd defendant also on two Wills Exhibits 61 and 126 of 1st February 1898 and 24th August 1895, under which one K. Papayya and G. Narasimharao, respectively, gave authority to their wives to adopt a daughter's son. It does not appear from the evidence if the power was exercised by either of the women; but the documents are relied on as indicating the consciousness and conviction of the testators as to the validity of such adoptions.

57. For a similar purpose, reliance is placed for the defence also on the revised decree of the Provincial Court of Appeal of the Northern Division in Original Suit No. 47 of 1834 filed as Exhibit 131, Somappa, the plaintiff in that case, was the father-in-law of the 1st defendant herein (see the pedigree Exhibit I). That suit having been brought by him for possession

(36) 11 M. 49 at p. 55 (F. B.); 11 Ind. Jur. 449; 4 Ind. Dec. (N. S.) 35.

of the plaint estate, his paternal uncles Wumapati, the first defendant therein, raised the plea that the plaintiff had been given away in adoption to his maternal grandmother while an infant. (See page 640 of the printed record). The adoption set up for Wumapati was no doubt not true ; but there remains the fact that such a plea was set up so long ago as 1834 in all seriousness as a tenable one, provided it could be established as a fact. It is contended for the defence, and I think not without some reason, that the fact of such a plea being set up indicates the social consciousness of the community at the time as to such adoptions.

58. Lastly, a judgment of the local Additional Sub-Court in Original Suit No. 40 of 1902 (Exhibit 123) is relied on for the defence, in which the adoption of a daughter's son among the Vaisyas of Rajahmundry was recognised on the authority of *Vayidinada* v. *Appu* (27) in the absence of any evidence adduced by either party.

59. Besides speaking to the specific instances of adoption of a daughter's son or brother's daughter's son or a sister's son, many of the defence witnesses also refer in their depositions to other instances within their knowledge and also to the existence of a custom in regard to such adoptions in general. Their evidence, as a whole, indicates to their belief in the validity of such adoptions on the basis of custom.

60. Then, coming to the rebutting evidence adduced on the plaintiff's behalf, his statement B analyses the evidence under four classes. Class I consists of the evidence of the plaintiff's witnesses that speak to cases where a person, having daughter's sons eligible for adoption, adopted a brother's son or a *gnati* or other *sapinda*, giving some property to the daughter's sons. The witnesses Nos. 2, 5, 15, 18, 20, 21, 24, 37, 38 and 41, speak to cases of adoption of brothers' sons, Nos. 1, 9, 16, 19, 22, 29, 31, 32, 33, 34 and 36 of adoptions of *sagotras*, and the others of adoption of *gnatis*. Class II consists of cases where a person, having daughter's sons whom he could have adopted, distributed the property among daughter's sons without adopting any one. Class III consists of cases in which a person appointed one of the daughter's sons to perform his obsequies, etc., giving him a large portion of his property and giving smaller portions to the other daughter's sons. Some of the cases in the said three classes are also supported by documents in reference to the distribution of property. Under class IV is set forth the evidence of plaintiffs' witnesses, some of whom are also Pandits, who state that they are not aware of the custom and that the adoption of a daughter's son or sister's son is prohibited by the Sastras. Some of them also say that they intended to adopt daughter's sons, but that they adopted others among their *sagotras* or *gnatis*, etc., on being told that such adoptions were prohibited by the Sastras, and also on the ground that they were not satisfied with the existence of such a custom as would warrant an adoption of the kind (plaintiff witness No. 4).

61. For the plaintiff, reliance is also placed on a case that came up before the District Munsif's Court, Narasapur, in Original Suit No. 102 of 1868, in which the adoption of a sister's son was held to be invalid. In that case, the adoption itself was held to be true, though made without the authority of the husband. The decision in that case proceeded on the general law as laid down in *Narasammal* v. *Balaramacharlu* (28) and *Jivani Bhai* v. *Javu Bhai* (37). No custom was pleaded in that case, nor was there any inquiry about the same.

62. In reference to the evidence of plaintiff's witness under classes I to III of his Statement B, it may be observed that the custom relied on for the defence is not an imperative or obligatory custom binding on the community in general as in the case of inheritance or succession, but only an optional one limited in its operation. It is not the defendants' case that every childless man having a daughter's son when making an adoption is bound by the custom to adopt him alone in preference to another. What is claimed for them is only that the custom or usage permits the adoption of a daughter's son also at the choice and selection of the adopter.

63. As to the choice of a boy for adoption according to Sastras and how it has been

(37) 2 M. H. C. R. 462.

varied gradually Mr. Mayne in his Hindu Law, observes as follows at page 171:—

"Hence, in the first place the nearest male *sapinda* should be selected, if suitable in other respects, and, if possible, a brother's son as he was already, in contemplation of law, a son to his uncle. If no such near *sapinda* be available, then one who is more remote; or in default of such, then one who was of a family which followed the same spiritual guide, or, in the case of Sudras, any member of the caste. Probably, this rule was strengthened by the feeling that it was unjust to the members of the family to introduce a stranger if a near relative was available. Originally, it seems to have been a precept. Subsequently, it sunk to a mere recommendation. It is now settled that the adoption of a stranger is valid even though relatives otherwise suitable are in existence."

64. The above being the law as to the selection of a boy in adoption, a childless Hindu may choose to follow the strict letter of the law by adopting a *sapinda* or *sagotra*, in the order of preference, or a stranger, or may adopt a daughter's son according to accepted custom, if one should be in vogue, Adoption itself being optional, he may not for reasons of his own, adopt anybody at all, but make an arrangement for distribution of his property at his pleasure. That being so, the instances included in classes I to III of plaintiff's statement do not seem to be of any real importance as disproving the custom relied on for the defence.

65. As to the evidence of plaintiff's witnesses under class IV, the persons concerned are apparently followers of the orthodox view, who prefer to act in accordance with the strict letter of the Sastras. The custom relied on in this case being, as already stated, of a restrictive operation it may be that the plaintiff witnesses and other persons in the community for the matter of that, may not be directly aware of the existence of the custom, having apparently had no occasion to have knowledge thereof. In the case of a custom, what the law requires seems to be not that each and every member of the community should have direct knowledge thereof which cannot be expected in the ordinary course of human conduct especially in regard to a permissive custom, but only that the persons following it should act, under the conviction that they were acting in accordance with a custom understood to have the force of law and (understood) not to be merely a repeated violation of law, and that the community coming into contact with such acts should acquiesce therein. According to the case in *Gopalayyan* v. *Raghupatiayyan* (31), already cited, such a conviction or consciousness has to be inferred from the acts of the kind, acquiescence in those acts, their publicity and so on. The acquiescence in such acts would, in general, be, on the part of the members of the community who get cognizance thereof by direct knowledge or information and also on the part of the Government, etc., See *Ohain Sukh Ram* v. *Parbati* (29). The case in *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (38), related to an obligatory custom of general application, and is thus clearly distinguishable.

66. The affiliation of a *Putrika Putra* or appointed daughter's son is as old as Hindu Law, and according to the *Vayidinada* v. *Appu* (27), the practice of the adoption of a daughter's son is referable to the old doctrine of *Putrika Putra*, though now obsolete. The custom of such adoptions has been in vogue among Brahmins in several parts of this Presidency and elsewhere, as stated already in paragraph 10 above; and if Brahmins in the Andhra Districts of the Presidency in practice make such adoptions it cannot be deemed that they did so without consciousness of the old Hindu Law as to *Putrika Putra* or of the custom in vogue in different parts of the Presidency. No Brahmin with any sense can be expected to go through such a serious act as an adoption for the mere fun of it, unless he be fully conscious of its efficacy; and the Andra Brahmins, as the plaintiffs would have them, must indeed be a peculiar people if they make adoptions without such consciousness and conviction.

67. As for the acquiescence of the community in such acts, there is a large enough body of evidence on the defence side to show that such adoptions were made with due publicity and that they were acquiesced in by the relations and other members of the public. In some of the instances adduced in the case, the adopter held *mirasi* office, to which the adoptee succeeded with the sanction of the Government. The plaintiff's witnesses them-

(38) 10 B. 528 at p. 543; 5 Ind. Dec. (N. S.) 742.

selves do not say that the persons that made adoptions of the kind were ostracized by the society or subject to other similar inconvenience. The plaintiff's own witness, C. Subbavadhanlu (Exhibit A), who, on his own showing, is an orthodox man versed in the Sastras and who professes to have declared the invalidity of the adoption proposed to be made by Sivarama Doss of Instance No 5, himself fixed the *muhurtham* for the adoption, graced the ceremony with his presence and took his *sambhavana* duly. Such conduct on the part of an orthodox Pandit like the witness indicates that persons of his like entertain no particular repugnance or abhorrence in reference to such adoptions, though they may not themselves have recourse to them in their own case, but prefer to act up to the letter of the Sastras. And, as indicated in the ruling in *Vayidinada* v. *Appu* (27), the rebutting evidence in such cases ought to be directed to show "that the members of the community declined to recognise sons so adopted as validly adopted, or that the custom is repugnant to the general sense of the community or that it is regarded as made in violation of law," the expression "law" used in the ruling being understood to be customary law, since otherwise every custom would in a sense be a violation of the Sastraic injunction. (See Mayne's Hindu Law at pages 56 and 57 quoted in paragraph 7, above). In *Basava* v. *Lingangauda* (39), his Lordship Justice Ranade says that, "Not a single case was shown on the defendant's behalf where the adoption of an only son by the Lingayats of these parts was disowned or repudiated by the people or their rulers, native or British." In *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshamma* (40) their Lordships of the Privy Council refer to the absence of resentment on the part of the people and of conflict between the decided law (customary) and the feeling of the people, in upholding the validity of the adoption of an only son. In the present suit, it is not shown for the plaintiff that the adopted sons were disowned by the community or that the custom is repugnant to the general sense of the community or that the community feels any resentment in such matters. It is not also shown that the adoptions are regarded by the community in general as violations of the (customary) law, though they may not be in accordance with the letter of the Sastras. As put by the plaintiff's own witness Dasaradha Padi, (Exhibit HH.2), such adoptions would seem to be regarded merely as *Gounapakhsham* (secondary), while adoptions made in accordance with the Sastras are deemed *Mukhyapaksham* (principal or primary).

68. Thus, the rebutting evidence adduced for the plaintiff as a whole does not seem to be of material consequence.

69. Of the 65 instances of adoptions for the defence, 46 are of daughters' sons (1 to 9, 11 to 16, 18 to 23, 25 to 35, 39 to 41, 43, 46, 48, 49, 54, 55, 57, 60, 62, 64 and 95), 6 of a brother's daughter's son (10, 17, 24, 37, 38 and 42) and the remaining 13 are of sister's son. Of these instances, 28 are from the Ganjam District, 9 from the Godavari District, 20 from Kistna, 7 from Guntur and one from Nellore. Of the 28 instances from Ganjam, 22 (44 to 65) relate to Uriya-Brahmins; and of the rest, 6 (Nos. 9, 15 16, 23, 29, and 41) to Vaishnava Brahmins living in the other districts. Of the total instances, 10 instances (Nos. 14, 19, 20, 25 to 30 and 43) being held as not properly established, there yet remain 55 instances. Of these, 5 relate to Vishnavites and 22 to Uriya Brahmins and 28 to Andhra Brahmins. Besides these, there are also the Brahmins two Wills (Exhibits 61 and 126) under which Andhra Brahmins authorised their wives to adopt their daughters' sons.

70. As to the instances from the Uriya Brahmins and the Vaishnavites the plaintiff's contention is that they are not relevant at all in reference to a custom among the Andhra Brahmins. It is no doubt true that the Uriya Brahmins come among the Pancha Goudas following the Bengal School of law and are given to animal food, and some of them (the Holuvas), who follow agriculture as a profession (Exhibit 138-t), are rather lax in their religious observances but, as spoken to by the plaintiff's witness, Dasaradha Padi, the law as to marriage and adoption is the same to the Uriya

(39) 19 B. 428 at p. 459; 10 Ind. Dec. (N. S.) 289.
(40) 22 M. 398 at p. 427; 21 A. 460; 1 Bom. L. R. 226; 3 C. W. N. 427; 9 M. L. J. 67; 26 I. A. 113; 7 Sar. P. C. J. 330; 8 Ind. Dec. (N. S.) 286; 9 Ind. Dec. (N. S.) 1001.

Brahmins and the Andhra Brahmins. His evidence on the point is as follows: —

'We observe only Karmas in keeping with the Vedas. Yagnavalkya and Mitakshara are our Dharma Sastras. The Sruthi relating to adoption is one and the same for us and the Andhras. * * * We do not marry girls who have already attained puberty. * * * Widow marriage is not in vogue among us. * * * The duties laid down in the Vedas are observed in one and the same manner by all Brahmins."

In view of this evidence, it does not appear that there are any essential differences in law as to marriage or adoption between the Uriya Brahmins and the Andhra Brahmins. Further, the Uriyas have been residing in close proximity with the Andhras of Ganjam for several generations, so that there would seem to be no serious objection to the Uriya instances also being taken into consideration in this case in view of the scope of the issue as settled. Further evidence in regard to such instances having been ruled out by the learned Sub rdinate Judge, Cocanada, in his judgment in the previous litigation between the parties (Exhibit GG), their Lordships of the High Court in their appeal judgment (Exhibit 122) were of the opinion that such evidence was relevant and should be obtained. And, when, in their Lordships' opinion, the evidence of the Uriya witnesses was relevant, a similar principle must apply to the Vaishnava cases, as well.

71. Even if the Uriya and Vaishnavite instances objected to for the plaintiff be excluded, there would still be 23 instances relating to Andhras. With these must be remembered the two cases of sister's son's adoption from Cuddapah and Madras Town referred to in *Vayidinada* v. *Appu* (27) as accepted by the Courts in 1906 and 1859 (see paragraph 10 above). The instances under notice cover a period of over 80 years from 1832 and come from four of the principal Andhra Districts. It is not to be supposed that the defence in the present case has been able to exhaust all cases of such adoptions in the Telugu country and the custom set up being itself of a limited operation, the absence of a larger number of instances placed before the Court may not be deemed to be a serious defect. In reference to a similar matter his Lordship Justice Ranade observes thus in *Basava* v. *Lingangauda* (39):

"Of course it has never been contended that every person adopting a child was bound to adopt an only son. Cases of adoptions of one, out of many sons will naturally be more numerous. But this preponderance by itself will not invalidate the adoptions of only sons when the custom was properly proved."

These remarks apply quite well to the present case also.

72. The custom in the present case has been shown to have been in vogue for 80 years; and, according to the ruling in *Mahamaya Debi* v. *Haridas Haldar* (41), evidence showing the exercise of a right in accordance with an alleged custom as far back as living memory can go, raises the presumption, though a rebuttable presumption, as to the immemorial existence of the custom. The custom set up in this case being according to the 9 Madras case, [*Vayidinada* v. *Appu* (27),] referable to the affiliation of appointed daughter's son recognised by the old Hindu Law, it may be taken to have been in vogue among Brahmins in general from time immemorial. There is also a text of Yama, quoted in Ghose's Hindu Law, 3rd Edition, Volume I, pages 683 and 755, which says that in adopting the daughter's son and the brother's son no ceremonies are required.

73. In view of the foregoing, the custom relied on in the present case must be held to be an ancient one. So far as the limited character of the custom under notice admits, the evidence also establishes the general uniformity and continuity of the custom. The various instances adduced in the case and the general acquiescence therein by the community without feeling any repugnance or resentment over the same, also indicates a conviction on the part of those following it that they have been acting on accordance with a customary law binding on them. The evidence on record, so far as it goes, must also be held to be clear and unambiguous; and it is not the plaintiff's case that the custom is immoral or opposed to public policy.

74. I accordingly hold on the 10th issue that the custom of adopting a daughter's

(41) 27 Ind. Cas. 400; 42 C. 455 at p. 472; 19 C. W. N. 208; 20 C. L. J. 183.

son or a sister's son obtains among Brahmins of the Andhra or Telugu portion as in the rest of the Madras Presidency.

75. 12*th issue* :—The allegation in paragraph 6 of the plaint is to the effect that, after the birth of the plaintiff, in or about July 1877, the first defendant recognised him as heir to the estate entitled to succeed on her death, ceased to perform the annual and other ceremonies of her husband and appointed plaintiff to perform all such ceremonies in his own right.

76. In reference to this allegation, there is no direct evidence to show that first defendant specifically recognised plaintiff as heir to the estate on her death. The deposition of the defendants' own witness, N. Krishnayya (Exhibit A—68), the family *purohit* of the first defendant, however, shows that the *mahalayams* and annual ceremonies of first defendant's husband were being performed on the *karthavyam* of the plaintiff even prior to the first adoption of the second defendant in 1900. The evidence of the witness on the point clearly goes in corroboration of the testimony of the plaintiff's father (Exhibit A-63) and his deceased maternal aunt's husband (Exhibit A 36) that the transfer of the *karthavyam* to plaintiff's name in regard to the ceremonies of first defendant's husband took place soon after plaintiff's birth in 1877. It must, therefore, be held that the circumstances alleged in paragraph 6 of the plaint as to transfer of the *karthavyam* are true.

77. Next, as to the effect of such transfer, the first defendant, as widow of the deceased, was bound to perform the ceremonies of her husband on her own *karthavyam*, and any transfer of *karthavyam* to another person would be invalid according to Sastra-unless it be to a person validly adopted by her. If she purported to transfer the *karthavyam* to any other, her act would amount to a mere delegation of her power and can have no binding effect either on her or her adoptive son. The transfer of *karthavyam* to plaintiff after his birth no doubt shows that the lady had then no idea of taking any body in adoption; but I do not think her then conduct in the matter debars her for ever from changing her mind and making an adoption later on, if she has otherwise authority for so acting.

78. With these remarks, I hold on the 12th issue, that the circumstances set forth in paragraph 6 of the plaint are substantially true, but that they cannot render second defendant's adoption invalid, if it should be held to be otherwise valid.

79. 13*th issue* :—The plaint estate of Vegayammapeta is included in the Schedule appended to the Madras Impartible Estates Act (II of 1904), and as such the succession to the estate will be by the rule of primogeniture. The custom of lineal primogeniture as applying to the estate was set up by first defendant's father in-law, Somappa (II), as against his paternal uncle, Wumapati, and he succeeded in establishing the same in Original Suit No. 47 of 1834, on the file of the Principal Court of Appeal for the Northern Division. See the revised decree of the Court, Exhibit 131, and the pedigree, (Exhibit I). In a subsequent litigation brought against the first defendant by *agnati* of her husband after the latter's death, Original Suit No. 5 of 1876 on the file of the Sub-Court, Cocanada, their Lordships of the Privy Council say in their judgment, Exhibit MM-1, that it was not disputed before them in that case that the Zemindari, according to an ancient custom, was impartible and that it had been held and enjoyed by the eldest male member in the direct line up to and inclusive of Somappa (I), the grandfather of first defendant's father-in-law, Somappa (II). In that litigation, and in the course of an intermediate litigation between first defendant's husband and a widowed daughter-in-law of his paternal grand-uncle in 1854, the first defendant and her late husband no doubt relied on a family arrangement, under which the estate was assigned to his father and also succeeded in their plea; but that cannot affect the custom of lineal primogeniture in reference to the estate which his father had succeeded in establishing in the earliest litigation, especially when the family arrangement itself proceeded in accordance with the pre-existing custom. Their Lordships of the Privy Council in the suit of 1873 advert to the decision of the Provincial Court with approval so far as it went; and all that they say in the penultimate paragraph of their judgment, Exhibit MM-1, is that it was immaterial for the purpose of the litigation before them to decide who would have been entitled to

succeed under the custom if the estate had remained part of the joint family property.

80. I, therefore, find on the 13th issue that the succession to the plaint estate is governed by the rule of lineal primogeniture. It must, however, be observed that a decision on this issue is not quite important for the purpose of this suit since, barring second defendant's adoption, the plaintiff would be the heir, whether the ordinary or lineal rule of primogeniture governs the succession.

81. 16*th issue* :—Clause 3 of section 4 of the Madras Impartible Estates Act (II of 1904) provides in express terms that nothing in that section shall be construed to restrict the power of the owner of an impartible estate to provide for the succession thereto in default of heirs. The first clause of the section prohibits an alienation of the estate except under certain circumstances ; but it does not prohibit the creation of an heir by adoption according to the Hindu Law. Such adoptions can be made under law not only by a male owner but also by his widow with his authority or with the assent of *sapindas*. It is no doubt contended for the plaintiff that an adoption by a widow, when it is made with the assent of *sapindas* is a sort of alienation ; but I feel unable to accept the position that an adoption of the kind can be held to be the equivalent to an alienation.

82. I accordingly find on the 16th issue that the adoption in dispute is not contrary to the provisions of the Impartible Estate's Act.

This appeal coming on for final hearing on the 19th April 1920, after the return of the finding of the lower Court upon the issues referred by this Court for trial, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—No objection has been taken before us to the findings on issues Nos. 12, 13 and 16, which are against plaintiff, or to the finding on issue No. 9 in his favour that the adoption of a daughter's son is invalid under Hindu Law. Argument has been confined to the finding on issue No. 10 that custom authorizes such an adoption among Telugu Brahmins such as the parties. We concur in that finding and in the lower Court's reasons for it and, therefore deal shortly with the objections advanced here against it.

The Telugu country begins, roughly, north of the City of Madras, being bounded on the south by the Tamil Districts and on the north by the Uriya, though there is, particularly in the case of the latter, no sharp division. The materials before the lower Court consisted, firstly, in general evidence on the side of plaintiff, that such adoptions were not recognised as valid by Telugu and Uriya Brahmins, secondly, on the side of second defendant in evidence, that they had taken place in a sufficient number of instances in the Telugu and Uriya country to establish a custom.

The general evidence consisted in a number of statements, Exhibit HH series. But it was inconclusive in the case of two witnesses, who merely said that the adoption of a sister's son was avoided in their families on occasions on which it would have been possible, as contrary to law and custom. In other cases it consisted only in assertions by persons described as Pandits, who, if their competence in this branch of knowledge is presumed, would ordinarily be prone to depreciate any preference for custom over adherence to the injunctions of the texts, by the study of which they live. In fact, some of them, Dasaradha Padhi, Appanna Sastri, Lokhanada Misra and Ananta Doss, mentioned instances of the adoption of a sister's son without referring to any consequent social or religious stigma being imposed. Nothing of any value was established by these witnesses.

The lower Court has dealt with the evidence relating to the instances relied on by second defendant with great caution and no objection has been taken to its conclusion that twenty-seven cases of adoption of a daughter's son in the Telugu Districts have been proved. It is said that some of these cases are inconclusive, because they are recent. But the proportion of recent cases is not unduly high in view of the greater care with which evidence relating to them would be obtainable ; and there is no suggestion that in any the adoption was made to create evidence for this trial. It is pointed out next that in some cases there was, besides the adoption, a document transferring pro-

perty to the adopted son consistently with the existence of doubt as to his position. But it is possible that this was due to a desire to prevent future litigation and this is probable in at least three cases, in which the adoptive fathers were persons of marked respectability, a member of the Legislative Council, a well-known Vakil, and a person on whom Government had conferred the title of Diwan Bahadur. Then it is argued that some, who speak to these adoptions, describe them as authorized by law, not custom. But these descriptions are so plainly wrong and the competence of those concerned to give them so small, that they may safely be ascribed to a natural and very ordinary desire to make no explicit innovation and to their inability as laymen to draw a legal distinction. Lastly, in six cases there is the objection that the families in question are those of Tamil immigrants in Telugu country and that, as they have brought their Tamil customs with them, their adoptions add nothing to the argument from the instances afforded by Telugu families proper. It does not, however, appear from the evidence that in any case the immigration was recent or that the adoptions in question were regarded with dislike or suspicion in their Telugu surroundings. Such a custom would be followed only at long intervals and on rare occasions. There is, therefore, no sufficient reason for discarding these six cases from consideration.

Argument has next been directed against the relevancy and weight of the remaining twenty-two instances relied on, on the ground that they occurred not in Telugu, but in Uriya families; and a similar argument has been attempted against the relevancy of the fact that adoptions of a daughter's son were held to be authorised by custom in the Tamil districts in *Vayidinada* v. *Appu* (27). The exhaustive judgment in that case no doubt dealt statedly only with the southern districts; and reference has also been made to the fact that it was to some extent, founded on the commentary of Vydianadha Dikshitar, a work alleged to be authoritative only in them. But there is no reason for supposing that the scope of the decision was limited to the southern districts for any reason but that the case before the Court came from Tanjore and there had naturally to be some limit to the collection of instances in support of the custom relied on; the argument from the reference to Vydianatha Dikshitar is answered by the observation that his commentary was afterwards treated as authoritative in *Brindavana* v. *Radhamani* (42), a case from Ganjam, a Telugu and Uriya district; and in fact in *Vayidinada* v. *Appu* (27) one instance relied on was from another Telugu district, Cuddapah. As regards the Uriya instances before us, there is nothing to support a distinction between the custom they support and that of the Telugu country. It has been pointed out that the territorial division between Telugus and Uriyas is particularly indefinite. The witnesses for plaintiff, of whom Dasaradhi Padhi, already referrred to, is the clearest, refer only to differences in ritual, to marriage with maternal uncle's daughter and to fish diet as peculiar to Uriyas, not to anything of significance in the present connection. Although Tamil, Telugu and Uriya Brahmins differ in language and residence, all alike, so far as we have been shown, agree in acceptance of Hinduism and of the Mitakshara Law; and we can see no reason why the judicial recognition in *Vayidinadha* v. *Appu* (27) of the custom now in issue as binding on the first mentioned and the evidence of instances in which it has been followed among the last, are not relevant and are not of material weight.

It remains to refer to six instances of adoption of a brother's daughter's son, which have also been proved. We need say only that the validity of such adoptions was regarded as standing on the same footing as that of adoptions of a daughter's son in *Vayidianada* v. *Appu* (27) and that in both the natural mother would be equally debarred from marriage with the adoptive father.

We, therefore, accept all the fifty-five instances, which the lower Court held to be established, as relevant and, in the absence of anything to rebut the inference from them, we regard them as sufficient to prove the custom alleged. It should be added that this conclusion is in accordance with the opinion in placitum 88, Strange's Manual of Hindu Law, 2nd Edition, page 22, the learned author abandoning therein the limitation to South India, expressed in placitum 92 of the First Edition of his work, page 17, and referring to a

(42) 12 M. 72; 4 Ind. Dec. (N. S.) 399.

proceeding of the Sudder Court as his authority. We accept the lower Court's finding and, therefore, we allow the appeal, dismissing the suit with costs throughout.

M. C. P.

Appeal allowed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1461 OF 1917.
July 19, 1920.
Present:—Mr. Justice Sulaiman and
Mr. Justice Gokul Prasad.
RAMANAND AND OTHERS—PLAINTIFFS—APPELLANTS
versus
JAI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Pre-emption suit—Decree awarding possession on payment of purchase-money—Money paid—Possession not obtained—Suit for possession, whether maintainable.

Where a person obtains a decree in a pre-emption suit for possession on payment of the purchase-money and pays the money, but fails to obtain possession, he is not entitled, by virtue of section 47 of the Civil Procedure Code, to maintain a fresh suit for possession on the basis of the decree. [p. 633, col. 2.]

Second appeal from the decision of the Additional Judge, Mainpuri, dated the 8th September 1917.

Messrs. *Piare Lal Banerji* and *Gulzari Lal*, for the Appellants.

Mr. *G. Agarwala*, for the Respondents.

JUDGMENT.—This appeal has been referred to a Division Bench, as the learned Judge before whom it originally came on for hearing doubted the correctness of the rule of law laid down in *Lakhrani Kuar* v. *Dhanraj Singh* (1). As all the authorities did not seem to have been laid before us in argument we took time to consider our judgment.

It appears that in 1905 the present plaintiffs brought a suit against these very defendants to pre-empt the property which is now in dispute. On the 28th April 1905 a compromise decree was passed, according to which the plaintiffs were to obtain possession of the property if they paid Rs. 1,000, within three months of the decree; in case of default, the suit was to stand dismissed. The plaintiffs paid that amount within the specified period but obtained possession neither through the Court nor privately. On the 25th April 1917, long after the period of limitation for an application for execution had expired, but within twelve years of the last decree, the plaintiffs instituted the suit, out of which this appeal has arisen, for recovery of possession of the property decreed to them previously. The Court of first instance, after much hesitation, felt bound to follow the case referred to above and decreed the suit. The lower Appellate Court has refused to follow it in view of certain observations made in the Letters Patent Appeal from it. In that case a Single Judge of this Court had held; "the plaintiff while in possession of the land in question was wrongfully dispossessed by the defendant and I hold that the plaintiff is entitled to succeed on that ground." This was perfectly correct. He, however, went on to hold that, even apart from that, the plaintiff was entitled "to sue and succeed" upon the previous decree.

In an appeal under the Letters Patent [*vide Dhanraj Singh* v. *Lakhrani Kuar* (2)] it was held that the plaintiff having got actual possession, though out of Court, and having been subsequently dispossessed, was entitled to bring a fresh suit. The learned Judges, referring to the view that it is always open to a decree-holder to bring a suit on the decree at any time within twelve years notwithstanding that the decree has become incapable of execution by lapse of time, remarked: "This dictum, if correct, would mean that suit after suit could be brought upon barred decrees. If this is correct law, it is a very alarming situation." They were inclined to hold that section 47, Civil Procedure Code, would be a bar to such a suit, but did not think it necessary to say anything further as the point was not necessary for the decision

(1) 32 Ind Cas. 684; 14 A. L. J. 102.

(2) 35 Ind. Cas. 601; 14 A. L. J. 709; 38 A. 509.

of that case and the question had not been fully argued before them.

There can be no doubt of the general principle, "that where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained," per Baron Parke in *Williams* v. *Jones* (3). The same principle was recognised in Civil Law where the action founded on the prior judgment was known as the *actio judicata*. Such an action may be treated as another form of execution, but the Legislature may prohibit it and prefer the more summary method. We must, therefore, examine the provisions of the Civil Procedure Code, and also review the authorities, in order to see how these provisions have been interpreted and applied.

The case of *Doobee Singh* v. *Jowkee Ram* (4) may be put down as the earliest authoritative case of our own Provinces. There the plaintiffs had obtained a decree awarding to them one-half of an orchard and directing possession to be given to them. They remained inactive for upwards of three years, and then brought a fresh suit for possession. A Full Bench of five Judges enunciated the law as follows: "where a decree is merely declaratory and does not require to be carried into effect by process of execution, the right thereby declared and ascertained exists independently of any process for enforcing it. But when the nature of the decree requires that it should be executed, a decree-holder cannot, after allowing the limitation period to lapse without issuing process of execution, seek by a fresh suit on the decree to obtain that which he should have sought for by execution."

In *Ram Jus Rae* v. *Ram Narain* (5) two out of the three Judges re affirmed the same principle and held that section 11 of the Act XXIII (to which section 47 of the present Code corresponds) had taken away the right of a decree holder to recover in a subsequent suit founded on his decree what he could enforce by execution in the ordinary way.

In *Sheikh Golam Hossein* v. *Musammat Alla Rukhee Beebee* (6) the same principle was even extended to a redemption suit. A Full Bench of five Judges again laid down that, where by a former adjudication persons became entitled to a remedy by process of execution for the recovery of possession, and by their own neglect they have lost this remedy, they cannot be permitted to revert to the position which they held prior to the institution of that suit and to ask for a remedy by suit. The provisions of section 60 of the Transfer of Property Act have, perhaps, made the principle no longer applicable to redemption suits, *vide Sita Ram* v. *Madho Lal* (7). But we have not been able to find any recent case of our own High Court in which the soundness of that principle has been doubted.

The Madras High Court has adhered to the same view. In the case of *Sanjeeviyah* v. *Nanjiyah* (8) it was held that a suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the *Mofussil*, the right of suit in such a case being taken away by section 11 of Act XXIII of 1861.

In the case of *Muttuvelu Pillai* v. *Vythilinga Pillai* (9) it was laid down that that section takes away from the parties the right to try by a fresh suit any question relating to the enforcement of the terms of the decree by process of execution, and, in accordance with the whole policy of the law of procedure, makes every such question determinable by an order in a summary proceeding before the same Court in the course of execution. And the same principle was followed in the case of *Kangnasary* v. *Shapyani Asary* (10) and in the case of *Sungara Narayan Pillay* v. *Sandira Pillai* (11).

In the Full Bench case of *Periasami Mudaliar* v. *Seetharama Chettiar* (12) which was not a case of a suit on a judgment,

(3) (1845) 67 R. R. 767; 13 M. & W. 628; 14 L. J. Ex. 145; 2 Dowl. & L. 690; 153 C. R. 262.

(4) 8 Agra H. C. R. 381; Agra F. B. Ed. 1874, 172.

(5) 2 N. W. P. 382.

(6) 3 N. W. P. 62.

(7) 24 A. 44 (F. B.); A. W. N. (1901) 194.

(8) 4 M. H. C. R 453.

(9) 5 M. H C. R. 185.

(10) 5 M. H. C. R. 375.

(11) 6 M. H. C. R. 13.

(12) 27 M. 243 (F. B.); 14 M. L. J, 84.

but one to enforce a Hindu son's pious obligation to discharge his father's debts, it was, however, observed on page 249* that "as against the judgment debtor himself or against his legal representative (who as such is equally bound by the judgment) it has long been held that under the Indian Processual Law the remedy is only by way of execution of the decree, and that no suit could be brought upon the judgment."

Following the old English practice of entertaining suits on judgments of the County Courts, a practice at one time grew up in Bombay under which suits on judgments of Small Causes Courts were allowed, till this had to be put a stop to after the enactment of section 94 of Act XV of 1852. But as for suits on decrees of an ordinary Civil Court the Bombay High Court does not appear to have permitted them.

In the case of *Manchharam Kalliandas* v. *Bakshe Saheb* (13) a suit for possession which had been granted by an unexecuted decree was held not to be maintainable.

In the case of *Kisan Nandram* v. *Anandram Pachaji* (14) the plaintiff's father had obtained a decree for possession which, however, was never executed. It was held that the remedy by a separate suit was barred by section 11 of Act XXIII of 1861.

In the case of *Sayad Nasrudin* v. *Vankatesh Prabhu* (15) it was remarked that section 11 of Act XXIII of 1861 and the decisions under that section seem to shut a plaintiff, who has failed to obtain execution of a decree in his favour, from making that decree the basis of a further suit, or from obtaining, by means of a subsequent suit, that which, by adopting the proper means, he might have obtained in execution; and that the recognition of such suits would tend to prolonged and possibly endless litigation, and so defeat the purpose of the Limitation Act.

In the case of *Fakirapa* v. *Pandurangapa* (16) it was pointed out that the practice of the Bombay High Court to entertain suits upon judgments of Courts of Small Causes was peculiar and too long to be disturbed though it might have been better if such a practice had never been initiated; that it was perhaps based on the fact that the Civil Procedure Code, with a few unimportant exceptions, had not been applied to the Bombay Court of Small Causes; but that no suit would lie upon a decree the execution of which was barred by limitation.

In the case of *Merwanji Nowroji* v. *Ashabai* (17) it was decided that even before the prohibition contained in section 94 of Act XV of 1882 a judgment-creditor in the Court of Small Causes had not the right to sue on his judgment, and that the provisions of the Civil Procedure Code preclude a judgment in a Court regulated by that Code being enforced by a separate suit.

The Calcutta High Court, though formerly upholding the view that no suit on judgment lies, has subsequently gone back the other way. In the case of *Sandes* v. *Jomir Shaikh* (18) it was held that a suit cannot be maintained in a Small Cause Court to recover the unsatisfied balance of a decree of such Court. This was followed in the case of *Moonshi Golam Arab* v. *Curreembux Shaikhjee* (19) where it was held that no suit would lie in the High Court in a decree of the Court of Small Causes. A dissenting note, apparently for the first time, was struck by Wilson, J., in *Attermoney Dossee* v. *Hurry Doss Dutt* (20). The learned Judge held that, as a general rule, a suit lies upon a decree unless the right is taken away by Statute, and that, in his opinion, there was nothing in Act X of 1877 to prevent such a suit. It is unfortunate that this case was decided *ex parte*, there being no one on behalf of the respondent to present the contrary view. Neither section 244 (*c*) of Act X of 1877 nor the previous cases seem to have been brought to his notice. This case was followed by another Single Judge of the Calcutta High Court in *Annoda Prasad* v. *Nobo Kishore Roy* (21) where a suit on an order of the Insolvency Court for payment of costs was held to be maintainable on the

(13) 6 B. H. C. R. 231.
(14) 10 B. H. C. R. 433.
(15) 5 B. 382; 3 Ind. Dec. (N. S.) 251.
(16) 6 B. 7; 3 Ind. Dec. (N. S.) 461.
(17) 8 B. 1; 4 Ind. Dec. (N. S.) 375.
(18) 9 W. R. 399.
(19) 5 C. 294; 4 C. L. R. 477; 2 Ind. Dec. (N. S.) 798.
(20) 7 C. 74; 4 Shome L. R. 162; 9 C. L. R. 357; 3 Ind. Dec. (N. S.) 597.
(21) 33 C. 560; 9 C. W. N. 952.

*Page of 27 M.—*Ed.*

ground that section 244 of Act XIV of 1882 was inapplicable, and that the suit must be held to have been based on a new cause of action as afforded by the previous judgment.

In the case of *Ashi Bhushan Dasi* v. *Pelaram Mandal* (22) a decree had been obtained against an alleged adopted son (as the representative of the wrong doer) under the guardianship of the deceased's widow, but the adoption was found in another suit to be invalid. Mookerjee, J., threw out a suggestion that "the remedy of the decree holder might possibly be by way of a suit against (the widow) if it be still open to him to sue her successfully in view of the provisions of the Statute of Limitation."

In the case of *Kalikananda Mukerji* v. *Bipro Das Pal Chouduri* (23) one of the defendants having died, a co-defendant was substituted in his place as his legal representative, and the plaintiff having refused to make the widow a party the suit was decreed. In a subsequent litigation it was found that the widow of the deceased was his successor and legal representative. The plaintiff, being unable to execute his decree as the deceased's estate was in the possession of the widow, brought a suit for a declaration that the estate in the widow's possession was liable to pay the decretal amount. It was held that the suit was not maintainable as a suit on a judgment.

The case of *Kali Charan Nath* v. *Sukhada Sundari Debi* (24) was a suit for recovery of money. The defendant died during its pendency leaving a Will whereby he had appointed the wives of his sons executrices to his estate, the plaintiffs being unaware of the existence of the Will substituted his sons in his place and got a decree. It was held that the executrices were not bound by the decree and the decree could not be executed against the estate in their hands. The learned Judges went on, however, to remark: "At the same time, it is clear that a suit can be brought against the executrices on the basis of the judgment already obtained", and referred to a number of English and Indian cases, pointing out some divergence of judicial opinion on the matter.

It will be noticed that in both the cases in *Ashi Bhushan Dasi* v. *Pelaram Mandal* (22) and *Kali Charan Nath* v. *Sukhada Sundari Debi* (24) the remarks of the learned Judges on the point were purely *obiter dicta* and wholly unnecessary for the disposal of those cases. Further, those cases are distinguishable, inasmuch as in each the decree could not possibly be enforced, the real heirs of the deceased not being a party to it. These cases can, therefore, be no authority for the proposition that a second suit on a judgment is maintainable in spite of the provisions of section 47, Civil Procedure Code.

We have given our best consideration to the question before us, and we are of opinion that, both on authority and on a correct interpretation of section 47, Civil Procedure Code, the present suit was not maintainable. Stripped of all unnecessary details, the relief claimed by the plaintiffs, in substance, amounts to asking for the fruits of a decree which they are unable to execute owing to lapse of time. The suit in effect does raise a question "relating to the execution, discharge or satisfaction" of the former decree and cannot be determined by a separate suit. The plaintiffs' claim in reality is that they obtained a decree for possession of this property, the defendants have not given them possession in spite of the said decree, and, therefore, the Court should compel the defendants to carry out their obligation under that decree. In our opinion such a suit falls clearly within the purview of section 47 and if it were not we fail to see what other form of suit would.

We may note that Article 122 of the Limitation Act can in no way help the plaintiffs. As was observed in the case of *Hari Nath Chatterjee* v. *Mohunt Mothurmohun Goswami* (25), the intention of the Law of Limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. In fact, the Limitation Act assumes the existence of a cause of action and does not define or create one.

(22) 21 Ind.Cas. 519; 18 C. L. J. 362; 18 C. W. N. 178.

(23) 26 Ind. Cas. 436; 19 C. W. N. 18 at p. 19; 21 C. L. J. 265.

(24) 30 Ind. Cas. 824; 20 C. W. N. 58; 22 C. L. J. 272.

(25) 20 I. A. 183 at p. 192; 21 C. 8 (P. C.); 17 Ind. Jur. 481; 6 Sar. P. C. J. 334; 10 Ind. Dec. (N. s.) 638,

We think that the decree of the lower Appellate Court, was under the circumstances correct. We accordingly dismiss the appeal with costs including fees in this Court on the higher scale.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

November 16, 1920.

Present :—Viscount Cave, Lord Moulton and Lord Phillimore.

Maharaja SIR RAMESHVAR SINGH BAHADUR—DECREE-HOLDER—APPELLANT

versus

HOMESHVAR SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Limitation—Decree not capable of execution—Limitation, commencement of.

In order to make the provision of the Limitation Act apply to the execution of a decree, the decree sought to be enforced must have been in such a form as to render it capable, in the circumstances, of being enforced. [p. 638, col 2.]

Where a decree is passed against the estate of a deceased person in the hands of the judgment-debtor, limitation in respect of the execution of the decree begins to run from the date on which some part of the estate comes into the hands of the judgment-debtor. [p. 639, col. 1.]

Appeal from a decree of the Patna High Court, dated May 4th, 1917, and reported as 42 Ind. Cas. 666, reversing a decree of the Subordinate Judge, Bhagalpore.

FACTS are sufficiently stated in their Lordships' judgment. The Subordinate Judge allowed the application for execution, but the High Court (Sharfuddin and Roe, JJ.) dismissed it on the ground that appellant could have executed the decree after the Subordinate Judge's decision in favour of Ekradeshvar in the suit which the latter brought against Janeshvar's widow claiming Janeshvar's property, *i e*, after the 20th August 1903.

Hence this appeal:

Messrs. *DeGruyther*, K C., and *Majid*, for the Appellant, submitted that the application was not barred by limitation: the Article applicable was not 182 but 181. The Indian Courts have frequently held that when there is an obstacle preventing execution and not in the decree-holder's control, he gets three years from the time when it was removed. Article 182 is for cases when there is no such bar or obstacle: when the decree-holder sleeps on his rights.

[LORD PHILLIMORE.—Might not the application come under Article 182 (7) on the principle *certum est quod certum reddi potest* ?]

We submit not: the proper Article is 181, The cases lay down that you must apply for execution within three years: but if you do so and are unsuccessful, later applications are treated as continuations or revivals of the former ones. This principle was followed by Sir Lawrence Jenkins in *Narayan Govind Manik* v. *Sono Sadashiv* (1)

[VISCOUNT CAVE.—It would seem that you must make a hopeless application, or this principle will not apply].

It was held in this case that the decree-holder had three years from the termination of the litigation.

An application similar to the present one was held not to be barred in *Shaikh Kamaruddin Ahmad* v. *Jawahir Lal* (2).

[Reference was also made to *Kalyanbhai Dilpchand* v. *Ghanasham Lal Jadunathji* (3)].

The decree here was not capable of execution till 1914.

There are a very large number of applications which do not fall under Article 182. On no principle of equity can you be barred when there is no remedy you can enforce. Applications under Article 182 must be applications which *can be made*. That Article does not apply here because you cannot get your starting point.

We rest our case on this, that till Ekradeshvar got possession of the property we could not apply for execution.

Mr. *Dube*, for the Respondent.—This application is barred by limitation. The two previous applications were against the widow and against Ekradeshvar's personal property: they were both dismissed. To be a revival,

(1) 24 B. 345; 1 Bom. L. R, 846; 12 Ind. Dec. (N. S.) 764.

(2) 32 I A. 102; 1 C. L. J. 381; 2 A. L. J. 397; 9 C. W. N. 601; 15 M. L. J. 258; 27 A. 334 (P. C.); 7 Bom. L. R, 433; 8 Sar. P. C. J. 810.

(3) 5 B, 29; 3 Ind. Dec. (N. S.) 21.

the process must be the same and the first application must not have been finally disposed of. Neither of these conditions is fulfilled here.

Revival can only be of an application not finally dismissed.

Suryanarayana Pandarathar v. *Gurunada Pillai* (4).

There are many other cases to the same effect.

[LORD PHILLIMORE.—I do not think you need go into them. This cannot be a revival].

Next, I submit that the decree was capable of execution before 1914. In effect, it was a decree against Janeshvar's estate. The decree says: "in the defendant's possession" the judgment, "in the hands of the defendant." Here the legal representative is also the heir, and the sole question is did or did not the property descend to him?

Rajrup Singh v. *Ramgolam Roy* (5).

The decree could be executed as and when defendant became legally entitled to the property. There was nothing to prevent the Court's selling Ekradeshvar's right, title and interest in 1908. Limitation ran from 25th August 1908.

[LORD PHILLIMORE.—The decree is not against Janeshvar's estate in the legal ownership of Ekradeshvar, but against Janeshvar's property in his possession].

The words of the judgment and decree must be construed with reference to sections 234 and 252 of the Civil Procedure Code of 1882 under which this decree was made: I say the decree is against the deceased's estate.

[LORD PHILLIMORE.—I can understand you limiting the words of the decree by the Code, but you are extending it.]

[LORD MOULTON.—You must go by the words of the decree, not by what decree you might have got].

The obstacle was removed on 25th August 1908.

Time begins to run when the judgment of the first Court is given:

Deoraj Singh v. *Karam Khan* (6), *Ruddar Singh* v. *Dhanpal Singh* (7), *Chalavadi Kotiah* v. *Polcori Alimelammah* (8).

[LORD MOULTON.—I do not think any of these decisions touches this case].

In construing a decree in execution proceedings, the Court will look at the substance of the matter:

Bissessur Lal Sahoo v. *Maharaja Luchmessur Singh* (9).

The possession was in law with Ekradeshvar all along; alternatively, time ran from 25th August 1908.

Mr. *DeGruyther*, *K. C.*, replied.

JUDGMENT.

LORD PHILLIMORE.—This is an appeal from the High Court at Patna which has reversed a decree of the Subordinate Judge of Bhagalpore. The question is whether the appellant is entitled to execute a decree, dated the 27th July 1906, or whether his right to do so is barred by the Limitation Act of 1908. The only provision of that Act which can apply is Article 182 of the Schedule, which prescribes three years from the date of a decree or order of a Civil Court as the time within which it must be enforced, subject to exceptions which do not affect the present case.

It appears that a former Maharaja of Darbhanga, who was the grandfather and predecessor-in-title of the appellant, made a *Babuana* grant of land to his younger son on condition that the Government revenue and cesses to which it was subject should be regularly provided for payment over to the Government. This younger son died leaving two sons of his own, Ekradeshvar and Janeshvar, who lived jointly for some time and then divided the property. Default in the payment to be provided having been made, the then Maharaja, who was the elder brother of the appellant, brought a suit in 1898 to recover the arrears due. During the pendency of this suit the appellant succeeded as Maharaja, and an arrangement was come to under which the shares and liabilities of the two younger brothers in the *Babuana* were defined. According to this arrangement the share in the *Babuana* of the defaulter was to be, in the first place, liable for sale to realise the amount due. In 1905 the appellant brought another suit against Janeshvar for Rs. 18,738.15.6

(4) 21 M. 257; 8 M. L. J. 25; 7 Ind. Dec. (N. S.) 538.

(5) 16 C. 1 at p. 5; 13 Ind. Jur. 139; 8 Ind. Dec. (N. S.) 1.

(6) 19 A. 71; A. W. N. (1896) 188; 9 Ind. Dec. (N. S.) 46.

(7) 26 A. 156 at p. 160; A. W. N. (1903) 221.

(8) 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 329.

(9) 6 I. A. 233; 5 C. L. R. 477 (P. C.).

due for arrears. Ekradeshvar was made a party. During the pendency of this suit Janeshvar died in April 1906, and a dispute arose between his widow and Ekradeshvar as to the succession to Janeshvar's share. In May 1906 the appellant applied to have Ekradeshvar's name substituted as defendant for that of Janeshvar, on the footing that, according to the Kulachar or custom, the former had succeeded to him in the property in question. In May 1906 an order was made to that effect, but the widow, who was in possession and claimed to be entitled, was declared not to be bound by any decree passed in the suit, nor was her interest to suffer thereby. Ekradeshvar having admitted the principal claim of the appellant, on the 27th July 1906 a decree was made against him for the sum above-mentioned and costs. The decree did not provide that he was to be personally liable, but declared that the decretal amount was to be realised by the sale of the property belonging to Janeshvar and left in Ekradeshvar's possession, but the appellant was not enabled to make any portion of the property of Janeshvar which was in the possession of any one else liable for the decree.

On the death of Janeshvar, in April 1906, his widow had obtained possession of his share of the *Babuana* property. A suit was brought in the Civil Court by Ekradeshvar against the widow, claiming that, in accordance with the custom, the property was his. On the 15th August 1908, the Subordinate Judge decided in his favour. But on the 2nd August 1909 the High Court at Calcutta (execution having been stayed meantime) reversed this judgment.* Ekradeshvar then appealed to the King in Council, and this Board, on the 22nd July 1914, reversed the judgment† of the High Court and decided in his favour. The property in question had remained throughout in the possession of the widow, and it was not until after the judgment of the Privy Council that Ekradeshvar obtained possession.

On the 13th April 1908 the appellant had presented a petition for the execution of the decree of the 27th July 1906 against Ekradeshvar, but the latter had objected, on the ground that no part of Janeshvar's estate had come into his hands, and that no property in his possession except what had belonged to Janeshvar, could be attached. The Subordinate Judge allowed this objection on the 23rd January 1909. After the High Court had delivered judgment in favour of the widow, in August 1909, the appellant further endeavoured to enforce the decree of 1906 against her, but on the 21st November 1910, the application was dismissed, on the ground that the decree was not binding on the widow, and the High Court affirmed this dismissal.

In December 1914, after the decision of the Privy Council in favour of Ekradeshvar, the appellant applied to the Subordinate Judge for the enforcement of the decree of 1906 against him but was met by a plea that the claim was barred by limitation. This plea raised the question that is now before their Lordships. The Subordinate Judge decided the point in favour of the appellant, on the ground that the decree had then become capable of execution for the first time. Ekradeshvar appealed to the High Court at Patna, which held that there was no inherent defect in the decree which prevented the appellant from applying to enforce his claim so soon as, in August 1908, the Subordinate Judge had decided in Ekradeshvar's favour, and that he might then have proceeded against Ekradeshvar alone or the widow with him.

Since the hearing in the High Court Ekradeshvar has died and is now represented by his sons, the respondents, in the present appeal by the Maharaja to the Privy Council.

Their Lordships are unable to concur in the view taken by the High Court at Patna when it thus reversed the decision of the Subordinate Judge. They are of opinion that, in order to make the provision of the Limitation Act apply, the decree sought to be enforced must have been in such a form as to render it capable, in the circumstances, of being enforced. A decree so limited in its scope as that of the 27th July 1906 under consideration cannot in their opinion, be regarded as being thus capable of execution. Under that decree Ekradeshvar was not made personally liable, nor did it extend to any portion of the estate of Janeshvar which was not in his hands. None of the estate came to his hands until after the decision of the Board in 1914. As to the ability of the appellant to have applied to enforce his

*See *Janeswari Babuasin* v. *Ekradeshwar Singh*, 3 Ind. Cas. 207.—[*Ed.*]

†See *Ekradeshwar Singh* v. *Janeshwari Babuasin*, 25 Ind. Cas. 417.—[*Ed.*]

claim when, in August 1908, the Smbordinate Judge decided that Ekradeshvar was entitled to recover possession against the widow, it is enough to point out that the High Court at Calcutta promptly stayed execution of this decision, and later on reversed it. Neither can their Lordships accede to an argument put forward by Counsel for the respondents that the decree against Ekradeshvar could be treated as a decree aginst the estate of Janeshvar, still less as one against that estate though not in the hands of Ekradeshvar. Their Lordships think that the appellant has not been shown to have been responsible for the delay which has taken place in giving effect to his title, which did not become complete until after the decision of this Board in 1914. They are of opinion that, when the Limitation Act of 1908 prescribes three years from the date of a decree or order as the pericd within which it must be enforced, the language, read with its context, refers only, as they have already indicated, to an order or decree made in such a form as to render it capable in the circumstances of being enforced. This interpretation appears to them not only a reasonable one in itself, but to be in accordance with the previously expressed opinion of this Board in *Shaikh Kamar-uddin Ahmad* v. *Jawahir Lal* (2). The case may also be put in this way. The decree against Ekradeshvar could not have been executed without a further application. This application could not have been made till Ekradeshvar had come into possession of the property of Janeshvar, and, by Article 181 in the Schedule to the Limitation Act, the period of limitation for making an application is three years from the time when the right to apply accrues.

For these reasons, their Lordships will humbly advise His Majesty that the judgment of the High Court at Patna should be reversed and that the decree of the Subordinate Judge of Bhagalpore of the 19th January 1916 should be restored. The appellant will have his costs of this appeal and of the appeal to the High Court of Patna.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1617 OF 1917.

July 21, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Sulaiman.

LACHMAN PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SHITABA KUNWAR—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 164, 201—Co-sharer, suit by, for profits—Khewat, *amendment of, during pendency of suit*—*Amendment, effect of.*

P., a recorded co-sharer, brought a suit against *D.* to recover his share in the profits of a *mahal* for the years 1912, 1913 and 1914 and obtained a decree in part. Both parties appealed to the District Judge and, during the pendency of the appeal, *D.* obtained an order from the Revenue Court directing the removal of *P*'s name from the *khewat*, whereupon the District Judge, treating the order of the Revenue Court as if it were a decision of a Civil Court such as is mentioned in the last clause of section 201 of the Agra Tenancy Act, dismissed the claim *in toto*. In second appeal:

Held, that the decision of the District Judge was wrong, as he was not entitled to go behind the record, or to take into consideration the subsequent amendment of the *khewat* which did not operate in regard to the years in suit, but operated only from the date on which the order directing the amendment was passed. [p. 640, col. 2.]

Second appeal from the decision of the District Judge, Cawnpore, dated the 10th July 1917.

Messrs. *K. N. Katju* and *Damodar Das*, for the Appellants.

Dr. *S. N. Sen* and Messrs. *Shyam Lal* and *Lakshmi Narain*, for the Respondent.

JUDGMENT.—Appeals Nos. 1617 and 1618 of 1917 arise out of a suit for profits brought by the plaintiff-appellant, Lachhman Prasad, who has since died and is now represented by Raja Babu. The original plaintiff sued to recover the profits of a 5 anna, 4 pie share in the *mahal* for the years 1912, 1913 and 1914 against *Musammat* Shitabo Kunwar. The defendant, among other pleas, raised the plea that the plaintiff was not the owner of the share recorded against his name. The Court of first instance found that the plaintiff was the recorded co-sharer of a 4 anna share and it gave the plaintiff a decree for a proportionate share in the profits, applying section 201 of the Tenancy Act and the

presumption noted therein. Both parties appealed to the District Judge. While the case was pending in the Court of first instance, the defendant applied to the Revenue Court for the removal of the plaintiff's name from the *khewat*. Apparently, the Court of first instance in that case disallowed the application and an appeal was preferred to the Collector who on the 5th of April 1916, *i. e.*, some six months or more after the decision of the profits suit by the Assistant Collector of the First Grade, directed the removal of the plaintiff's name from the *khewat* of that year. This order of the Collector was upheld on appeal and the final order on this matter was passed on the 17th of April 1917 by the Board of Revenue. The appeals, in the meantime, were kept pending in the Court of the District Judge. The District Judge has dismissed the plaintiffs suit *in toto* on the ground, apparently, that since the institution of the suit the Revenue Courts had themselves removed the plaintiff's name from the *khewat*. Two appeals were preferred to this Court and the learned Judge of this Court before whom they came for decision referred the two appeals to a Bench of two Judges. The essentials of the case are set out very clearly in his order of reference. He remaks that, when the case came up before the District Judge in appeal he took notice of the orders which had been passed by the Revenue Courts and dismissed the claim on the ground that the plaintiff was not a recorded co-sharer at the time the suit was brought. The District Judge did not say so, in so many words. What he did actually say was as follows:—"This order in the Revenue Court has the same effect as if it were to be discovered now that the plaintiff was not a recorded co-sharer at the time of bringing his suit." It is a little bit difficult to understand what the District Judge meant by this, because, as a matter of actual fact, plaintiff admittedly was recorded as a co-sharer on the date on which he brought his suit and was a recorded co-sharer in the years to which the suit relates. What actually the District Judge has done is, that he treated the order of the Revenue Court as if it were the decision of a Civil Court such as is mentioned in the last clause of section 201 of the Tenancy Act. The meaning of section 201, so far as the words "shall presume" are concerned, was set at rest, one would have thought, by the Full Bench decision to be found in *Durga Parshad* v. *Hazari Singh* (1). It was clearly and distinctly laid down there that the presumption, so far as the Revenue Court was concerned, was irrebutable but that it could only be rebutted by the decision of a Civil Court to which any party might go to establish by a suit, the fact that the plaintiff had not such proprietary rights in the years in suit to which he laid claim. It is urged on behalf of the defendant-respondent that the Revenue Court has found, as a matter of fact, that the plaintiff's name had been wrongly recorded since the year 1900. It appears that the plaintiff was a sort of puisne usufructuary mortgagee and that, apparently, there was some prior mortgagee who brought a suit and it is said impleading the plaintiff obtained a decree for sale and the plaintiff lost his rights because he did not redeem the prior mortgage. This may or may not be correct, but it is open to the other side to go to the Civil Court and to settle the matter. But so far as the Revenue Court is concerned it must be presumed that the plaintiff has the right against which his name was recorded in the years in suit and at the date of the suit. We do not think that the District Judge was entitled to go behind the record or to take into consideration the subsequent amendment of the record which did not operate in regard to the years in suit but operated only from the date on which that order was passed. The Judge was wrong in treating that decision as a decision of a Civil Court such as is mentioned in the last paragraph of section 201 of the Tenancy Act. We think that the decision of the Court below is wrong. We allow the appeal and set aside the decision of the Court below. We direct that the Court do restore the two appeals to their places on its file and determine them according to law. There are other points in the dispute which have to be decided. Costs in this Court will abide the result of the suit.

Appeal allowed.

(1) 11 Ind. Cas 116; 33 A 793; 8 A. L. J. 1025.

KALI NATH ROY *v.* EMPEROR.

PRIVY COUNCIL.

APPEAL FROM THE MARTIAL LAW COMMISSIONERS, LAHORE.

December 9, 1920.

Present :—Lord Viscount Cave, Lord Dunedin, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

KALI NATH ROY—APPELLANT

versus

EMPEROR—RESPONDENT.

Appeal to Privy Council in criminal cases—Pardon, grant of, to appellant, whether sufficient reason for not entertaining appeal—Sedition, law of, application of, oneswpaper articles—Question of fact—Privy Council, whether will interfere with conclusions of local Courts—Penal Code (Act XLV of 1860), s. 124 A.

Where an appeal in a criminal case is pending before the Privy Council and a free pardon is granted to the appellant, this of itself is a sufficient reason for the Board declining to entertain the appeal. [p. 643, col. 1.]

Levien v. *Reg.*, (1867) 1 P. C. 536; 36 L. J. P. C. 62; 16 W. R. 159, approved.

Once it appears that in a trial for sedition the principles of the law of sedition have been rightly understood by the Tribunal in India, the question whether those principles have been properly applied to the facts of the case is so much in the nature of a question of fact and depends so largely upon local conditions that it is difficult for the Board to interfere on this ground with the conclusions arrived at by the Court in India. [p. 642, col 2.]

Appeal by special leave from a judgment, dated the 28th May 1919, of a Commission appointed under the Martial Law Ordinance, 1919, and sitting at Lahore.

FACTS of the case are sufficiently stated in their Lordships' judgment. The "case for the respondent" contained the following paragraph :—

12. Since special leave to appeal was given by their Lordships in this case, a free pardon has been granted to the appellant, among other persons, in the Punjab, and orders have been issued for the refund of the fine, and it is submitted that no good purpose could be answered by further entertaining the present appeal [*Levien* v. *Reg.* (1).]

Messrs. *Upjohn*, *K. C.* (with him Mr. *Dube*), for the Appellant :—With regard to the preliminary point about not entertaining the appeal, this case is distinguishable from *Levien's case* (1). There, a free pardon was granted after presentation of the appeal: here, the matter was mentioned when leave to appeal was granted, and it was explained that the commuted sentence would be worked out before the appeal was heard.

Sir *Erle Richards*, *K. C.*, for the Respondent :—A pardon was granted by the Viceroy on September 18th, 1920 with regard to persons who had not taken part personally in the violent deeds. (He read the form of the pardon). I have had a telegram that orders have been issued to refund the fines.

Mr. *Upjohn* :—This is not a real pardon, one as if the conviction had never been.

(The Board intimated they would hear the appeal).

Mr. *Upjohn* submitted that there was new point of jurisdiction not covered by *Bugga* v. *Emperor* (2). The order appointing the Commission only mentions "offences committed with the recent disturbances." The articles complained of began on April 3rd and at that time the only disturbance had been at Delhi, not Lahore.

[LORD PHILLIMORE.—"Recent disturbances" may be anywhere].

The power of these officers is local: they cannot try offences committed elsewhere. The Commissioners here had no jurisdiction.

Further, on the merits these articles are not seditious. Sufficient weight has not been given to the explanations to section 124 A. The agitation was a perfectly constitutional movement to petition the King-Emperor to disallow the Rowlatt Act, which he still had power to do.

Mr. *Dube* followed, "sedition" cannot have a different meaning in England and India. These articles should be construed in the same way is if written here. They do not exceed the limits of fair criticism.

Sir *Erle Richards K. C.*, and Mr. *Kenworthy Brown*, for the Respondent, were not called on.

JUDGMENT.

VISCOUNT CAVE.—The appellant was convicted on the 28th May 1919, by a Court of Commissioners sitting at Lahore under Ordinance I of 1919, and having the powers of a summary Court-martial, of an offence under section 124A of the Indian Penal Code, *i.e.*, of having, by written words, excited or

(1) (1867) 1 P. C. 536; 36 L. J. P. C. 62; 16 W. R. 159.

(2) 56 Ind. Cas. 440; 47 I. A. 128; (1920) M. W. N. 326; 2 U. P. L. R. (P. C.) 50; 24 C. W. N. 650; 18 A. L. J. 456; 22 Bom. L. R. 609; 39 M. L. J. 1; 12 L. W. 296; 1 L. 326; 21 Cr. L. J. 466 (P. C.).

attempted to excite disaffection towards His Majesty or the Government established by law in British India, and was sentenced to two years' rigorous imprisonment—afterwards reduced to three months' simple imprisonment—and to a fine of Rs. 1,000. Special leave to appeal was granted by His Majesty in Council on the 16th August 1919.

The facts are shortly as follows:—In March and April 1919 there was unrest in the Punjab. Serious disturbances occurred at Delhi on the 30th March, when some persons were killed; and these disturbances were followed by disorder and violence at Amritsar and Lahore and elsewhere in the Punjab. The disturbances at Lahore occurred on the 6th, 10th, 11th and 12th April, the evidence showing that on the 11th April, Lahore city was "practically closed to the Police." The appellant was the Editor of the *Tribune*, a daily newspaper, published at Lahore, and on the 6th, 8th, 9th, 10th and 11th April, he published in that newspaper paragraphs and articles commenting on the deaths at Delhi the persons killed there being repeatedly described as "martyrs" and charging the Government with grave misconduct in connection with the disturbances. It was stated in the issue of the 10th April that the "atmosphere was highly surcharged" and the "public mind in a state of unusual excitement."

On the 6th May the appellant was charged, in consequence of these paragraphs and articles, with the offence above described, and also with an offence under rule 25 of the Defence of India Rules; and on the 28th May judgment was delivered convicting him of the offence under section 124A of the Penal Code and pronouncing sentence as above. The charge under rule 25 was not proceeded with.

The appellant in his case gave two reasons against his conviction, *viz.*, (1) that his trial by the summary procedure of Martial Law was bad in law and wholly unconstitutional; and (2) that, on a reasonable construction of the articles complianed of, the appellant was not guilty of the offence of sedition as defined by section 124A of the Indian Penal Code.

The facts and Ordinances bearing on the first point raised by the appellant, *viz.*, want of the jurisdiction in the Tribunal by which he was tried, were substantially the same as in the case of *Bugga* v. *Emperor* (2), decided by the Board in February last, the only distinction being that the order of the Lieutenant-Governor directing a trial before the Commissioners did not (as in that case) name the accused who were to be so tried, but applied to "all persons charged with offences connected with the recent disturbances." Their Lordships have no doubt that the offence with which the appellant was charged was connected with the disturbances referred to in the order, and accordingly that this case is not distinguishable from the case cited. This contention, therefore, fails.

With reference to the second point raised on behalf of the appellant, *viz*, that, on a reasonable construction of the articles complained of, the appellant was not guilty of the offence with which he was charged, their Lordships have carefully considered the judgment delivered by the President of the Commission, with a view to ascertaining whether the Commission properly construed the section and gave proper weight to its terms and to the explanations annexed to it. The judgment was a very careful one and their Lordships do not find that the section was in any way misconstrued or misunderstood. This being so, there remains only the question whether the principles of the law were properly applied in detail to the language of the various articles; and this question, as was pointed out in *Annie Besant* v. *Advocate General of the Government of Madras* (3), is one which partakes so much of the nature of a question of fact that it would be difficult for the Board to interfere on this ground with the conclusions arrived at by a Court in India. The decision of such a Court must necessarily depend, not only on the construction of the written matter complained of, but also on the local conditions obtaining at the time of publication and a just appreciation of the effect which the publication under those conditions of the articles in question would be calculated to produce; and the Board could not revise the conclusions of the local Tribunal on facts of

(3) 52 Ind. Cas. 209; 46 I. A. 176 at p. 196; 37 M. L. J. 139; 20 Cr. L. J. 593; 17 A. L. J. 925; 23 C. W. N. 986; 21 Bom. L. R. 867; (1919) M. W. N. 555; 10 L. W. 451; 26 M. L. T. 408; 1 U. P. L. R. (P. C.) 74; 43 M. 146; (1919) 35 T. L. R. 500 (P. C.).

this nature without putting themselves into a position which they have repeatedly declined to assume, namely, that of a Court of Appeal in criminal proceedings. In these circumstances, their Lordships, while not thinking it necessary to express any opinion of their own as to the intention of the articles in question, are not prepared to advise His Majesty to interfere with the conclusions arrived at by the Commission.

It should be added that, in the course of the argument, their Lordships were informed by Counsel for the Crown that since leave to appeal was given a free pardon had been granted to the appellant. If so, this of itself would be a sufficient reason, as pointed out in *Levien* v. *Reg* (1), for not entertaining the appeal; but as the pardon was disputed and direct evidence of its having been granted was not forthcoming their Lordships did not stop the case on this ground.

For the above reasons, their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the Appellant: Mr. *H. S. L. Polak.*

Solicitor for the Respondent: *The Solicitor, India Office.*

CALCUTTA HIGH COURT.

CRIMINAL REVISIONS NOS. 479 AND 496 TO 499 OF 1920.

July 2, 1920.

Present:—Justice Sir N. R. Chatterjea and Mr. Justice Cuming.

ALI MOHAMMAD MONDAL AND OTHERS 2ND PARTY—PETITIONERS

versus

FAKIRUDDI MUNSHI AND OTHERS—1ST PARTY—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 107, 145, 147—Dispute in respect of lac growing on trees—Proceeding under s 145, whether within jurisdiction—Rights of parties—Civil suit pending—Breach of peace apprehended—Proper course.

The Police submitted a report that, in attempting to collect lac on plum trees standing on lands comprised in the holdings of the tenants of a Zemindari concern, the officers of the latter were opposed by the lessees of the tenants, and that there was every possibility of a serious breach of the peace at any moment between the parties; an order was thereupon made by the District Magistrate directing a proceeding under section 145 of the Criminal Procedure Code to be drawn up and the *lac* trees attached: this order was attacked in a revision petition to the High Court and the question was, whether the subject-matter of the dispute came within section 145:

Held, that "lac" did not fall within the meaning of the expression "land" in section 145 of the Criminal Procedure Code, and that the proceedings held under that section were without jurisdiction; that the matter did not come within section 147, and even if it did, no order for attachment could be made. [p. 647, col. 2.]

Where a civil suit is pending for the determination of the rights of the parties in certain property, it is improper to start proceedings under section 145 of the Criminal Procedure Code; if immediate steps are necessary to avert a serious breach of the peace proceedings under section 107 to bind down the parties are more appropriate. [p. 648, cols. 1 & 2]

Rule against the order of the District Magistrate, Maldha.

FACTS appear from the judgment.

Babu *Dasrathi Sanyal* (with him Babus *Manmatha Nath Mukerjee*, *Debendranarain Bhattacharyya* and *Nisithanath Ghatak*), for the Petitioners:—The petitioners before your Lordships are second parties in a proceeding under section 145 of the Code of Criminal Procedure. The proceedings under section 145 were initiated upon a Police report at the instance of the opposite party who had laid information before the Police that a large number of armed men had collected to attack his men and *adhidars* (lessees) and *loot* his lac godown. The Police reported that there was a likelihood of a serious breach of the peace between the Zemindar and his tenants in connection with the collection of lac grown in trees on the lands in possession of the tenants. Thereupon, the District Magistrate took action under section 145, Criminal Procedure Code.

The first ground upon which the present rule was obtained was in these terms:—"For that the dispute in respect of which the present proceeding has been drawn up not being one in respect of any land or water within the meaning of section 145, Criminal Procedure Code, the learned District Magistrate had no jurisdiction to proceed under that section and make the order of attachment complained of." A dispute in respect of the

collection of lac grown on trees cannot form the subject-matter of a proceeding under section 145. "Lac" is not "land" in its ordinary sense. It cannot also come within the extended meaning of 'land" given by sub-section (2) of section 145, because it is neither crop" nor "produce of land." As to the process by which lac is grown, reads Encyclopedia Britannica, under the heading 'lac." Reads also the counter-affidavit of Fazil Biswas to indicate the process of growing lac. It is clear that lac is not the natural product of the tree but is produced on the tree by a kind of parasite It is a resinous exudation of a kind of insect which lives on the sap of the trees and uses the twigs of the trees as their support. Conceding, for the sake of argument, that "trees" are "produce of land," it does not follow that anything produced on trees is also 'produce of land." Produce of a produce of land does not come within the meaning of sub-section (2) of section 145. Having regard also to the process by which lac is produced, it cannot be called a "crop" because the word "crop", within the meaning of sub section (2) of section 145, is really restricted to something which is a produce of land. The proceeding under section 145 in respect of a dispute over the collection of lac is without jurisdiction.

The second ground on which the Rule was issued was that, in view of the entries made in the finally published Record of Rights having the force of decrees of the Civil Court, and in view of the result of the suits under section 106, Bengal Tenancy Act, the learned District Magistrate was not competent to proceed under section 145,Criminal Procedure Code, in respect of the dispute which has in effect been finally determined by the Civil Court. In the finally published Record of Rights there is an entry that the tenants can cut the trees and appropriate the wood. The Zemindars then instituted civil suits for a declaration that the tenants have no right to cut and appropriate trees on their holdings without the consent of the landlords. The tenants filed written statements, issues were framed and some witnesses were examined when the Zemindars withdrew the suits without leave to bring fresh suits. Having regard to the Settlement proceedings and the result of the civil suits and to the provision of section 23 of the Bengal Tenancy Act, no proceeding should have been taken under section 145, Criminal Procedure Code.

Lastly at the time of issuing the rules further proceedings in the matter were directed to be stayed by the order of the High Court, but in the matter of stay of proceedings there has been a deliberate disobedience of the order of the High Court as is apparent from the orders of the District Magistrate for the sale of the attached lac.

Sir *A. Chaudhuri* (with him Babus *Hemendranath Sen* and *Probodh Kumar Das*), for the Zemindar, Opposite Party :—The omission of the Magistrate to give effect to the presumption arising from the entries in the Record of Rights is not a question going to the jurisdiction of the Magistrate, and the High Court cannot interfere on that ground. See *Chintamoni Jena* v. *Jagannath Ramanuja Das* (1). Refers also to *Prafulla Nath Tagore* v. *Hodding* (2).

Chapter XII of the Code of Criminal Procedure deals with disputes as to immoveable property. The present proceedings were drawn up under that Chapter. The Code of Criminal Procedure has not defined "immoveable property." The expression, as defined in section 3, clause (25) of the General Clauses Act (X of 1897), is comprehensive enough to cover a case like the present.

[CHATTERJEA, J.—But see section 145 (2), Criminal Procedure Code.]

That sub section only says what "land" "includes" and is, therefore, not exhaustive.

As to the right of the Zemindar to trees standing on tenant's holdings, see *Nafar Chandra Pal* v. *Ram Lal Pal* (3).

[CHATTERJEA, J.—That is a case under section 23 of the Bengal Tenancy Act and is really against you.]

It is open to the landlord to show that the tenants are not entitled to cut down and appropriate trees. Under the English Law trees are part of the land on which they stand. See *Llewellin, In re, Llewellin* v. *Williams* (4).

(1) 28 Ind. Cas. 651; 19 C. W. N. 123; 16 Cr. L. J. 315.
(2) 42 Ind. Cas. 604; 21 C. W. N. 1053; 26 C. L. J. 39; 18 Cr. L. J. 938.
(3) 22 C. 742 at p. 750; 11 Ind. Dec. (N. s.) 493.
(4) (1888) 37 Ch. D. 317; 57 L. J. Ch 316; 58 L. T. 152; 36 W. R. 347.

Refers also *Chaurasi* v. *Rama Shankar* (5), *Maharaja Surjakanta Acharja Bahadur* v. *Maharaja Jagadindra Nath Roy Bahadur* (6). If the dispute is one over trees, it is also a dispute over land. Then it is impossible to argue that lac is not "crop" of land. Reads Imperial Gazetteer, Volume III, under the heading "lac." People always speak of a lac crop. So, from whatever point of view the matter is look at, there is no escape from the position that there was a dispute over land and the Magistrate war, therefore, perfectly justified in drawing up proceedings under section 145.

Mr. *U. N Sen Gupta*, for the *adhidars*, Opposite Party :—I adopt the arguments of Sir Asutosh Chaudhri.

Babu *Manmathanath Mookerji* in reply :—The District Magistrate ought not to have drawn up proceedings under section 145, Criminal Prosedure Code, as it was clear that the Zemindars were attempting to get civil remedies through Criminal Courts. The practice of taking to Criminal Courts disputed claims involving questions of right and title has been strongly condemned by the High Court. See *Amrit Manjhi* v. *Emperor* (7).

If there was a real apprehension of a breach of the peace, the District Magistrate should have taken action under section 107, Criminal Procedure Code. The proceedings under section 145 are wholly without jurisdiction and should be set aside. See *Gobind Chunder Moitra* v. *Abdul Sayed* (8), *Doulat Koer* v. *Rameswari Koeri* (9) and *Atul Hazra* v. *Uma Charan Changdar* (10).

JUDGMENT.—This is a Rule calling upon the District Magistrate of Maldah, and the opposite party (who are the first party in a proseeding under section 145 of the Criminal Procedure Code), to show cause why the order of the District Magistrate of Maldah, dated the 30th April, 1920, should not be set aside on the 2nd and 3rd grounds mentioned in the petition, or why such other order should not be made as to this Court may seem proper.

The petitioners are tenants holding lands as occupancy *raiyats* under the Mathurapur Zemindari concern in the District of Maldah and were the second party, while the opposite party, who are the manager and other officers of the concern and the lessees under them, were the first party to the proceedings under section 145.

The dispute between the Mathurapur Zemindari Concern and the tenants relates to the right to grow and collect lac on plum trees standing on lands comprised in the holdings of tenants.

The proceedings under section 145 were started upon a Police report dated the 29th April 1920 to the effect that, the concern was trying to collect lac from the trees standing on the lands of the tenants by their *adhidars* (lessees) ; that the tenants on their part were equally anxious to oppose them in their so doing; that on the 26th April Mr. Stevenson, the Manager of the Concern, had laid information before the Police alleging that about 500 men had collected with 24 guns to attack his men and *adhidars* and *loot* his Taipur lac-godown ; that on enquiry it transpired that that there was every possibility of a serious breach of the peace at any moment between the Concern and its tenants in connection with the collection of lac grown on trees on the lands of the tenants in a number of *mauzahs* (naming them) ; that a serious breach of the peace, attended with loss of life, was imminent, and suggested that injunction might be issued under section 144, Criminal Proedure Code, upon the members of both the parties mentioned in the report directing them to abstain from collecting lac grown on trees on the lands of tenants in order to avoid immediate riot.

Thereupon, the District Magistrate made the following order on the 30th April 1920:—"Draw up proceeding under section 145, Criminal Procedure Code, and attach the lac trees standing in the holdings of the tenants mentioned in the proseeding pending further orders. The Police will make arrangements for collecting the lac when it is ready and

(5) 28 A. 266; A. W. N. (1905) 278; 3 A. L. J. 13; 3 Cr. L. J. 52.
(6) 11 C. W. N. 198 at p. 201; 5 Cr. L. J. 32.
(7) 51 Ind. Cas. 668; 46 C. 854 at p. 860; 23 C. W. N. 628; 29 C. L. J. 322; 20 Cr. L. J. 508.
(8) 6 C. 835; 8 C. L. R. 217; 4 Shome L. R. 115; 3 Ind. Dec. (N. s.) 540.
(9) 26 C. 625; 3 C. W. N. 461; 13 Ind. Dec. (N. s.) 1002.
(10) 33 Ind. Cas. 822; 20 C. W. N, 796; 23 C. L. J. 555; 17 Cr. L. J. 182.

for bringing it into head quarters and stacking it here."

It appears that on the 4th May and subsequent dates, the Police from different Police stations submitted four reports praying for proceedings under section 145, Criminal Procedure Code and the District Magistrate on the 8th May, 10th May and 18th May 1920 drew up four different proceedings making in all about 700 tenants second parties in five different proceedings and in each case directed the lac trees to be attached. The proceedings ran as follows : —

....."I am satisfied from the Police report that a breach of the peace is imminent, I do hereby direct both parties to appear before me on the 29th May 1920, and to put in written statements of their respective claims as respects the fact of actual possession of the disputed lac on the said trees. As the case is one of emergency, the disputed trees with lac thereon are attached till the decision of the case." The 31st May was fixed for filing written statements, and this Rule was granted on the 1st June, and further proceedings were directed to be stayed pending the disposal of the Rule.

The opposite party has appeared by Counsel to show cause and the learned District Magistrate has shown cause by a letter.

The second ground taken in the petition is as follows:—

"For that the dispute in respect of which the present proceeding has been drawn up not being one in respect of any land or water within the meaning of section 145, Criminal Procedure Code, the learned District Magistrate had no jurisdiction to proceed under that section and make the order of attachment complained of".

The first question for consideration, therefore, is whether the subject matter of dispute comes within section 145 of the Criminal Procedure Code. Proceedings under that section can be taken where "a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof". Sub-section (2) of that section lays down : "For the purposes of this section the expression 'land or water' includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property". The subject-matter of dispute in the present case is lac grown on trees.

It is alleged by the petitioners that the process by which they and other tenants have been growing lac upon trees on their holdings is that described in the Encyclopedia Britannica, under the heading of 'lac', and which runs as follows:—"Lac, a resinous incrustation formed on the twigs and young branches of various trees by an insect, *coccus lacca* which infests them....As soon as the minute larval insects make their appearance, they fasten in myriads on the young shoots, and, inserting their young proboscide into the bark, draw their nutriment from the sap of the plant. The insects begin at once to exude the resinous secretion over their entire bodies; this forms in effect a cocoon, and the separate exudations coalescing, a continuous hard resinous layer regularly honey-combed with small cavities is deposited over and around the twig. * * * * To obtain the largest amount of both resin and dye stuff, therefore, it is necessary to gather twigs with their living inhabitants in or near June and November,—Lac encrusting the twigs as gathered is known in commerce as "stick lac..."

In the counter-affidavit of Fazil Biswas, filed on behalf of the opposite party, the process by which lac is grown by them is stated thus: "Lac cannot be grown on the same plum trees twice every year. To begin with, the branches of plum trees are cut in the Bengali month of Falgoon; then the new branches and leaves begin to shoot out. Then, in the month of Ashar little twigs covered with lac germs are placed over and together with new branches and thereupon lac begins to swarm and spread over the new branches. Thereafter, in the month of Kartic, this crop is collected. This process is repeated in respect of those other trees on which lac is sown in the month of Kartick and collected in the month of Bysack". Whatever may be the difference between the two processes stated above, it is clear that lac is not a natural product of the tree, but is produced on the trees by a parasite. The learned District Magistrate himself, in showing cause, points out that "lac is not a thing that is allowed to grow by itself : a certain quantity of each year's crop is saved as

seed and a month or two later is attached to the trees by human agency from which the next crop develops."

It is contended on behalf of the opposite party that lac comes within the expression "crops" of land. We do not think, however, that lac is a crop. The meaning of the word "crop" as given in dictionaries is as follows:—"The plants or grains collectively that are cultivated for consumption: also the soil product of a particular kind, place or season, etc., etc., (See the Standard Dictionary).

"The 'produce] of the field, etc.....The annual produce of plants cultivated or preserved for food especially that of the cereals; the produce of the land either while growing or when gathared; harvest * * * * with qualification or contextual specification. The yield or produce of some particular cereal or the plant in a single season or in a particular locality. The crops the whole of the plants which engage the agricultural industry of a particular district or season. * * * * The annual or seasons yield of any natural product". (See Oxford Dictionary).

It has been argued that people speak of a lac crop, and hence that lac is a crop within the meaning of the term as used in section 145. People also talk of a crop of hair or a crop of cases and we think it is quite clear from the words of section 145 that crop is there restricted to something the produce of the soil. It is next contended that "trees" are "produce of land", and an observation in the case of *Maharaja Surja Kanta Acharja Bahadur* v. *Mahara a Jagadindra Nath Roy Bahadur* (6) is relied upon, where the learned Judges observed:— "The *gazari* trees may come within the term 'other produce of land.'"

It may be conceded that 'trees' are produce of land. But it does not follow that anything produced on trees is also "p oduce of land". We are not concerned with the definition of "immoveable property" as given in the Transfer of Property Act or the General Clauses Act which were referred to in argument, because, although the words "tangible immoveable property" occurred in the Criminal Procedure Code of 1882, they are replaced by the words "land or water" in the present Code. The ordinary signification of the expression 'land' has been extended to certain other things (among others) to "crops or other produce of land". But in order that the thing may be called land it must be (leaving aside the other things which have no application to the present case) either "crops" or "other produce of land". As stated above, "trees" may come within the definition of land as being "produce of land," but we are unable to hold that lac which is not a part of the tree itself, but is a parasitic growth on the tree is also "produce of land." It is said that as the lac insects draw their sustenance from trees, the lac is part of the trees. But, in order that a particular thing may fall within the definition of land, it must be either land or 'crops' or 'produce of land'. It is not open to us to add to, or extend the meaning of the expression 'land' as given in the section. We think that lac cannot be called 'produce of land' unless we hold that a parasitic growth on a tree which is a produce of land is also land, and that cannot be done without straining the language. We are accordingly of opinion that 'lac' does not fall within the meaning of the expression 'land' in section 145, Criminal Procedure Code. That being so, the proceedings held under section 145 were without jurisdiction. It is contended, however, on behalf of the opposite party that, even if the case does not come under section 145, the right of using the trees for growing lac might come under section 147 which relates to a dispute concerning the right of use of any land. But the definition of 'land', as including 'crops or the produce', is for the purpose of section 145 only and there is no such definition in connection with section 147. In the next place, even assuming that 'land' in section 147 also includes "crops or other produce of land", no proceeding has been drawn up under that section, and even if any such proceeding were drawn, the order of attachment of the lac was without jurisdiction, as section 147 does not provide for attachment and, having regard to the subject-matter of that section, no order for attachment can be made.

The third ground taken in the petition runs as follows:—"For that, in view of the entries made in the finally published Record of Rights having the force of decrees of the Civil Court, and in view of the result of the

suits under section 106, Bengal Tenancy Act, the learned District Magistrate was not competent to proceed under section 145, Criminal Procedure Code, in respect of the dispute which has been in effect finally determined by the Civil Court".

It appears that the Mathurapur estate comprises Touji No. 60 and several other Toujis, and in the course of the Settlement proceedings which took place in the year 1917-1918 it was claimed on behalf of the Zemindar that the tenant had no right to cut and appropriate the trees on their holdings. No question, however, was raised with respect to the right of growing lac. The Settlement Officer, Mr. Nelson, made enquiries into the dispute about the right to trees (in Touji No. 60); took evidence on both sides, and came to the conclusion (see his note dated the 19th June 1917) that the tenants have the right to cut down and appropriate trees in Touji No 60, and by his order dated 11th August 1917, directed that, "after the entry of fruit trees, in the *khatian* will be entered 'fruit and timber belong to the *raiyat*.'" In the case of non-fruit bearing trees the entry will be "timber belongs to the *raiyat*". It further appears that in 1918 a Revenue Officer made enquiries as to the right to trees evidently in respect of all the Toujis. Both the landlords and tenants were represented by Pleaders and witnesses were examined on both sides. The Revenue Officer submitted his report (together with the evidence and written arguments filed by both parties) to the Settlement Officer to the effect that the tenants have full right to cut and appropriate trees on their own lands without the landlord's permission, and suggested that a note be made to that effect in "Circle I and all villages". The Settlement Officer, Mr. Nelson, thereupon made the following order on the 5th July 1918:—"Make an entry in each case where there are trees The *raiyat* can cut the trees and appropriate the wood'". But although such an entry was directed to be made in "each case" by the Settlement Officer, Mr. Nelson, it appears that such an entry was made in the Record of Rights relating to lands of Touji No. 60 only and no such entry was made in respect of the lands of other Toujis in the finally published Record of Rights. The landlords (the Mathurapur Concern) thereupon instituted two sets of suits under section 106 of the Bengal Tenancy Act one in respect of Touji No. 60 and the other in respect of the other Toujis, for a declaration that the tenants had no right to cut down or appropriate trees, and that entries to that effect might be made in the Record of Rights. These suits were transferred to the Subordinate Judge for trial. The tenants filed written statements. Pending those suits, the present proceedings under section 145, Criminal Procedure Code, were started, and the Mathurapur Concern applied for withdrawal of the said suits with liberty to bring fresh suits on the ground that there were formal defects in the plaint, and on other grounds. The application was opposed on behalf of the tenants, and the learned Subordinate Judge refused to grant permission to withdraw with leave to bring fresh suits. The Mathurapur Concern, however, withdrew the suits without leave to bring a fresh suit. It is accordingly contended on behalf of the petitioners that, as the effect of the withdrawal of the suits, without leave to bring fresh suits, was to preclude the landlords from bringing fresh suits in respect of the same subject-matter having regard to the provisions of Order XXIII, rule 1 of the Code of Civil Procedure, they were debarred from disputing the rights of the tenants to the trees.

It is unnecessary to consider the precise effect of the withdrawal of the suits upon the rights of the landlords, if they have any. There was the order of the Settlement Officer (Mr. Nelson) directing entries to be made in the Record of Rights to the effect that the tenants have the right to cut down and appropriate the trees on their holdings. It is true, for some reason or other, the entries as directed were not made in the finally published Record of Rights in respect of the lands of all the Toujis, and it appears that that was one of the grounds upon which the withdrawal of the two suits were applied for. But a suit lies under section 106 for the decision of a dispute not only regarding any entry made by a Revenue Officer in the Record of Rights, but also with respect to any omission made from the Record of Rights, and the suits could have been proceeded with for declaration that the

tenants had no right to the trees, and for making entries in the record accordingly. We may also refer here to a criminal case which originated in a dispute between a lessee of Mr. Hennessey (the predecessor-in-title of the Mathurapur Concern) and two tenants of the estate with regard to the collection of lac from trees standing on lands by the tenants, in the year 1918. Each party charged the other with theft of stick lac, and in the case against the tenants, summons were issued. The latter moved the High Court and obtained a Rule. The learned Judges (Richardson and Huda, JJ.,) in quashing the proceedings [See *Amrit Manjhi* v *Emperor* (7)] observed:—"In the view we take, regard being had to the nature of the dispute, there is little reason to suppose that the charge of theft, from whichever side it comes, will be substantiated. The dispute is eminently one for the Civil Courts where only it can be finally determined. It will be to the interest of all parties that a decision should be sought for there. The practice of taking to the Criminal Courts, for the purpose of a preliminary skirmish, disputed claims involving questions of right and title, about which the parties may intelligibly and with perfect good faith take opposing views, is in our opinion much to be deprecated". We entirely agree with those observations, and it is very much to be regretted that, in spite of the opinion expressed in the above case, the Mathurapur Concern did not think it fit to proceed with the suits actually brought by them and in which the rights of the parties could be satisfactorily determined, but withdrew them even when leave to bring fresh suits was refused by the Court, and that the Magistrate, in the face of the order of the Settlement Officer, and the fact that civil suits were pending for the determination of the rights of the parties to the trees, thought fit to start proceedings under section 145 of the Criminal Procedure Code. The learned Magistrate says that the withdrawal of the suits could not possibly affect the right to take the crop which was growing on the trees long before the suits were withdrawn" and in another passage says, "my information is that the landlords grew the lac". But we think that the version of one party should not have been accepted before any evidence was gone into as to the fact of actual possession. No doubt it was necessary to take steps at once to avert serious breach of peace which was apprehended by the Police; but proceedings could have been effectively taken under section 107 to bind down the parties.

The learned District Magistrate in showing cause refers to the findings of his predecessor, Mr. Lindsay, to the effect that the Zamindar for many years previous to 1916 had let out the right to grow lac on all plum trees in the estate including those standing on tenants' holdings, to persons who made a business of lac cultivation, and who were not tenants of the estate at all but residents of other districts who came at stated times solely for the purpose of placing the seed lac on the trees and taking it away when ripe; and that the tenants never themselves grew lac even on trees on their own holdings. These findings, however, were arrived at in criminal proceedings, and before the orders passed by Settlement Officers specially entrusted with the ascertainment and Record of Rights of landlords and tenants, and who enquired into and determined such rights on the spot.

The petitioners alleged that they and other tenants under the Zemindari having right of occupancy and other superior rights have enjoyed the right to cut and appropriate fruit growing and other trees upon their holdings and to otherwise enjoy the usufruct thereof, the Zemindar having no right or voice to interfere therein, and that, as an incident of their said right to the trees upon their holdings, the said tenants including the petitioners and their predecessors have always been growing lac upon trees on their holdings.

This is denied by the opposite party who allege that the tenants have no right to the trees, that the predecessors in-title of the Mathurapur Concern for the first time introduced the cultivation of lac in the estate, and brought men from other places who had knowledge of such cultivation, and through them (the *adhidars*) they and their predecessors have been growing and collecting the lac on trees both on *khas* land as well as lands in the possession of tenants, that the Court of Wards who was in charge of a portion

of the Zemindari for some time used to do the same, and that the tenants had no right to the same. We cannot express any opinion on the point, as no evidence has been taken, and no written statements even have been filed by the parties, and what is stated above is taken from the affidavits filed by the parties and the documents referred to by the parties before us. We are not in a position to express any opinion on the questions, nor are we concerned now with the relative values of the findings arrived at by Mr. Lindsay in the criminal proceedings and Mr. Nelson in the Settlement proceedings. All that we mean to say is, that a dispute such as the present ought not to have been made the subject matter of a proceeding under section 145 of the Criminal Procedure Code. In the view we have taken of the first point (the second ground of the petition), however, it is unnecessary for us to discuss the matter further, or decide whether the order was wrong on the third ground taken in the petition.

The learned District Magistrate being evidently of opinion that the case comes within the purview of section 145, Criminal Procedure Code, was of course quite right in directing the lac to be attached. But the action taken by him with respect to the lac after it was attached is open to serious comment.

It appears that after the attachment, the Magistrate employed the men (the *adhidars*) of the Mathurapur Concern to collect the lac from the trees standing on the holdings of the tenants, and had it stored in the lac godowns of the Mathurapur Concern. This Rule was granted by this Court (Walmsley and Cuming, JJ.,) on the 1st June; further proceedings were directed to be stayed, and the Rule was made returnable on the 11th June. It appears that on the 7th June the Mathurapur Concern issued notices to the public that the lac was grown by them and would be sold by them at their Cutchery where it was stored, on the next day, *i.e*, the 8th June. On the 8th June the tenants applied to the Magistrate to stay the sale, but the lac was sold on the next day, the 9th June. In the face of the order of this Court directing further proceedings to be stayed, the District Magistrate should have stopped further proceedings as he was bound to do. The learned Magistrate, in his letter dated the 4th June, showing cause, states that he made "arrangements to have the crops cut and sold operations which must be performed within a limited time otherwise the entire crop becomes spoiled and useless"... "the cutting and preparation of the lac for sale requires a certain amount of skill and that, entrusting it to those who are not accustomed to the work, would result in a considerable quantity of the crop being damaged and unsaleable. Accordingly, I employed the landlords' lessees as the agents; but I wish to emphasize the point that not a single stick of lac is being cut or taken to the godown except under the direct supervision of a responsible Police Officer and that it is being stored in a *pucca* godown of which the Deputy Superintendent of Police himself keeps the key. There can, therefore be no question of loss or damage to the crop which would be sold by the Police in the ordinary way at the godown to purchasers from other districts who come every year and the proceeds would be deposited in the treasury ready to be made over to whichever party succeeded in proving its case in the section 145 proceedings."

We have no doubt the District Magistrate acted with a view to save the lac from loss or deterioration, but we cannot approve of the manner in which it was carried out. It may be that the cutting and preparation of the lac for sale requires a certain amount of technical skill, but each party asserted that they had always been growing and collecting lac, and each party claimed that they had grown, and claimed the right to collect and sell the lac in dispute; and one of the parties (the lessees of the Mathurapur Concern) was employed to do so to the entire exclusion of the other, and the lac was stored in the godown of the Mathurapur Concern. However that may be, the Mathurapur Concern should not have been allowed to issue public notices for the sale of the lac. The notice issued by the Mathurapur Concern on the 7th June was to the effect that the lac grown by the Mathurapur estate on all the trees on the *jote* lands of the tenants had been cut with the help of the Police and was in Police custody and that about 250 maunds out of the said lac would be sold at the

godown of the Mathurapur Kothi of the Mathurapur Zemindari Company on the 8th June at 4 P. M. Thereupon a petition was submitted on behalf of the tenants to the District Magistrate annexing a copy of the notice. They pointed out that with the object of having their rights proclaimed, and with a view to appropriate the lac grown by the the tenants, and in disobedience of the orders of the Magistrate the Mathurapur Concern had issued notices on the 7th June for holding private sale of the lac on the 8th. They further pointed out that a Rule had been granted by the High Court, and the 11th June had been fixed for the hearing, that the opposite party had with a view to appropriate the lac grown by the petitioners at a small price had given short notice of the sale, and that if the sale were held on that day it could not fetch a proper price because, in order to secure purchasers of lac and sell it on competition at high prices, notices should be given at least at Pakur, Dhulyan, Sahebgunge and other places, and that the petitioners would suffer serious loss if the sale were held on that day and prayed that the sale might be stayed. The District Magistrate's order upon the petition was as follows:—

"I am informed by Superintendent, Police, who was present at the sale, that several buyers were present from the places mentioned in this petition, and that the lac fetched Rs. 80 per maund which is a very high price. If the lac had been kept any longer in the godown, it would have deteriorated and would not have fetched so high a price. No loss has been caused to any one as the full value has been deposited in the treasury and will be made over to whoever proves his case in section 145 Criminal Procedure Code proceedings."

Another petition appears to have been submitted later on the 9th June, and which ran as follows:—

"1. That the first party issued a notice on 7th June 1920 advertising for the private sale of all lac deposited in the godown of the first party under Police control which have out from the trees of the tenants and attached under your Honour's order to the utter disregard of the solemen order of the Court and in order to exercise their own absolute right and control over the property and to the utter ignorance and without the knowledge of the second party.

"2. That the date of sale in the aforesaid notice was fixed for 8th June 1920 at 4 P. M. and the place of sale was notified as the Cutchery house of the Concern. The petitioners beg to file herewith a copy of the said notice for your Honour's perusal.

"3. That the second party have come to know that some lac has been sold away in presence of the Superintendent of Police at Mathurapur at the appointed time and the petitioners beg to submit that all this has been done by the first party in hot haste and with a sinster motive.

"4. That all proceedings have been stayed under the orders of the Honourable High Court, and the Honourable High Court has fixed 11th June for the hearing and disposal of the Rule granted to the second party.

"5. That the petitioners beg to submit that, in spite of the above orders, the first party have acted illegally in selling away the lac and the petitioners have reasons to believe that the lac have been sold away at an abnormal value and they entertain every doubt of the misappropriation of the money realised by such sale by the first party.

"6. That the petitioners beg to submit that the lacs were grown by them on their own trees and they are entitled to them in their own right and title thereto.

"7. That the petitioners, therefore, humbly pray that your Honour will be graciously pleased to proceed against the first party for their illegal and wrongful act and pass orders for the deposit of the value in Court immediately, and pass such other orders as it may deem fit and proper under the circumstances of the case.

"The petitioners beg to submit that they filed a petition in the locality at 5 P. M. before the Superintendant of Police for stay of sale, there was delay of filing this petition by one hour as they had to come to town for legal advice."

The District Magistrate made the following order on the said petition on the 9th June 1920:—

"This petition is based on a misconception of the facts. The correct facts are as follows:—

"If lac is kept too long in the godown it

deteriorates, therefore, it was necessary to sell the lac that had been first gathered in order to obtain the highest possible price for it. I accordingly directed the Police to hold a sale of half the total crop to begin with, and, in accordance with my orders, the Superintendent Police personally went to Mathurapur and held the sale. The notices were issued by the Mathurapur Zamindari Co., at request of the Police and the Company was not acting on its own behalf, but simply as agents on behalf of Government, to sell the lac which was under attachment by and the property for the time being of Government. There is thus no assertion of any right by the Company nor are the claims of the tenants prejudiced in any way nor is there anyting illegal or sinister about the proceedings which were all done openly in accordance with my orders to prevent loss of the lac. The tenants are not entitled to deal with the lac so long as it is under attachment. The price obtained was Rs. 80-1 per maund which is the highest figure I have ever heard of, bidders were, as appears from the Superintendent Police's report, present from Pakur which is the centre of the lac industry and the bidding was keen. There can, therefore, be no question of any damage having been caused to the tenants by the sale, and as for misappropriation of the proceeds by the Zamindars that is out of the question, as he has deposited Rs. 1,500 in the treasury as security which more than covers the amount realised at the sale. There still remains about half the crop which is not yet ready for sale. Before it is sold, notice will be issued as usual and the tenants may fetch any one they like to bid. The Zamindar is under agreement with the Collector to deposit the full amount realised in the treasury, if that comes to more than the Rs. 1,500 already deposited".

It appears from what is stated by the District Magistrate in the above orders and in his letter to this Court showing cause, that there was necessity for taking prompt action, because, as the learned Magistrate puts it,....."the operations of cutting and selling the lac must be performed within a limited time otherwise the entire crop becomes spoiled and useless". But, as stated above, the men of the opposite party were employed to cut and collect the lac to the exclusion of the petitioners. Even if the cutting and collection of the lac by men of the Mathurapur Concern and the storing of it in their godowns were justified by the exigencies of the situation, we do not see any justification for allowing the Mathurapur Concern to issue notices to the public for sale of the lac. It is stated in the order of the 9th June that they did so at the request of the Police and as agents of the Government to sell the lac which was under attachment and the property for the time being of the Government. It is difficult to see why the Police itself could not issue the notices and why one of the parties to the proceeding was requested to issue the notices of sale. The notice issued does not state that they were doing so on behalf of the Government or that the lac was Government property. The notice stated that the lac was grown by them and would be sold at their Cutchery on the 8th June. The notices were issued on the 7th June that the lac would be sold the next day, the 8th June. The tenants pointed out that the notice was a very short one, and that notices should be issued at various places mentioned in the petition and the sale stayed. Assuming that the sale could not be postponed till the 11th June, the date fixed for the hearing of the Rule, without risk of loss to the lac, it does not appear why notices were not issued earlier and why the Police left it to one of the contending parties to arrange the business. The fact that further proceedings had been ordered to be stayed by the Rule issued by this Court was brought to the notice of the District Magistrate, and he must have been aware of the order staying further proceedings, at any rate, on the 4th June when he wrote the letter showing cause. If urgent action had to be taken for selling the lac, we do not understand why the matter was not represented to this Court, and why directions of this Court was not obtained. The letter showing cause, however, was written by the District Magistrate on the 4th June, *i. e.*, before the notices of sale were issued by the opposite party and before the petitions referred to above were submitted by the tenants. We think, therefore, that an explanation should be called for from the District Magistrate about

the matters referred to above and we direct accordingly.

Before concluding this judgment, we think it necessary to point out the impropriety of the District Magistrate's writing a letter to the Subordinate Judge before whom the suits under section 106, Bengal Tenancy Act, were pending, for postponement of the suits. It appears that, while the suits were pending, the District Magistrate wrote a letter to the Subordinate Judge which runs as follows:—

Malda,
18. 5. 20.

"Dear Sir,

"I understand that certain section 106, Bengal Tenancy Act, cases of Mathurapur estate are fixed for to-morrow. The Manager informs me that he will be unable to produce his evidence then because his principal witnesses, the lac *adhidars*, are all engaged on behalf of Government in cutting lac. He asks me to confirm this statement to you so that you will not think it is put forward merely as an excuse to gain time. The statement is quite correct. The entire lac crop has been attached by me under section 145, Criminal Procedure Code, and I have employed the *adhidars* as agents on behalf of Government to cut the lac under Police supervision as they are the only persons who know how to handle it. If they are taken away to give evidence here the work will be at a stand still and much of the crop will be destroyed, which would not be to the advantage of the tenants supposing they win the section 145, Criminal Procedure Case.

A. K. Jameson."

We think the Magistrate would have been well advised to avoid writing such a letter as his action was likely to be misconstrued. Even if any confirmatory statement of the District Magistrate was justifiable, in view of the fact that the witnesses had been employed by him as Government agents to collect lac, it could and should have been made by an affidavit sworn by some officer of the Government and filed in Court.

The learned District Magistrate in his letter showing cause refers to the nature of the action he had taken in order that this Court may not think that he had acted in an "arbitrary or partisan spirit" and also refers to the "entirely mistaken" idea of the tenants that he was biased in favour of the landlord. We have no doubt that he acted in good faith, and in order to avoid loss to the lac. But the facts stated above, *viz.*, that the men of the opposite party were employed to cut and collect the lac (though under Police supervision) to the exclusion of the petitioners; that the lac was stored in the godowns of the oppoiste party; that he wrote the letter to the Subordinate Judge to help the opposite party in obtaining adjournment of the case; that the opposite party were allowed to issue notices for sale of the lac in their Cutchery as if it was their own property, and that, in spite of his attention having been drawn to the notices issued by the opposite party and the Rule issued by this Court, the District Magistrate took no notice of it, nor obtained directions of this Court, all these are calculated to create an impression that the Magistrate was biased in favour of the opposite party.

We set aside the proceedings under section 145, Criminal Procedure Code. The question of the disposal of the lac and the sale-proceeds of the portion already sold will be dealt with hereafter.

Proceedings set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1382 OF 1920.

December 11, 1920.

Present — Mr. Justice Martineau.

BISHNA AND ANOTHER—CONVICTS —PETITIONERS

versus

EMPEROR—RESPONDENT.

Punjab Excise Act (I of 1914), s. 61—Illegal possession of liquor—Husband and wife, whether can be considered as in joint possession.

Where liquor, and apparatus for manufacturing it, are found in a house which is in the joint occupation of a husband and wife, but which belongs to the husband, the latter alone must be regarded as being in possession of the articles. The wife,

KHUSHI RAM v. EMPEROR.

in such a case is not guilty of an offence under section 61 of the Punjab Excise Act.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Gurdaspur, dated the 13th August 1920, affirming that of the Magistrate, First Class, Gurdaspur, dated the 16th July 1920.

Lala *Mehr Chand Mahajan*, for the Petitioners.

Mr. *Sundar Das*, for the Government Advocate, for the Respondent.

JUDGMENT.—Bishna and his wife, Thakari, have been convicted under section 61 of Act I of 1914 of being in possession, without a license, of liquor and of apparatus for manufacturing it. Bishna's application for revision has been rejected and I have only to consider Thakari's case. She has been convicted only because it has been found that, during the raid on the premises, she broke a bottle of liquor. But her doing this would show nothing more than that she wanted to destroy evidence, and does not prove that the liquor and other articles were in her possession. I think that those articles must be regarded as having been in the possession only of her husband, who was the owner of the house.

Mr. Sundar Das, who appears on behalf of the Crown, asks that the conviction may be altered to one under section 201 of the Indian Penal Code, but Thakari was not charged with that offence, and I must decline to alter the conviction at the present stage.

I accordingly accept the application so far as Thakari is concerned, and acquit her of the offence of which she has been convicted. The fine if paid will be refunded.

Application partly accepted.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1338 OF 1920.

December 11, 1920.

Present:—Mr. Justice Scott-Smith.

KHUSHI RAM—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 424—Dishonest removal of property—Burden of proof—Question of title—Civil dispute—Procedure.

Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court. [p. 655, col. 2.]

Unless dishonesty is proved, a conviction under section 424 of the Penal Code cannot be sustained. [p. 655, col. 1.]

On the death of a person a dispute arose between his two widows as to the succession to his property and both of them put padlocks on the shop in which the property was. Some of it was subsequently removed from the shop by the accused at the instance of one of the widows: the other widow brought a suit to establish her title to the property:

Held, that the accused could not be convicted of an offence under section 424 of the Penal Code as, in the absence of a clear finding as to the respective titles of the widows, it could not be said that his removal of the property was dishonest. [p. 655, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Multan, dated the 2nd August 1920, affirming that of the Magistrate, First Class, Multan dated the 17th June 1920.

Lala *Mool Chand*, R. S., for the Petitioner.

JUDGMENT.—The petitioner in this case has been convicted by the lower Court under section 424, Indian Penal Code, for dishonestly removing certain property from a shop upon which were the padlocks of *Musammat* Khushali Bai and *Musammat* Mulo Bai, the widows of one Jaikishen Das, who died some two months previously. The petitioner is the brother of the deceased and what has been found by the Courts below is, that he removed property, probably at the instance of *Musammat* Mulo Bai, who claims to be entitled to the whole of it. The deceased during his lifetime made over his keys to *Musammat* Mulo Bai, who was living with him, *Musammat* Khushali Bai not having lived with him for some eight or ten years before his death. Ten days after his death *Musammat* Khushali Bai, who

claimed a share in the property, put her own lock on the shop. It was some two months after this that the property was removed, according to the petitioner, by *Musammat* Mulo Bai herself with the help of some third person, he himself having nothing to do with the removal. During the two months that elapsed after *Musammat* Khushali Bai put her lock on the shop, neither party took any steps to establish her right in the Civil Courts. *Musammat* Mulo Bai was in possession after the death of Jaikishen Das and it was, therefore, *Musammat* Khushali Bai who should have sued to establish her right in the Civil Courts. Taking as correct the finding of the lower Courts that Khushi Ram removed the property, the question is whether he did so dishonestly, for, unless dishonesty is proved, the conviction under section 424, Indian Penal Code, cannot be sustained.

Before the Magistrate *Musammt* Khushali Bai produced no evidence in support of her title. Evidence was produced on behalf of the accused to show that *Musammat* Mulo Bai alone was entitled to the property, but the Magistrate came to no clear finding on the point. He said that there was "no substantial proof of the complainant being a discarded wife, and whether she is or is not entitled to anything must be decided by a Civil Court." The civil suit brought by *Musammat* Khushali Bai is now pending between the parties, and the issues framed therein, a copy of which has been shown to me by the petitioner's Counsel, show that the dispute is of a complicated nature. If, eventually, it be decided that *Musammat* Khushali Bai is not entitled to a share in the property, it would follow that Khushi Ram's action in removing the property from the locked shop was not a dishonest one; for, if the property belonged wholly to *Musammat* Mulo Bai, then its removal was not done with any intention to cause wrongful loss to *Musammat* Khushali Bai or wrongful gain to *Musammat* Mulo Bai. In my opinion, the Magistrate was not justified in convicting the petitioner unless he could affirmatively hold that *Musammat* Khushali Bai was entitled to a share in the property. There is no such finding and the conviction cannot, therefore, be sustained. I think that this was a case where a Magistrate might very well have acted upon the principle enunciated in *Emperor* v. *Bishen Das* (1), to the effect that parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court.

I, therefore, allow the revision and, setting aside the conviction and sentence, acquit Khushi Ram and direct that the fine, if paid, be refunded to him.

Revision allowed.

(1) 8 Ind. Cas. 1161; 33 P. R. 1910 Cr.; 57 P. L. R. 1911; 12 Cr. L. J. 50.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 662 OF 1920.

November 18, 1920.

Present:—Mr. Justice Ryves.

LAL LOKPAL SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Order directing prosecution—Evidence recorded in absence of accused—No opportunity to cross-examine—Order, whether justified.

An order under section 476, Criminal Procedure Code, directing the prosecution of a person upon evidence recorded in his absence, and without affording him an opportunity to cross-examine the witnesses cannot be justified. [p. 656, col. 1.]

Criminal revision from an order of the Magistrate, First Class, Mainpuri, dated the 13th September 1920.

Mr. *Satya Chandra Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In the course of a murder trial before the Committing Magistrate, the Magistrate, at the instance of the prosecution, issued summons to Lal Lokpal Singh to appear in his Court apparently to give the prosecution an opportunity to examine him with reference to a letter produced by the prosecution. The summons was issued on three occasions but without result. The enquiry in the Magistrate's Court was concluded without the evidence of Lal Lokpal Singh having been recorded

KANWAR v. EMPEROR.

and the case was committed to the Sessions. In that Court also Lal Lokpal Singh did not appear and the case ended in the acquittal of the accused. Subsequently, the learned Magistrate issued notice to Lal Lokpal Singh under section 476 of the Criminal Procedure Code to show cause why he should not be prosecuted under section 174 of the Indian Penal Code for intentionally omitting to attend his Court. Lal Lokpal Singh appeard and put in an application through a Vakil to the effect that the witnesses, more particularly the Sub-Inspector and the constable who had deposed as to the service of one of the summons in the village on Lal Lokpal Singh, should be re called before the Magistrate and he should be given an opportunity to cross-examine them. This seems to be a very reasonable request. Lal Lokpal Singh was no party to the previous prosecution and the evidence was taken behind his back. The learned Magistrate, however, rejected the application holding that a prayer for regular enquiry should be rejected as it was not called for in the interests of justice.

It is quite true that under section 476 of the Criminal Procedure Code, as has been laid down in many rulings of this Court, a preliminary enquiry may be unnecessary, that is to say, it is not absolutely necessary to justify an order under that section, but in all those cases the person against whom an order was made, had always been before the Court and the evidence in the proceedings recorded in his presence and, therefore, an opportunity had been provided to him to test the evidence by cross-examination. The present case is very different and I do not understand how the Magistrate can come to any conclusion against the accused under section 476 without giving him an opportunity to cross-examine the witnesses whose evidence has been taken behind his back. He should certainly be given an opportunity to cross examine the witnesses. I, therefore, direct the record to be returned to the Magistrate and he be directed to call the witnesses whom Lal Lokpal Singh may summon and he be given an opportunity to cross examine them. It will be open to the Magistrate after such enquiry to proceed as he may be advised.

Record returned.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1319 OF 1920.

December 13, 1920.

Present :—Mr. Justice Wilberforce.

KANWAR—ACCUSED—PETITIONER

versus

EMPEROR RESPONDENT.

Restriction of Habitual Offenders (Punjab) Act (V of 1918), ss. 4, 7—Criminal Procedure Code (Act V of 1898), s. 110, proceedings under—Order of restriction, whether can be passed.

Where proceedings were started against a person under section 110 of the Criminal Procedure Code and at the very close of the case, without even calling upon him to show cause to the contrary, the Magistrate passed an order of restriction against him under the Punjab Restriction of Habitual Offenders Act :

Held, that the Magistrate had no jurisdiction to make the order of restriction.

Petition, under section 439 of Act V of 1898, for revision of the order of the District Magistrate, Karnal, dated the 25th June 1920, comfirming that of the Magistrate, First Class, Karnal, dated the 15th May 1920.

Lala *Ramanand*, for the Petitioner.

JUDGMENT.—In this case the proceedings were started against the petitioner under section 110, Criminal Procedure Code At the very close of the case, without even calling upon the petitioner to show cause to the contrary, the Magistrate passed an order of restriction under Act V of 1918. The petitioner's appeal to the District Magistrate was dismissed. It is clear that the Magistrate had no jurisdiction to pass the order complained of as no proceedings under Act V of 1918 had been even initiated against the petitioner. The necessary notice required by section 4 (1) of that Act was not served upon him, nor was he asked even verbally before the Court to show cause why the order of restriction should not be passed. In these circumstances, I am compelled to accept the petition and set aside the order of restriction.

Petition accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 21 B OF 1919.

July 17, 1920.

Present :—Mr. Macnair, A. J. C.

SHANTIDAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HIRALAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 20—Blank hundi *signed and delivered—Presumption—Holder, rights of.*

A person who gives another possession of his signature on a blank *hundi*, *prima facie* authorises the latter to fill it up and give to the world the bill as accepted by him. He enables his agent to represent himself to the world as acting with a general authority, and he cannot say to a *bona fide* holder for value, who has no notice of secret stipulations, that there were secret stipulations between himself and the agent. [p. 658, col. 2; p. 659, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Akola, in Civil Suit No. 35 of 1917, dated the 30th April 1919.

Messrs. *M. B. Niyogi* and *V. V. Ghitale*, for the Appellants.

Mr. *M. V. Joshi*, for the Respondents.

JUDGMENT.—The parties to this appeal are banking firms trading in the name and style of Dalichand Onkardas and Rakhabdas Sanklecha, respectively at Khamgaon. The plaintiffs have brought this suit alleging that the defendant firm on or about the 27th October 1913 drew a *hundi* on the plaintiff's firm for Rs. 5,000 payable 61 days after date, the payee being the Bank of Bombay; the *hundi* was for the benefit and use of the defendant, the latter firm having requested the plaintiffs before-hand to accept the said *hundi* and having agreed also to pay into the Bank the amount of the *hundi* on the date of maturity; that on or about the date of maturity they demanded the money from the defendants to pay the same in discharge of the *hundi*, but the defendants having failed to pay the same the plaintiff who had accepted the *hundi* and, therefore, bound in law to make the payment on the date to the payee had to pay Rs. 5,000 to the Bank of Bombay. The plaintiffs further pleaded that even if they fail to prove that there was an actual agreement between the parties before the drawing of the *hundi* to the effect that the defendants were to supply the funds, they, having accepted the *hundi* as drawees and having made the payment on the due date in good faith and the proceeds of the *hundi* being actually taken by the defendants, are entitled to recover this amount from the defendants both under the law and the custom of the market.

The defendant firm is owned by the defendants Nos. 1 and 2, who are joint Hindu brothers. The defendant No. 2 was a minor at the date of the suit; having attained majority during the pendency of the suit, he has defended the suit as major.

The defendant No. 1 alleges that though the *hundi* (Exhibit P-6) bears his signature, yet he has not drawn it. He denies its execution and consideration He also denies that there was any agreement between the parties previous to the drawing of the *hundi* and that he took any money under the *hundi*. He further alleges that he used to keep *hundi* papers signed in blank with Deokishan Aidan a firm of Akola, which was a broker of the Bank of Bombay, Akola Branch, and that there was an understanding between him and the said Aidan that a *hundi* was to be drawn on the said papers whenever he issued instructions to Aidan for the same. He pleads also that one Wasudeorao, the *munim* of the plaintiff's firm at Akola, has in collusion with the said Aidan caused the *hundi* to be drawn on one of the papers kept by him with Aidan and thus appropriated the proceeds of the *hundi*, and that the plaintiffs also were parties to this collusion. He thus denies the claim. Defendant No. 2 puts forward these grounds and further denies the claim on the ground that, if the said *hundi* was drawn by defendant No. 1, defendant No. 2 is not liable on it as the same was not for his benefit and in the usual course of business.

The learned Sub-Judge has found that the defendant's firm drew Exhibit P-6 for Rs. 5,000 on the plaintiff's firm; that the plaintiffs accepted the *hundi* and paid Rs. 5,000 into the Akola Branch of the Bank of Bombay; that the defendant's firm received the amount of the *hundi*; that the *hundi* is genuine and is not the result of collusion between Aidan and the plaintiffs' agent; that the assets of defendant No. 2 are liable for the payment of

the plaintiffs' claim. The suit was decreed. The defendats appeal.

The first ground of appeal is that, the lower Court refused to examine the defendants' witness, Surajmal, who was present. I am referred to the entry in the order-sheet dated the 1st February 1919. This entry refers to an application for permission to summon one witness on behalf of the defendant No. 2. The order-sheet states:—

"He is the same witness, Surajmal Gangaram, whom defendants took several steps to summon but the witness could not be caught hold of."

It seems clear that, if the witness was present, the Court was not aware of the fact. The Counsel for the parties have signed the order-sheet. The appellants have not cared to submit an affidavit or even to ask that file D should be sent for. I must hold that it is not shown that Surajmal was present. The learned Sub-Judge was clearly justified in refusing an adjournment to summon the witness at that stage.

The next ground is that, the lower Court should have drawn presumptions against the plaintiffs from the plaintiffs' refusal to enter the witness-box, especially after their agreeing to enter the box. I note that the appellants do not now ask that the plaintiffs should be examined. On 5th April 1918 the plaintiffs Nos. 1 and 3 appeared and were ready to go into the witness box. The lower Court refused to allow them to go for reasons which appear insufficient Before me it is not stated that the plaintiffs could give useful evidence on any point except on the alleged request made by the defendants to the plaintiffs' firm that the latter should honour the *hundi*. The failure of the plaintiffs to enter the witness box will be considered with regard to the question whether such request was really made.

On the third it is alleged that, certain facts have been ignored or insufficiently considered by the lower Court. It is difficult to ascertain from the ground of appeal what is really urged by the defendants. The defendants allege conspiracy between Wasudeorao, the plaintiff's agent, and Aidan. The lower Court has come to a finding on this and other points. The grounds of appeal do not show which findings are attacked. The pleadings before me have been similary vague.

The defendants' case was that, defendant No. 1 had provided Aidan Laxmandas with blank *hundis* and with blank cheques. The *hundis* were to be negotiated whenever Aidan received instructions. It seems obvious that, after Aidan issued such *hundis* in accordance with the instructions received from the defendant, the defendant cannot say that such *hundis* were not executed by him. It appears to me to make no difference if Aidan filled in and executed this particular *hundi* without directions from the defendant. It was not possible for outsiders to know what instructions the defendant had given to Aidan. If the defendant used Aidan as his agent and put him in a position to issue *hundis*, then he is responsible if such *hundis* are accepted.

Again, it is not denied that the amount of the *hundi*, less discount, was credited by the Bank of Bombay to the current deposit account of the defendant's firm. The money was then paid on a cheque (Exhibit P 5). The Defendant's firm have admitted that they had provided Aidan with blank cheques in order that they might draw the amount. In the absence of collusion, the plaintiff cannot be responsible for the proceeds of the *hundi* after these proceeds had reached the defendants' account. The defendants then received the proceeds of the *hundi*.

Again, section 20 of the Negotiable Instruments Act appears clearly to apply to the present case. The defendant gave *prima facie* authority to Aidan to make a negotiable instrument upon a blank *hundi*. Section 20 of the Negotiable Instruments Act terms the person to whom a blank *hundi* is given a holder, and it seems clear that such a person received *prima facie* authority to deliver the *hundi* after executing it. The law on this point is explained in Chalmer's Negotiable Instruments in British India, Fourth Edition, Chapter XV. For the purposes of this case it is sufficient to quote the remarks of Creswell, J., see page 1751:—

"A person who gives another possession of his signature on a bill-stamp, *prima facie* authorises the latter as his agent to

fill it up and give to the world the bill as accepted by him. He enables his agent to represent himself to the world as acting with a general authority, and he cannot say to a *bona fide* holder for value, who has no notice of secret stipulations, that there were secret stipulations between himself and the agent."

The plaintiff, unless fraud on his part is proved, is a holder in due course. It follows that, unless collusion between Aidan and the plaintiff's agent is proved, the plaintiff's suit must succeed.

I proceed to deal with the question whether the defendant has proved such collusion. Some of the facts mentioned in ground No. 3 of the memorandum of appeal are intended to support the plea that such collusion was proved. The Nos. 1 and 2 have no bearing on the point. On the Nos. 3 to 7 it is urged that there should have been better evidence of a request to the plaintiff's firm to accept this *hundi*. One of the plaintiffs should have entered, but did not enter, the witness-box; but it is clear that his evidence to the effect that his agent had spoken to him of such a request could have carried little weight and I can lay little importance on this omission. As both parties had their principal place of business at Khamgaon the absence of a letter is not strange. On fact No. 8 it is enough to say that, instructions to an agent at another town might well be given orally by the plaintiffs. On facts Nos. 9 to 11 it is sufficient to state that, Gopi Kisan is a person who would naturally be employed by Aidan for the receipt of the money on the *hundi*. On the facts Nos. 12, 13 and 15 it is enough to say that, I do not agree with the finding of the lower Court that the story of blank signed cheques being kept with Aidan is improbable. This does not affect the liability of the defendants.

It is strongly urged that the absence of any entry on a date prior to the payment by the plaintiff to the Bank in the plaintiffs' account-books leads to the inference that the plaintiffs' agent, Wasudeorao, accepted the *hundi* in collusion with Aidan and without authority from his masters. The theory is put forward that the plaintiffs' finding that, owing to Wasudeorao's bad faith, they were bound to make a payment to the Bank of Bombay made up their mind to represent that Wasudeorao had accepted the *hundi* on their instructions and to recover the amount paid from the defendant's firm by the present suit. There seems no particular reason why an entry should be made in the regular account-books of the plaintiffs at the time when the plaintiffs accept a *hundi*. No money passed hands at that time. The entry (Exhibit P-9), though it does not bear a date, appears to have been made before the payment to the Bank of Bombay; for the entry is in the *nakal bahi* for Sambat 1969, whereas the entry of payment to the Bank of Bombay is in the *kird* for Sambat 1970. A perusal of the entry (Exhibit P-9) shows that it does not purport to have been made on 29th December 1913 (the date on which the *hundi* matured) though there is a reference to that date in the body of the entry. There is then no substance in the foundation on which the theory to which I have referred is built. I find nothing on the record to justify an inference that Wasudeorao colluded with Aidan.

I cannot infer from the delay in filing the suit and the conduct of the case by the plaintiffs that the case is a false one. The appeal fails and is dismissed. Costs on appellants.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 999 OF 1917.

July 17, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Sulaiman.

BANSI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KANHAYA AND OTHERS—DEFENDANTS AND PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Mahabrahmin, status of—Right to receive alms, declaration as to, whether can be obtained.

Inasmuch as the right to beg, or a beggar's right to receive alms, does not constitute property as it is understood in law, a beggar cannot, under section 42 of the Specific Relief Act, obtain an

injunction entitling him to receive alms to the exclusion of other beggars. [p. 661, col. 1.]

The *Mahabrahmins* who solicit alms from pious Hindus on the bank of the Ganges river at Allahabad are beggars, and as such have no legal status. [p. 662, col. 1.]

Second appeal from the decision of the Subordinate Judge, Allahabad, dated the 10th of April 1917.

Messrs. *B. E. O'Conor* and *Badri Narain*, for the Appellants.

Dr. *S. N. Sen*, Mr. *Panna Lal*, and the Hon'ble Dr. *T. B. Sapru*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal. The facts of the case are as follows:—

On the banks of the Ganges, not far from Allahabad, is a spot where a ferry crosses the river; it is named Kubri Ghat. This apparently is a convenient spot for pious Hindus to bathe in the Ganges and apparently many of them do this in connection with religious ceremonies connected with deaths and other circumstances in their families. The contending parties in this case are Mahabrahmans, the plaintiffs, and Ganga Putras, the defendants, they may both be described as parasites of Hindu society. These persons go down to the Kubri Ghat and when a pious Hindu is about to bathe they offer him what they call "*kusha*," that is, a small bunch of grass. They pronounce a *Mantra* and he returns the grass together with a small pecuniary present. The spot where it occurs is private property belonging to the Zemindars of two villages Swad Khat and Taj Mullahan. Between the Ganga Putras and the Mahabrahmans there have been constant disputes in the past each seeking to prevent the other from obtaining these alms which are given by the bathers.

In the year 1904 there was a dispute and a Magistrate, by an order, dated the 2nd of July 1904, passed apparently under section 144, Criminal Procedure Code, restrained the plaintiffs, the Mahabrahmans, from taking any such gifts within a distance of 13 yards of the water's edge. The order held good only for two months and it was passed to prevent a breach of the peace taking place during that time. It was a period of festival during which many Hindus frequented the Ghat. Shortly before the present suit was instituted, in the year 1913, there was further trouble between these two classes and a Magistrate took action and bound down each party under section 107, Criminal Procedure Code. At the same time he published the old order of the 2nd of July 1904 for the information of the parties. He did not take action under section 144, Criminal Procedure Code, himself but merely published the order for their information. Thereupon, the plaintiffs brought the present suit. In paragraph 1 of their plaint, it is stated that they and their ancestors had been receiving these alms from people who came to bathe at Kubri Ghat by giving them *kusha* on the bank of the Ganges. They admitted that the defendants, that is, the Ganga Putras, had all along been receiving similar gifts by sitting on a mat and tying up a calf on the bank of the river and they also admitted that the defendants used to pay Rs. 150 as rent to the Zemindars for the piece of land which they thus occupied. They recited the order of the 2nd of July 1904 and the occurrences of the year of 1913 and the orders passed by the Magistrate. In paragraph 6 they admitted that the gifts given by the pious Hindus were purely voluntary acts. They went on to say that the Criminal Court had improperly infringed their rights as against the rights of the defendants and that the parties were entitled to receive whatever offerings were given to them by the bathers who frequented the bank. They asked for three reliefs,—

(1) That the order of the Criminal Court dated the 23rd June 1913 should be set aside. This relief has been denied to them by both the Courts below and they lay no claim to it before us;

(2) that it be declared that they have a right to take *dan*, that is, alms, by offering *kusha* on the bank of the Ganges at Kubri Ghat, and

(3) that a perpetual injunction be issued to the defendants restraining them from interfering with the plaintiffs in receiving alms on the bank of the river.

The Court of first instance framed five issues. The defendants in their defence admitted that they paid Rs. 150 as rent every year to the Zemindars as mentioned by the plaintiffs but not for the right of tying a calf and spreading a mat but according to a decree passed by the Civil Court in a certain case; they also admitted the incidents which had occurred in the Criminal Court. They claimed that they had an exclusive right to take the gifts offered by the Hindu bathers

and maintained that the Mahabrahmans had only a right to receive such gifts when the ceremony with which the giver was concerned was a funeral ceremony, otherwise the Ganga Putras had an exclusive right to take all gifts offered by bathers in the river. They maintained that the plaintiffs improperly interfered with their rights to take gifts. They maintained that the right of a Ganga Putra, is *Birt Jijmani* (which was a voluntary gift) and that a *Man Birt* was a purely personal gift. The Court of first instance framed the first issue as follows: "Have the plaintiffs got any cause of action?" It held that they had none and dismissed the suit. An appeal was preferred to the District Judge. He held that the plaintiffs had a cause of action and remanded the suit for decision on other issues.

The first Court then held that a gift made by the bathers in the river constituted *Man Birt*, that is a purely personal gift and not *Birt Jijmani*. It held in favour of the plaintiffs that they had a perfect right to go to Kubri Ghat and accept gifts by giving *kusha* to Hindus and it finally gave the plaintiffs the following declaration and injunction: "That the plaintiffs have always a right to accept *dan* by giving *kusha* on the bank of the Ganges at Kubri Ghat." It granted an injunction against the defendants restraining them from interfering with the plaintiffs in taking *dan* by giving *kusha* to bathers on the bank of the Ganges at Kubri Ghat.

There was no issue framed as to the alleged lease of the land used by the defendants. The defendants appealed and in their appeal they did not attempt to base their case in any way on the alleged lease. The Court of Appeal came to the conclusion that the plaintiffs were only entitled to accept such gifts as were ordinarily offered to Mahabrahmans and that their rights were not co-extensive with those of the defendants. It, therefore, set aside the decree of the first Court, so far as the declaration was concerned, and it gave the plaintiffs an injunction restraining the defendants from interfering with the plaintiffs in taking *dan* which bathers gave to them as Mahabrahmans at Kubri Ghat on the bank of the Ganges. The plaintiffs have come here in second appeal. They contend that they are entitled to a declaration such as was granted to them by the first Court; that they are entitled to accept any gifts whatsoever that are made to them whether they are connected with funeral rites or not; that the injunction granted by the Court of Appeal is of no use to them, and that they seek both the declaration and the injunction to maintain their right to accept alms of any sort offered to them by any body.

The defendants have filed objections: (1) One of the pleas which they have taken is that the right claimed by the plaintiffs is not recognised by law; (2) They further contend that the plaintiffs are neither entitled to the declaration nor to the injunction granted by the Court below. (3) The third plea taken is that the defendants, being lessees of the bank of the river at Kubri Ghat, the plaintiffs are not entitled to any injunction which interferes with the defendants' admitted right of *Birt Jijmani* within a distance of 13 yards from the river. In view of the fact that there had been no finding as to the lease throughout the litigation, nor had the defendants based their rights on their capacity as lessees, this third plea cannot be allowed to be taken before us.

The first question for consideration is whether, in view of the facts, the plaintiffs are in any way entitled to any relief whatsoever, either to the declaration or to the injunction. Section 42 of the Specific Relief Act lays down that: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief." In the present case the plaintiffs have come forward with no legal character whatsoever. The character they have assumed for the purposes of this litigation is the character of a beggar, that is, a person who begs from a person who is charitably inclined to give. In most countries this would render him liable to punishment in a Criminal Court. Even in this country, no beggar has a legal character. The character that he has is more likely illegal than legal. Therefore, the plaintiffs are not entitled to a declaration so far as their character is concerned. The next question is, whether they have any right as to any property which is in dispute in the present case. It is impossible to hold that

a beggar's right to receive alms is a right to property in any way. On their own showing, the plaintiffs admit that what they call *Mon Birt* is nothing less and nothing more than a pure gift made by a Hindu bather and is a personal offering to the donee. This right is not claimed in connection with any property, such as a temple or shrine or any other immoveable property. It is impossible, therefore, to hold that what the plaintiffs claim in the present case is property. It appears, therefore, to us that, under section 42 of the Specific Relief Act, it is impossible to give the plaintiffs the declaration which they now seek. Injunctions are dealt with in section 54 of the Specific Relief Act. Under that section "a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.... When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the Court may grant a perpetual injunction." It seems to us that, on the facts of the present case, it is impossible for us to say that there was any breach of any obligation existing in favour of the plaintiffs. The question, of course, is simple. No body is obliged to give to them nor are the defendants, the Ganga Putras, under any obligation towards them. Again, it cannot be said that the Ganga Putras invade or threaten to invade the plaintiffs' right to, or enjoyment of property. As we have pointed out above, the right to beg cannot constitute property as it is understood in law. Therefore, on the facts of the case, it appears to us that the plaintiffs are in no way entitled either to an injunction or to a declaration; we do not think that the remand order of the District Judge under which he sent back the case at all precludes us from coming to this conclusion. The plaintiffs might well have a cause of action and yet be not entitled to the reliefs they claimed. It is not necessary for us to go into and decide the question whether the defendants, the Ganga Putras, have any exclusive right or any right whatsoever as against the present plaintiffs-appellants. It may be that they equally are with the plaintiffs only beggars and as such they have no right whatsoever greater than that of the plaintiffs. It may be, on the other hand, that they are lessees of the land and as such they are entitled to keep the plaintiffs off the land. But as to these two points we express no opinion whatsoever. On the facts of the case, the suit was bound to fail. The appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

We allow the second objection, namely, that the right claimed by the plaintiffs is not recognised by law. The plaintiffs' suit will stand dismissed with costs in all Courts.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 784 OF 1919.

April 22, 1920.

Present:—Mr. Justice Oldfield and Mr. Justice Phillips.

KUPPUSAWMI IYENGAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KAMALAMMALL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4—Minor—Guardian ad litem having adverse interest—Decree, whether binding on minor—Limitation Act (IX of 1908), ss. 7, 9, Sch. I, Art. 44—Hindu joint family—Cause of action accruing to minor brother—Limitation for suit, commencement of.

A mere defect in following the rule as to representation of minors is not necessarily fatal to the proceedings so as to render invalid a decree against the minors [p. 663, col. 1.]

Where a cause of action accrues to two brothers of a Hindu joint family when they are minors, time for bringing a suit runs from the date on which the older of the two attains majority. [p. 663, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cuddalore, in Appeal Suit No. 113 of 1917, preferred against that of the Court of the Additional District Munsif, Villupuram, in Original Suit No. 1 of 1916.

FACTS appear from the judgment.

Messrs. *A. Rashyam Iyengar* and *T. G. Ragavachariar*, for the Appellants.—The lower Court erred in holding that the suit was barred and that plaintiffs should have

set aside the decree passed against them while they were minors. In the prior suit the minors were not properly represented. The interest of their mother who was their guardian *ad litem* was adverse to the interests of the minors. There was no effective representation and the decree should be treated as a nullity. It need not, therefore, be set aside. *Baij Nath Rai* v. *Dharam Deo Tewari* (1), *Khiarajmal* v. *Daim* (2).

Messrs. *L. S. Veeraraghava Iyer* and *M. Patanjali Sastri*, for the Respondents.—Mere defective representation of the minors will not render the decree obtained against them a nullity.

Adverse interest of the mother will not render her representation altogether void. The cases cited by appellants' Vakils are distinguishable. In *Baij Nath Rai* v. *Dharam Deo Tewari* (1), the question turned upon whether a prior decree was *res judicata* when it was obtained through the guardian's gross negligence. In *Khiarajmal* v. *Daim* (2) the Privy Council did not deal with the question of representation. The decree is not necessarily fatal to the proceedings. See *Walian* v. *Banke Behari Pershad Singh* (3).

JUDGMENT.—The lower Appellate Court held that the suit was barred, because, a previous decree having to be set aside, before relief could be given, Article 144, Schedule I, of the Limitation Act was inapplicable.

Appellants contend that the previous decree need not be set aside being a nullity, inasmuch as it was obtained against them as minors with their mother as a guardian *ad litem* and her interest in the litigation being adverse to theirs, she was not competent to represent them with reference to Order XXXII, rule 4 (1), proviso. Assuming, but not deciding, that the mother had any sort of adverse interest, we are not prepared to hold that she was so wholly disqualified that her representation must be treated as no representation and the decree must be regarded as null and need not be set aside on proof of fraud or otherwise. No authority cited for appellants goes that length. *Baij Nath Rai* v. *Dharam Deo Tewari* (1) has been relied on. But in it the question was not whether a previous decision should be set aside, but whether it was *res judicata*, when it was alleged to have been obtained through the guardian's gross negligence; and it is not clear that the same considerations arise on the latter question as on the former. The other case mainly relied on was *Khiarajmal* v. *Daim* (2) and in it the Judicial Committee no doubt referred to decrees obtained and sales held when the persons directly concerned were not parties to the proceedings or properly represented as nullities. But the question is then, what constitutes proper representation, their Lordships not dealing with the point further except by reference to *Kishen Chunder Ghose* v. *Musammat Ashoorun* (4) in which there was no representation at all. On the other hand, in *Walian* v. *Banke Behari Pershad Singh* (3) it was pointed out that a defect in following the rule as to representation of minors was not necessarily fatal to the proceedings. We are not, in the circumstances, prepared to hold that any possible adverse interest on the part of the mother rendered the decree against the present plaintiffs, the minors, a nullity. It, therefore, has to be set aside and the present suit is out of time.

Next, it is argued that this suit should have been regarded as one against the second defendant to recover from him the advantage which he has realized as implied trustee for the plaintiffs during their minority. It is not necessary to set out in detail the facts on which this plea is based, or to deal with it on its merits, because it was not, in our opinion, relied on in the Court of first instance and we are not prepared to consider it for the first time in second appeal.

Lastly, the suit has been held barred on the assumption that time ran from the date on which the elder of the plaintiffs attained majority, consistently with *Doraisami Sirumadan* v. *Nondisami Saluvan* (5). Reference has been made to *Nobin Chandra Barua* v.

(1) 35 Ind. Cas. 707; 38 A. 315; 14 A. L. J. 353.
(2) 32 C. 296; 9 C. W. N. 201 (P. C.); 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734.
(3) 30 C. 1021; 7 C. W. N. 774; 5 Bom. L. R. 822; 30 I. A. 182; 8 Sar. P. C. J. 512.
(4) Marsh. 647.
(5) 21 Ind. Cas. 410; 38 M. 118; 25 M. L. J. 405; 14 M. L. T. 401.

Chandra Madhab Barua (6) in which (it is said) a plea of limitation was disallowed in similar circumstances. There, however, perhaps with reference to the Dayabhaga Law, the elder of the plaintiffs concerned was held not capable of giving a discharge and that case must be distinguished on that ground.

The second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

(6) 36 Ind. Cas. 1; 44 C. 1; 20 M. L. T. 430; 21 C. W. N. 97; 14 A. L. J. 1199; 18 Bom. L. R. 102?; 31 M. L. J. 886; 24 C. L. J. 509; (1916) 2 M. W. N. 565; 5 L. W. 452 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 171 OF 1919, WITH RULE No. 29 OF 1919.

January 7, 1920.

Present :—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

Sreemutty RADHASHYAM DASYA, WIDOW OF GOLAK NARAIN PODDAR, AND ANOTHER —OPPOSITE PARTIES Nos. 1 AND 2—APPELLANTS

versus

Sreemutty RANGA SUNDARI DASYA, WIDOW OF SAGAR CHANDRA DE— PETITIONER—RESPONDENT.

Probate and Administration Act (V of 1881), s. 50 —Probate, revocation of—"Just cause," meaning of— Civil Procedure Code (Act V of 1908), O. XXXII, applicability of, to uncontested probate proceedings.

The mother of a deceased testator applied, as his executrix, for Probate of his Will; general citations were issued and a special citation was issued to the widow of the deceased, who was then a minor, with a direction that a guardian *ad litem* should be appointed for her; her father was so appointed, and a citation was issued to him, but he refused to receive it when it was tendered to him. The Probate proceedings were uncontested; the Will was proved in common form and Probate was granted to the mother. For several years the widow received benefits under the Will, and some five years after coming of age, and more than six years after the grant, she applied for revocation of the Probate, the petition being signed by her father on her behalf. The Probate was revoked on the ground that no appearance was entered for the widow, and the mother was directed to prove the Will in solemn form. On appeal:

Held that the facts did not disclose any "just cause" within the meaning of section 50 of the Probate and Administration Act, and that the delay in bringing forward a case against the Will was fatal to the application for revocation. [p. 666, cols 1 & 2.]

Although, as a rule, when a Will, of which Probate is sought, affects the interest of a minor, a guardian *ad litem* should be appointed for the minor, yet, until a contest arises, Order XXXII of the Civil Procedure Code has no application to the proceedings. [p. 666, col. 1.]

The effect of Order XXXII is, that no person can be appointed a guardian *ad litem* without his express consent, and the question whether the person appointed as such guardian consented to act is always one of importance on the merits, and the refusal by such a person to accept a citation when tendered to him might be regarded as a refusal by him to act. [p. 666, col. 2.]

Appeal against the decree of the second Additional District Judge, Dacca, dated the 26th June 1919.

Mr. *B. Chakraburty*, Dr. *Basak* and Babu *Paresh Lal Shome*, for the Appellants.

Babus *Mohendra Nath Roy* and *Rajendra Chandra Guha*, for the Respondent.

JUDGMENT.—This is an appeal from the judgment and decree of the Additional Judge of Dacca, dated the 26th June 1919.

On the 13th March 1912 Probate was granted of the Will of Sagar Chandra De, who died on the 1st Aswin 1318 (18th September 1211), leaving him surviving his mother, his childless widow, then a minor, a minor brother and one or two married sisters.

The proceedings were not contested; the Will was proved in common form and Probate was granted to the mother as executrix.

The decree appealed from revokes the Probate and directs the executrix, the appellant before us, to prove the Will in solemn form.

The petition for revocation was presented by the widow on the 18th November 1918, more than six years after the grant of Probate. The petition was signed on the widow's behalf by her father, Srish Chandra Dhar. The widow was 16 or 17 years old when her husband died and came of age in 1312 or 1313.

The Additional District Judge has found that, after her husband's death, the widow continued to live with her husband's relations in amity and has only recently gone to live with her father, who occupies a house opposite the testator's, in the same street. The suggestion contained in her petition that

she was on bad terms with her mother-in-law is unfounded.

As to the terms of the Will, no doubt the testator left the bulk of his property to his brother, but he bequeathed to his widow a lump sum of Rs. 1,000, and a monthly allowance of Rs. 5 for her maintenance. His estate was valued by the Collector at Rs. 6,595. He and his brother appear to have carried on a joint business as Poddars and to have inherited from their father, in equal moieties, a one-fourth share in holding No. 85 of *khas mahal* No. 8397 of the Dacca Collectorate. The rent due on account of the share was Rs. 2-1.

The Additional District Judge seems to have accepted an account produced by Nagar Chandra to whom, as residuary legatee, the executrix had made over the estate. The account, in our opinion, shows that Nagar debited himself with the sum of Rs. 1,000 and that he had made payments to the widow (amounting to Rs. 250) besides meeting various small expenses incurred by her. Nagar says that he offered to pay the widow Rs. 1,000 but at her and her father's request he took charge of the money and paid her from time to time such sums as her occasions required. He states that he executed a *hatchitta* for the whole sum in her favour and there is evidence in support of that statement. As early as March 1912 he paid the widow a sum of Rs. 43.

Moreover, in 1913 or 1914, in connection with the holding above referred to, Nagar applied for the registration of his name in the Collectorate in place of that of the testator. A surveyor, who was formerly Khas Tahsildar at Dacca, has been examined. He was ordered to make an enquiry. He enquired about the testator's heirs and sent for Sris Chandra who told him that neither he nor his daughter had any objection to Nagar's name being registered.

It is clear, therefore, that Sris Chandra and his daughter knew of the Will shortly after the grant of Probate. We are further satisfied that they were cognizant of the Probate proceedings.

The application for Probate was made on the 1st December 1911. General citations were issued and the District Judge further directed that special citations should be issued on certain persons, including the widow, and that a guardian *ad litem* should be appointed for the latter. Srish Chandra was so appointed, and it is not disputed that he was the proper person to act for his daughter. Her present petition describes him as her "guardian and protector." A note in the order sheet, under date the 19th February 1912, states that the notices had been issued and the service proved except in the case of a married sister of the testator. That lady subsequently filed a petition consenting to the grant of Probate to the testator's mother and the order granting Probate was accordingly made. In spite of Srish Chandra's denial, there is no doubt that a citation was served on him as the widow's guardian. The service is proved by the peon and by the evidence of two witnesses, one of whom put his name on the citation at the time. Srish Chandra refused to receive the notice and it was fixed on the door of his house.

There is, further, the evidence of a Pleader of the Judge's Court that Srish consulted him with a view to revocation of the Probate. He says Srish came to him four, five or six years ago, his memory not being exact. But it must have been soon after Probate was granted, because he advised Srish to wait till his daughter attained her majority.

The petition alleges that the Will was collusively concocted by the testator's mother and his surviving son, Nagar Chandra. In the course of his evidence, Srish Chandra stated that the testator was delirious throughout the whole of the illness, lasting 22 or 23 days, which ended in his death. He was the only witness examined for the widow and his statement was denied by Nagar and another witness on the other side The widow herself was not examined. An application for her examination on commission was made so late that the Judge rejected it. Allegations such as those made by Srish Chandra ought to have been made as soon after the event as possible, when the circumstances were fresh in the memory of those who had access to the testator. As he intended to revoke the Probate, the Additional District Judge very properly did not discuss this question. In the view we take of the case, it is right to say that, in our opinion, any attempt at this distance of time to establish, on such evidence as that of Srish Chandra, that the Will was a forgery would be hopeless.

It is important to observe, in this connection, that there is no suggestion that any facts subsequently came to the knowledge of the widow or her father which were not known to them at the time of the Probate proceedings.

The ground on which the Additional District Judge has revoked the Probate is that Srish Chandra entered no appearance for the widow. It is true that he refused to accept the citation when it was tendered to him, and if the refusal was not due to pettishness, as it often is, it might be regarded as a refusal to act for his daughter. But father and daughter were living close to each other and it is difficult to suppose that they were not in communication during the Probate proceedings. No reason exists why, if they had a case to bring forward against the Will, they should not have brought it forward at the time. The question is, whether the facts disclose "just cause," within the meaning of section 50 of the Probate and Administration Act, for revocation.

A citation for Probate is not a summons to appear. The object of citations, whether general or special, is to give those interested an opportunity of coming in, if they so choose, and contesting the application for Probate. Until a caveat is entered the proceedings are not contentious. Section 83 of the Prabate and Administration Act shows that up to that stage there is no "*lis*" and no suit. Until a contest arises, Order XXXII of the Civil Procedure Code, which is headed, "Suits by or against Minors and Persons of Unsound Mind," would seem to have no application to the proceedings. It has, however, been laid down in a series of cases in this Court that where a Will of which Probate is sought affects the interest of a minor, a guardian *ad litem* should be appointed for the minor [*Walter Rebells* v. *Maria Rebells* (1), *Shoroshibala Debi* v. *Anandamoyee Debi*(2), *Dwijendra Nath* v. *Golok Nath Sarma*(3)]. Such a rule may be expedient as a rule of practice. But it does not follow that every rule in Order XXXII is thus made strictly and legally applicable. The question here turns on rule 4 of Order XXXII, the effect of which is, according to the authorities, that no person can be appointed a guardian *ad litem* without his express consent. In an unreported case, in some respects similar to the present (R. A. No. 266 of 1917, decided on the 17th March 1917), *Sachindra Narain Saha* v. *Hironmoyee Dassi* (4), this Court had occasion to consider the application of the rule to Probate proceedings. It was held by Greaves, J., (Newbould, J. concurring) that the rule did not apply to proceedings which had not arrived at the contentious stage. The learned Judge came to that conclusion after referring to relevant provisions in the Probate and Administration Act and to statements of the English pratice in this connection to be found in Tristram and Coote's Probate Practice and Mortimer on Probate Practice. We do not understand that the further observations which the learned Judge made were intended to prescribe a strict rule binding in all cases. The question whether the person appointed guardian *ad litem* consented to act will always be one of importance on the merits. But we much doubt whether it is open to the Courts, or advisable, to lay down a strict and binding rule which would govern every case irrespective of its particular facts.

There are, however, circumstances in the present case which differentiate it from the case which came before Greaves and Newbould, JJ. It is proved that, for several years, the widow has received benefits under the Will, and we are of opinion that the facts in this connection afford a good ground for refusing to re-open the proceedings. *Kunja Lal* v. *Kailash Chandr* (5), *Manorama Chowdhurani* v. *Soshi Mohan Das Mazumdar* (6)]. We have no wish to curtail the privileges of minors but there is a danger of those privileges being abused at the instigaton of designing persons with interested motives. Regard must sometimes be had to the convenience, the feelings and the pockets of those who labour from the commencement of the proceedings under the disadvantage of maturity. In the present case, in our opinion, it would be unfair and unjust to the testator's mother to call upon her to prove the Will in solemn form. No just cause is shown for doing so.

(1) 2 C. W. N. 100.
(2) 12 C. W. N. 6.
(3) 28 Ind. Cas. 574; 21 C. L. J. 287; 19 C. W. N. 747.
(4) 59 Ind. Cas. 435; 24 C. W. N. 538.
(5) 7 Ind. Cas 740; 14 C. W. N. 1068 at p. 1073.
(6) 28 Ind. Cas. 886; 19 C. W. N, 366; 42 C. 480.

WADHAWA SINGH v. SUNDAR SINGH.

In the view we take, the appeal must be allowed and the application for revocation dismissed As we cannot make the applicant's father responsible for the costs, we make no order. The cross-objection has not been pressed and is dismissed. No orders are necessary on the Rule.

Appeal allowed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 331 OF 1920.
December 9, 1920.
Present:—Mr. Justice Scott-Smith.
WADHAWA SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS
versus
SUNDAR SINGH—DEFENDANT—RESPONDENT.

Court-fee—Decree for possession on payment of money—Appeal—Relief asked possession without payment—Court-fee payable—Civil Procedure Code (Act V of 1908), s. 149—Appeal filed on insufficiently stamped memorandum - Deficiency made up after expiry of limitation—Extension of time.

Where a plaintiff is given a decree for possession of land on payment of a sum of money and he appeals from the decree asking that he should be given possession without any payment, the Court-fee leviable on the memorandum of appeal is an *ad valorem* fee on the amount directed to be paid by the lower Court.

Where an appeal is filed in time on an insufficiently stamped memorandum, and on the deficiency being pointed out to the appellant by the office he disputes the order and does not make up the deficiency till long after the appeal is barred by time, he is not entitled to the benefit of section 149 of the Civil Procedure Code.

Second appeal from the decree of the District Judge, Amritsar, dated the 14th July 1919, reversing that of the Munsif, First Class, Tarn Taran, District Amritsar, dated the 20th March 1919.

Lala *Fakir Chand*, for the Appellants.

Lala *Bakhshi Ram*, for the Respondent.

JUDGMENT.—Mr, Bakhshi Ram raises a preliminary objection to the effect that the appeal to this Court is barred by time. The judgment of the lower Appellate Court is dated the 14th of July 1919 and the memorandum of appeal was presented to this Court on the 7th of October 1919, but as the Court-fee stamp was insufficient, it was returned in order that the deficiency might be made up, and was re-filed duly stamped on the 10th February 1920. On that date the appeal was barred by time.

BASDEO MAL v. KANHAIYA LAL.

The plaintiffs had sued for possession of certain land without payment of anything to the defendants. The decree of the lower Appellate Court was one for possession on payment of Rs. 150, mortgage money; in other words, it was a decree for redemption. In appeal to this Court the plaintiffs asked that they should be given a decree for possession without payment of anything. The proper Court-fee stamp upon the memorandum of appeal was an *ad valorem* one upon the amount of the mortgage-money and the office order returning it for making up the deficiency was a perfectly correct one. The plaintiffs could have re-filed the appeal within time, but instead of doing so they disputed the order and did not re-file it until four months later. Under these circumstances, I do not consider they are entitled to the benefit of section 149, Civil Procedure Code. I follow the cases reported as *Amtul Qadir* v. *Muhammad Yusaf* (1) and *Lekh Ram* v. *Ramji Das* (2).

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 49 Ind. Cas. 871; 57 P. W. R. 1919; 8 P. L. R. 1919.
(2) 57 Ind. Cas 215; 1 L. 234.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 118 OF 1919.
June 30, 1920.
Present:—Mr. Justice Sulaiman and Mr. Justice Kanhaya Lal.
BASDEO MAL GOBIND PRASAD AND OTHERS—DEFENDANTS—APPLCIANTS
versus
KANHAIYA LAL LACHMI NARAIN AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, Sch.

BASDEO MAL *v.* KANHAIYA LAL.

II—Arbitration—Award—Extension of time for submitting award, whether proper—Agreement to refer to arbitration—Party to agreement, whether can withdraw—Revision.

Inasmuch as a Court has jurisdiction to extend the time for submitting an award, the mere exercise of that jurisdiction does not amount to a material irregularity. [p. 668, col. 2.]

Once a party agrees to submit a dispute to arbitration, and the arbitrator proceeds to evidence, it is not open to him to withdraw from the arbitration [p. 668, col. 2.]

The adjudication of disputes by arbitration should be the result of the free consent of the arbitrator to undertake the duties of arbitrating between the contending parties who have agreed to repose confidence in his judgment. [p. 669, col. 1.]

The Court has no authority to compel a private arbitrator to arbitrate against his own will. [p. 669, col. 1.]

The mere fact, however, that a Court has used threatening language towards an arbitrator is not a ground for interference under section 115 of the Civil Procedure Code in the absence of anything to show that, in consequence of such language, the arbitrator was forced to arbitrate against his will.

Civil revision from an order of the City Munsif, Moradabad.

Mr. *Shiva Prasad Sinha*, for Mr. *J. N. Misra*, for the Applicants.

Mr. *Surendra Nath Sen*, for the Opposite Party.

JUDGMENT.—This revision arises out of two cross-suits. It appears that on the 2nd of January 1919 the parties referred their dispute to an arbitrator, and on the 21st of January 1919, the arbitrator made a partial award and returned the papers saying that there were not sufficient materials before him to come to a finding on the other issues. The finding on the issue decided by him was adverse to the present applicants, the Court sent the papers back to the arbitrator directing him to proceed with the case and decide it on the evidence. The applicants sent a registered notice to the arbitrator prohibiting him from proceeding with the case and requesting him to send the papers to the Court. The arbitrator asked for instructions from the Court and the learned Munsif directed him to proceed with the case regardless of the notice. After this, an application seems to have been made by the present applicants in the Court below withdrawing from the arbitration That application was also rejected. The date fixed for the submission of the award was the 29th of March, but no award was submitted till then. Time was extended up to the 5th of April, but no award was submitted even then. A further extension was, therefore, granted till the 16th of April 1919, and a reminder was sent to the arbitrator. Neither any award nor any reply to the reminder was received by the 16th of April 1919. The Court passed an order that, inasmuch as neither the arbitration award nor any application for extension of time had been received, a registered letter should be sent to the arbitrator calling upon him to send his award by the 30th April 1919, or to explain or show cause why he should not be charged with contempt of Court. On the 30th April 1919 the arbitrator made his award. Objections were taken to the award, but the learned Munsif overruled them and passed a decree in terms of the award. The applicants have come up in revision to this Court and on their behalf it is contended, (1) that the Court below had no jurisdiction to force the arbitrator to act, he having returned the papers to the Court; (2) that the Court had acted without jurisdiction and with material irregularity in extending the time for filing the award from time to time without any application; (3) that the applicants having given notice to the Court and the arbitrator that they did not wish to have the case decided, the Court has acted without jurisdiction in accepting the award. As to the last two grounds mentioned above, we think there is no force in them. The Court, under the Code of Civil Procedure, had jurisdiction to extend time to the arbitrator to submit his award and we are unable to see any want of jurisdiction or material irregularity in the act of the Court in ordering such extensions. Once the applicants had agreed to submit their dispute to an arbitrator who had made a partial award and recorded some evidence, it was not open to the applicants to withdraw from the arbitration, and the Court below was justified in rejecting their application. It has, however, been strongly urged that, in view of the order, dated the 16th of April 1919, the arbitrator was forced to act in the matter. We have examined the record and we find that there is nothing to show that, previous to the order of the 16th of April 1919, the arbitrator had declined to act and

that he was forced to make his award by the threat contained in the order of the 16th of April 1919. Under these circumstances, we find ourselves unable to set aside that order. Further, this objection was not taken in the Court below but has been raised for the first time in revision.

At the same time, we cannot refrain from remarking that the language used by the learned Munsif in his order dated the 15th of April 1919, was wholly improper and objectionable. The Court has no authority to compel a private arbitrator to arbitrate against his own will. If it had been a fact that the arbitrator had refused to arbitrate and that he was subsequently forced by the Court to arbitrate, we would have had no hesitation in setting aside the order of the Court below. As was pointed out in the case of *Shibcharan* v. *Ratiram* (1), it is one of the most essential principles of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrator to undertake the duties of arbitrating between the contending parties who have agreed to repose confidence in his judgment. The Court below was, therefore, not justified in sending a notice to the arbitrator to show cause why he should not be charged with contempt of Court. At the same time, as we have remarked above, there being nothing to show that the arbitrator had previously refused to act in the matter and that he was forced to arbitrate by the threatening language used in the order of the 16th of April 1919, we find ourselves unable to interfere. The two applications are, therefore, dismissed with costs.

Application dismissed.

(1) 7 A. 20; A. W. N. (1884) 212; 4 Ind. Dec. (N. S.) 250.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 851 OF 1920.

December 16, 1920.

Present :—Mr. Justice Scott-Smith

RATAN CHAND JWALA DAS AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

ASA SINGH BOGHA SINGH—DEFENDANT —RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 85—Mutual account, what is—Advance of money by plaintiff—Grain sent by defendant to plaintiff for sale—Suit to recover balance—Limitation.

An account is mutual when there are transactions on each side creating independent obligations on the other. [p. 670, col. 1.]

Where the transactions create obligations on one side only, those on the other being merely complete or partial discharges of such obligations, the account is not mutual. [p. 670, col. 1.]

The absence of a shifting balance, however, is not conclusive against the mutuality of an account. [p. 670, col. 2.]

Plaintiff made advances of money to the defendant. The latter used to send grain to the plaintiff who used to sell it and, after deducting his commission, used to credit the balance to the defendant's account. He brought the present suit to recover the balance due to him on the account :

Held, that the suit was governed by Article 85 of Schedule I to the Limitation Act. [p. 670 col. 2.]

Second appeal from the decree of the District Judge, Shahpur, at Sargoda, dated the 9th March 1920, reversing that of the Munsif, First Class, Sargoda, dated the 9th December 1919.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—In the suit out of which the present appeal arises the plaintiffs' firm made advances of money to the defendants. The defendants are dealers in grain and used to send their grain to the plaintiffs' shop. Plaintiffs' sold it as commission agents and, after deducting their commission and other charges, credited the amount remaining to the defendants in the account. On the 17th of April 1913 the accounts were made up and the defendants struck a balance in the form of an acknowledgment. The plaintiffs having sued for the balance due to them on the accounts, the lower Appellate Court has held that the suit is governed by Article 85 of the Limitation Act and is barred by time.

The plaintiffs have filed a second appeal in this Court.

It is not disputed that if Article 85 applies the suit is barred by time, but Mr. Nanak Chand, on behalf of the appellants, contends that Article 85 is not applicable and that the suit is really one for money payable for money lent under Article 57 of the Limitation Act. He admits that the so-called balance does not amount to an account stated. Article 85 relates to a suit brought for the balance due on a mutual open and current account where there have been reciprocal demands between the parties. It has always been held that an account is mutual when there are transactions on each side creating independent obligations on the other and that where the transactions create obligations on one side only, those on the other being merely complete or partial discharges of such obligations, the account is not mutual. For instance, in the present case, if it were shown that the plaintiffs made advances to the defendants and that the defendants from time to time sent them consignments of grain in part payment, then Article 85 would not apply. Ganda Ram, plaintiff, who was called as a witness on behalf of the defendants, stated that the latter were grain dealers and that he was their commission agent. He said that defendants' grain used to lie at his shop, that he used to sell it and, after deducting his commission and other charges, the balance used to be credited to the defendants' account. He admitted that on the first Katak 1970 four bags of *bajra* belonging to the defendants came to his shop, and that their price was credited on the 3rd of March *i.e.*, some months later after they had been sold. Mr. Nanak Chand relies upon the case reported as *Ishar Das* v. *Harkishan Das* (1). In that case the course of dealings was as follows. Plaintiff advanced loans to defendant from time to time and in re-payment defendant occasionally passed grain to plaintiff which the latter sold and credited to the former's account. After some months, the accounts were examined and a balance was struck in plaintiff's favour. It was held that the plaintiff's suit was on a closed account and not on an open one, and that it was governed by Article 64 or by Article 57 of the Limitation Act. In that case there was apparently no relation of principal and agent between the parties and the consignments of grain made by defendant to the plaintiff were merely made in part payment of the sums advanced. The facts were distinguishable from those of the present case He also referred to *Shive Gowda* v. *Fernandez* (2). That also was a case where the plaintiff financed the defendant and the defendant in re-payment sent consignments of coffee to the plaintiff. It was held that the accounts, though current and open, were not mutual within the meaning of Artile 85 of the Limitation Act. It was said that payments made on account by one party and credited by the other whether in money or goods did not render the account mutual and that there must be independent obligations on both sides to make the account mutual.

One argument urged for the plaintiffs' firm was that the balance was always in their favour and that the absence of a shifting balance was an indication that the account was not mutual. In *Velu Pillai* v. *Ghose Mohammad* (3), however, it was held that the absence of a shifting balance was not conclusive against the mutuality of the account. The same was the view adopted in *Ganesh* v. *Gyanu* (4). The case appears to me to be very similar to the one reported as *Namberumal Chetty* v. *Kotayya* (5). In that case the plaintiff advanced moneys to the defendant and the latter consigned goods to the former for sale on commission, and it was held that there were independent obligations on each side and that the account between the parties was a mutual, open and current account within the meaning of Article 85.

Now, even if the simple relation of creditor and debtor existed between the parties in regard to the cash advanced by the plaintiffs' firm to the defendants, the relation of principal and agent existed between the defendants and the plaintiffs in regard to the sale of the former's grain. Defendants' grain used to lie at the plaintiffs' shop and the plaintiffs had to account to the defendants for its price after deducting thier own charges. There was, therefore, an independent

(1) 35 Ind. Cas. 577; 148 P. W. R. 1916; 7 P. L. R. 1917.

(2) 8 Ind. Cas. 141; 34 M. 513; 8 M. L. T. 412; (1911) 1 M. W. N. 1; 21 M. L. J. 891.

(3) 17 M 293; 4 M. L. J. 140; 6 Ind. Dec. (N. S.) 203.

(4) 22 B. 606; 11 Ind Dec (N. S.) 986.

(5) 21 Ind. Cas. 773; 14 M. L. T. 498.

obligation on the plaintiffs' side and that, in my opinion, was sufficient to satisfy Article 85 of the Limitation Act.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1340 OF 1917.

July 6, 1920.

Present :—Mr. Justice Walsh and Mr. Justice Gokul Prasad.

CHHATTER SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TEJ SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4 (3)—Minor, suit against—Guardian, appointment of—Consent of guardian, nature of—Minor, when bound by proceedings.

It is not necessary that the consent of the person to be appointed guardian, under Order XXXII, rule 4 (3) of the Civil Procedure Code, should be express; it may be implied from conduct, as, where notice is served on a person to show cause why he should not be appointed guardian, and he does not appear in answer to the notice appointing him guardian. [p. 671, col. 2.]

In the absence of anything to suggest that the interests of a minor have not been duly protected in a suit, and that he has been prejudiced by the appointment of a guardian, an irregularity in the appointment is not a sufficient ground for setting aside the proceedings at the instance of the minor. [p. 672, col. 2.]

Second appeal from a decree of the Second Additional Judge of Aligarh.

Mr. *Piare Lal Banerji*, for the Appellants.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—This is a defendants' appeal against a decree setting aside a decree. The former suit was brought on a bond against the members of a joint Hindu family by the defendants who obtained the decree. The suit was brought against the members of the family including the *karta* or managing member and also the other adult members and also their minor brothers, who were sued by name in their individual capacity. With regard to the minors the following steps were taken. With reference to certain minor members of the family notice was issued by the then plaintiffs, defendants to the present suit, to one Gulab to show cause why he should not be appointed their guardian, and, with reference to the other minor members, a similar notice was issued to one Jamna Das. These two persons did not give any express consent. On the other hand, they did not refuse. They remained silent. The Court appointed them guardians. They were already themselves parties to the suit as defendants. They were, as has already been pointed out, members of the same family, and their interest in the suit and their defence, if there had been one, were precisely identical with that of the minors. They did not appear in answer to the notice appointing them as guardians and the Court, under the circumstances, inferring, as was natural, that they had no objection, appointed them as guardians of the minors. In these circumstances, the suit was decreed against all the defendants, not *ex parte* in the strict sense of the word, but against the persons who were on the record as defendants but who, having no defence, did not trouble to appear, as an undefended suit. The question raised by this second suit in which the minors seek to set aside the decree is, whether the former decree ought to be held binding upon them in law. The lower Appellate Court, disagreeing with the first Court, has decreed the suit on the ground that the minors were not properly represented. It has based its finding upon Order XXXII, rule 4, sub-clause (3), which provides that no person shall without his consent be appointed guardian for the suit. These words are new in the existing Code and are stronger than anything contained in the old Code, but were clearly put in for the protection of the person whom it was proposed to appoint. The lower Appellate Court has held that the consent mentioned in that sub-clause must be express. It disagreed with the first Court in holding that it might be implied, and held that it must be obtained. In our view this is untenable. Many instances may be given from legislation where consent may be implied and is not necessarily to be expressed in any document or record, and it is germane to the argument to point out that in the order itself which we are

called upon to construe another of the rules, namely, Order XXXII, rule 7, sub-section (1), dealing with the leave required from the Court for a next friend or guardian to enter into any compromise enacts that such leave shall be expressly recorded in the proceedings. It, therefore, appears that in these rules of procedure, which, after all, are only directory, where the Legislature requires something to be expressly set out in writing or recorded, it says so in so many words. The lower Appellate Court is right in holding that the amended form, which the Rules Committee of the High Court has recently directed to be issued to the proposed guardian, cannot of itself alter the law or make that binding upon the guardian which would otherwise not be binding; but in our view it is a question of fact in each case to be determined by the Court appointing the guardian, such determination of course to be subject to review in any subsequent suit challenging the appointment, where, under all the circumstances of the case, it can be properly held that the particular guardian did or did not consent or was not willing to act. We do not agree with the view of the lower Appellate Court that the absence of a proposed guardian to a notice calling upon him cannot, in any circumstance, raise the presumption of consent. Circumstances such as those which we have enumerated in this judgment are very strong to raise the presumption that the brothers in question had no reason for refusing, and had every reason for consenting, and by their silence did consent. That finding of fact has been established beyond dispute. The only question is whether there is anything in the eye of the law sufficient to justify that finding of fact. We hold that consent under this rule may be implied from conduct, and that it was rightly implied in the circumstances of this case. If this view is correct, there is no irregularity; even if there had been any irregularity, we should have considered ourselves bound by the authorities which have been cited to us to disagree with the lower Appellate Court upon the ground that no prejudice had been shown to the plaintiffs. Three authorities have been cited upon this point. We think that the rule which ought to guide the Courts in these matters is best sought in the observations of the Privy Council in the case of *Walian* v. *Banke Behari Pershad Singh* (1). It is true that that decision was under a different provision in the earlier Code of 1882, but in substance there is no distinction between that case and this, and their Lordships' observations must be accepted in their widest significance as applicable to all similar cases, whatever detailed variation may take place in the actual rules governing the appointment of guardians. They laid great stress upon the fact that there was nothing to suggest that the interests of the minor were not duly protected and it had not been shown that the alleged irregularity had caused any prejudice to the plaintiffs. There is a decision of this Court, in the case of *Rambrichh Ram* v. *Tarak Tewari* (2), in which it was distinctly held by Mr. Justice Piggott and one of us that, whatever the irregularity may be, the moment it is shown that there has been no fraud and that the minor's interests have not been prejudiced, the minor's right to set aside the proceedings must be denied. In the course of the argument Mr. Justice Piggott used an expression which we adopt:—"The question whether the minor was in fact prejudiced depends upon the particular circumstances of each case and does not necessarily follow from an irregularity in the appointment of a guardian *ad litem*." In the judgment of one of us it was pointed out that there are in these cases two distinct issues, (1) whether the appointment was itself irregular, and (2) whether the minors have been prejudiced by such irregularity. Following the decision in that case, and having regard to the fact that no prejudice was either alleged or shown at the hearing of this case in the Courts below, we should hold, in any event, that the plaintiffs have failed to establish their legal right to succeed in this suit. The decree of the lower Appellate Court must be reversed and the decree of the first Court restored with costs.

Appeal allowed.

(1) 30 C. 1021 at p. 1031; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512.
(2) 33 Ind. Cas. 805; 14 A. L. J. 589.

LAKHAMBAI *v.* DEVIBAI.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 13 OF 1916.

January 31, 1919.

Present:—Mr. Kincaid, A. J. C., and Mr. Raymond, A. J. C.

Musammat LAKHAMBAI, WIFE OF THAWERDAS, AND ANOTHER—APPELLANTS

versus

Musammat DEVIBAI AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. XLI, r. 31—Omission to comply with provisions of rule, effect of—Easement—Garden—Right of management and ownership reserved—Succession, how regulated.

The omission by an Appellate Court to comply strictly with the provisions of Order XLI, rule 31 of the Civil Procedure Code amounts to no more than an irregularity curable by section 99 of the Code. [p. 674, col. 1.]

Where an easement is created in favour of a community over a garden which they are empowered to use as a public park, but the right of management and ownership are retained by the owner, the garden descends in the ordinary way subject to the charge upon it. [p. 674, col. 2.]

Appeal from the decision of the Joint Judge, Sukkur.

Mr. *Rupchand Billaram*, for the Appellants.

Mr. *G. A. Kikla*, for Respondent No. 1.

JUDGMENT.—The facts of this appeal are shortly as follows: A certain Deumal had two sons, Bodaram and Lila. The former had two daughters and a granddaughter. The latter had a son.

The family tree is as under,—

DEUMAL.

Bodaram, (died 26-7-1897)= Hundibai, (died 18-1—1901)

Lilaram,

Kundanmal, (deft. No. 2) *alias* Khemchand.

Sat Bhawan, (died 1906) =Deumal,

Lakhambai, (deft. No. 1.)

Devibai =Narainlal.

Bodaram died on the 26th July 1897. His widow, Hundibai, survived him but died on the 18th January 1901. After the death there arose a dispute between Sat Bhawan on one side and Lakhambai and Lilaram on the other. Sat Bhawan filed a suit No. 1093-1901 in the Court of the Sub Judge, Shikarpur, asking for the partition of Hundibai's property and she alleged that it had been the self-acquired property of Bodaram and that she and Lakhambai were each entitled to a half share to the exclusion of Lilaram. The disputes were referred to arbitration; an award was made and a decree was passed in the terms of the award. By this decree all the property, with the exception of Survey Nos. 94 and 95 and a sum of Rs. 7,810, were divided into three equal shares. These shares were allotted to Sat Bhawan, Lakhambai and Kundanmal. Lilaram appears to have resigned his rights in favour of his son. With these three shares we are not concerned. The dispute before the Court concerned Survey Nos. 94 and 95 and the sum of Rs. 7,810. The decree provided that Survey Nos. 94 and 95 were to be turned into a property for charitable purposes. People in general will take rest on this property and a trough for watering cows will receive water supply from the well and people in general will take rest (on the land). None of the parties will be entitled to dispose of it. But the plaintiff and defendants (Sat Bhawan and Lakhambai and Kundanmal) will look after the said garden from time to time. The said land stands in the *khata* transferred by Shewaram *vod* Changomal. The parties will get the *khata* transferred by Shewaram to their names whatever expenses is incurred on it will be borne by the parties in three equal shares.

As regards the sum of Rs. 7,810, the decree provided that Rs. 1,310 should be given in charity, that Rs. 2,000 shall be spent in building a *pacca* well, a reservoir, a *dome* and in constructing a trough for watering cows. The remaining Rs. 4,500 were to be spent in buying shops and houses in Sukkur or Shikarpur. The rents to be devoted to *sadavarat* in religious ceremonies connected with Bodaram's death. The surplus rents were to be divided into three shares, of these, two shares were to be spent by Kundanmal for charitable purpose. The other share was to be taken by Sat Bhawan and Lakhambai and at first devoted to the expenses of Kundanmal's trees and, after Kundanmal's majority, to the expenses of the garden and well.

In 1906 Sat Bhawan died leaving a minor

daughter, Devibai. In 1913, while Devibai was still a minor, her husband Narainlal filed a suit asking that her name should be substituted in the revenue registers in place of Sat Bhawan, her mother, for the two Survey Nos. ; that she should be put in joint possession of them ; that an injunction should be issued to Lakhambai, Kundanmal and Teumal restraining them from interfering with her right to manage the two Survey Nos. jointly with them. The first Court dismissed the suit on the ground that the Survey Nos. had vested in trustees and not in Sat Bhawan and Lakhambai and Kundanmal. The latter, so the learned Sub Judge held, had only been appointed to assist the trustees. Against this finding Devibai appealed to the District Court of Sukkur. The learned Joint Judge reversed the first Court's decree and allowed Devibai the reliefs prayed for by her. Against this decision a second appeal has been made to this Court.

Mr. Rupchand, who appeared for the appellants, advanced several grounds. The judgment of the lower Appellate Court, he said, did not comply with the provisions of Order XLI, rule 31. Devibai, as a minor, was not entitled to sue. The plea of Teumal, Devibai's father, that he had inherited by Will from Sat Bhawan had not been considered. Lastly, the lower Appellate Court was wrong in holding that Devibai could inherit the right to manage the garden.

I shall consider these contentions one by one. It is true that the lower Appellate Court has not complied with the provisions of Order XLI, rule 31. The learned Judge has not stated the points for determination and his decision thereon. I would, therefore, specially direct his attention to that rule as its provisions are imperative. At the same time, the learned Judge's omission does not amount to more than an irregularity, and can be amended by section 99 of the Civil Procedure Code.

As regards the minority of the plaintiff, the answer is that she has been represented by her next friend, her husband. It has been urged that, so long as she is a minor, she cannot fill the office of a trustee. She is, however, not suing as a trustee but as the heir to her mother, Sat Bhawan. At the present moment, moreover, she is admittedly a major.

The argument that the case should be remanded, that the lower Court may decide whether Teumal had established his case that Sat Bhawan made a Will in his favour is met by the fact that Teumal has not appealed to this Court. There is also a finding of fact by the lower Appellate Court, that the Will relied on by Teumal is not genuine.

There remains the main contention that Devibai could not inherit the right to manage the garden. Now it has not been denied that Devibai is the heir of her mother, Sat Bhawan. Whatever rights therefore, were possessed by Sat Bhawan were inherited by Devibai. But, so Mr. Rupchand has argued, the garden land was vested in Kundanmal's trustees, Maghaldas and Kundandas. Sat Bhawar, therefore, had no rights in the garden which Devibai could inherit. I have, however, read very carefully the decree and nowhere can I find any vesting of the garden land in Kundanmal's trustees. On the contrary, the decree has directed that the *khatta* should be transferred to the name of Sat Bhawan and Lakhmibai and Kundanmal. The expense of doing so was to be borne by them in three equal shares, the management of the garden was expressly conferred on Sat Bhawan Lakhambai and Kundanmal.

On these two was thrown the burden of defending the title of the garden and of paying any excess in its upkeep. The conditions therefore, resemble those mentioned in section 438, Mayne, wherein will be found the following passage:—

"Another state of things arises where land or other property held in beneficial ownership subject merely to a trust as to part of income for the support of some religious endowment."

Here, again, the land descends and is alienable and partible, in the ordinary way the only difference being that it passes and with the charge upon it. The same rule would apply where the owner retained the property in himself but granted the community or part of the community an easement over it for specified purposes.

All that the decree created was an easement in the community over the garden which they were empowered to use as a public park. The right to manage it, the right of ownership over it, remained with Sat Bhawan,

Lakhambai and Kundanmal. On Sat Bhawan's death Devibai succeeded to Sat Bhawan's share in these rights. The lower Appellate Court, therefore, was correct in awarding Devibai the relief claimed by her.

Lower Court's finding and decree confirmed with costs.

Appeal dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 101 OF 1918.
July 16, 1920.
Present :—Mr. Justice Piggott
and Mr. Justice Gokul Prasad.
SANEHI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
L. ONKAR MAL—DEFENDANT—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 35—Indorser, liability of—Notice of dishonour, whether necessary.

Section 35 of the Negotiable Instruments Act restricts the liability of an indorser to cases where notice of dishonour has been given to him : or, in other words, the fact of the bill of exchange being dishonoured and the intimation thereof to the indorser are conditions precedent to his being made liable thereunder. [p. 676, col. 2.]

Second appeal against the decision of the Additional Subordinate Judge, Moradabad, dated the 21st December 1917.

Mr. *P. L. Banerjee*, for the Appellants.

Mr. *W. Wallach*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs under the following circumstances :—

Some money was due to the plaintiffs by the defendant, in payment of which the defendant sent a *hundi* to the plaintiffs drawn by Tulshi Ram-Ram Baksh on Bansidhar-Manohar Lal in favour of the defendant. The plaintiffs endorsed the *hundi* to Raja Ram and Raja Ram endorsed it to Nanak Chand. Nanak Chand lost the *hundi*. Without taking any steps to obtain a duplicate of it he brought a suit against Raja Ram and recovered the amount from him, his (Nanak Chand's) immediate endorser. Raja Ram in his turn sued the plaintiffs and the plaintiffs had to pay the consideration of the *hundi* together with costs and damages. The plaintiffs now bring this suit to recover from the defendant the amount that they had to pay to Raja Ram in execution of his decree. The defence raised was that neither the plaintiffs nor the subsequent purchaser of the *hundi* took proper steps for realising the amount due thereon and it was owing to their negligence and improper proceeding that the money could not be recovered from the drawer. Another plea in defence was that the *hundi* was not presented to the drawee and, for these two reasons, the defendant could not be made liable. The first Court came to the conclusion that the plaintiffs were not bound to supply information of the loss of the *hundi* to the drawer and drawee, nor were they bound to ask for a duplicate and that there was nothing which would prevent them from recovering the money. The defendant went up in appeal and the learned Subordinate Judge, finding that it was admitted that the *hundi* was never dishonoured by the drawee and that the plaintiffs could have called for a duplicate *hundi* from the drawer under section 45 (*a*) or have demanded the money from the drawee under section 81 by giving security, came to the conclusion that, having regard to these facts, the plaintiffs were not entitled to recover the amount from the defendant, the defendant's liability being contingent upon the *hundi* being dishonoured. He, consequently, dismissed the plaintiffs' claim. The plaintiffs come here in second appeal. Section 35 of the Negotiable Instruments Act is quite clear and it restricts the liability of the endorser to cases where notice of dishonour has been given to him, or, in other words, the fact of the bill of exchange being dishonoured and the intimation thereof to the endorser are conditions precedent to the endorser being made liable thereunder. Mr. P. L. Banerji has contended that he was not suing on the *hundi* but he was suing for recovery upon a contract for which the consideration had failed. We do not think that he can fall back upon general principles when the case is expressly governed by the provisions of section 35. More-

over, we are not satisfied that the consideration in this case has failed at all. It is admitted that the *hundi* was never presented to the drawee and, under these circumstances, we cannot assume that the consideration has failed. We, therefore, think that the judgment of the Court below is correct and dismiss the appeal with costs including in this fees on the higher scale.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL No. 1056 OF 1920.

December 3, 1920.

Present :— Mr. Justice Martineau.

THE FIRM BUDHU RAM HONDA RAM— DEFENDANTS—APPELLANTS

versus

RAMZAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 105—"Affecting the decision of the case", meaning of—Arbitration, order superseding, whether can be attacked in appeal from final decree.

The words "affecting the decision of the case" in section 105 of the Civil Procedure Code, mean affecting the decision of the case with reference to the merits of it.

An order superseding an arbitration is not an order which affects the decision of the case with reference to the merits of it, and even if such an order is erroneous the error cannot be made a ground of objection in the appeal from the final decree in the case.

Miscellaneous second appeal from the order of the Senior Subordinate Judge, Jhang, dated the 21st January 1920, reversing that of the Munsif, Second Class, Jhang, dated the 10th December 1919.

Mr. *Mokand Lal Puri*, for the Appellants.

JUDGMENT.—In this case the plaintiff sues to have a certain decree declared void on the ground that it was obtained by fraud.

On the application of the parties the case was referred to arbitration, and the 17th April 1919 was fixed for the filing of the award. On that date the defendant was present but the plaintiff was absent, and as the plaintiff had not paid the arbitrator's fee the Munsif superseded the arbitration and dismissed the suit for default under Order IX, rule 8, Civil Procedure Code. On the 7th October 1919 the Munsif on the plaintiff's application restored the case to the file, and he then proceeded to try the suit on the merits and finally dismissed it.

The plaintiff appealed to the Senior Subordinate Judge, who held that the order superseding the arbitration could be attacked in the appeal from the final decree under section 105, Civil Procedure Code, and that it was an illegal order, and he remanded the case with the direction that it be referred to the arbitrator.

The defendant has preferred a second appeal to this Court.

The main question is, whether the order superseding the arbitration was one "affecting the decision of the case" within the meaning of section 105 of the Civil Procedure Code. If it was, it could be attacked in the appeal from the decree, otherwise not.

There is ample authority for the view that the words "affecting the decision of the case" mean "affecting the decision of the case, with reference to the merits of it," *e. g.*, see *Chintamony Dassi* v. *Ragoonath Sahoo* (1) and *Gulab Kunwar* v. *Thakur Das* (2) and I do not find a contrary view expressed anywhere except in an *obiter dictum* of Karamat Hussain, J., in *Nand Ram* v. *Bhopal Singh* (3). That learned Judge referred to *Gopal Chetti* v. *Subbier* (4), but there was no discussion of the point in that judgment. It is clear that the order superseding the arbitration was not one which affected the decision of the case with reference to the merits of it, and I hold, therefore, that, even if the order was wrong, the error could not be made a ground of objection in the appeal from the final decree.

It is unnecessary to go into other points. I accept the appeal, set aside the order

(1) 22 C. 981; 11 Ind. Dec. (N. s.) 651.
(2) 24 A. 464; A. W. N. (1902) 136.
(3) 16 Ind Cas. 1; 34 A. 592; 10 A. L. J. 130.
(4) 26 M. 604; 13 M. L. J. 308.

of the Senior Subordinate Judge and remand the case to him under Order XLI, rule 23, Civil Procedure Code, for disposal of the appeal before him on the merits. Court-fee on the appeal in this Court to be refunded. Other costs to be costs in the case.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 54 OF 1920.

May 20, 1920.

Present :—Mr. Lindsay, J. C.

MAHESH PRASAD AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

BHARATH AND OTHERS—DEFENDANTS —RESPONDENTS.

Mahabrahmans, offerings to—Contract to divide offerings, whether can be enforced.

No contract for the division of money or other articles received by Mahabrahmans in the way of charity is enforceable except as between the immediate parties thereto. [p. 678, col. 1.]

Appeal against the decree of the third Additional District Judge, Lucknow, dated the 3rd December 1919, upholding that of the Munsif, Lucknow, dated the 12th December 1918.

Messrs. *A. P. Sen* and *Salig Ram*, for the Appellants.

Mr. *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal and the only question for discussion is, whether or not the suit, in so far as it related to a claim for what is known as Mahabrahmani rights, was maintainable.

Both the Courts below have held on certain authorities of this Court that the suit was not maintainable and have dismissed the claim to this extent.

According to the pleadings, Ramma, who died long ago, left three sons, Sheo Din, Ghure and Rupan. One of the plaintiffs is a grandson of Sheo Din. The other plaintiff is a grandson of Ghure.

Rupan, it is said, left two widows, *Musammat* Bhagana and *Musammat* Gulbasi. The latter died on the 22nd of July 1918, and the plaintiffs claimed that as reversioners they were entitled to succeed to such Mahabrahmani rights as were once vested in Rupan. The defendant claimed under a transfer in their favour made by Gulbasi.

So far as this Court is concerned, the law on the subject has been laid down in a Bench ruling to be found in *Baddu* v. *Babu Lal* (1). In this judgment various previous rulings of this Court have been referred to and discussed, including a ruling reported as *Bhagwan Din* v. *Mani Ram* (2). In this case it was held that where a third person makes a voluntary offering to one of the parties and the other party claims a share in it, that is not a suit in which a right to property is involved and the plaintiff is not entitled to recover any share of that offering except on the ground of a contract between the parties. In *Baddu* v. *Babu Lal* (1) it was held that where such a contract has been made a suit would lie for the breach of it. It was also held that a contract amongst Mahabrahmans with respect to the distribution of alms to be received in the future by the exercise of voluntary charity was not enforceable against the heirs or representatives of the parties to the agreement.

In the present case the allegation of the plaintiffs was that the right to receive the Mahabrahmani dues had been divided by an arrangement which was come to between the three sons of Ramma. According to the Bench ruling in *Baddu* v. *Babu Lal* (1) any rights based upon this contract or agreement cannot be enforced by the present plaintiffs against the defendants. The plaintiffs, however, have relied upon the ruling of a Single Judge of the Court reported as *Raghubar* v. *Musammat Rukmin* (3). The decision in that case appears to favour the plaintiffs' contention, but it seems to me that if due effect is to be given to the ruling of the Bench in *Baddu* v. *Babu Lal* (1) this latter decision cannot

(1) 11 O. C. 212.
(2) 5 O. C. 225.
(3) 42 Ind. Cas. 794; 20 O. C. 265.

be followed. I agree with the reasoning of Mr. Greeven in the Bench case and hold with him that no contract for the division of money or other articles received by Mahabrahmans in the way of charity can be enforced except as between the immediate parties to the agreement. If the decision in *Raghubar* v. *Musammat Rukmin* (3) purports to lay down the law in any other sense I cannot accept it. It is true that other High Courts have taken a different view of the law but we here are bound by the law of our Court and the Bench case to which I have referred above seems to me to be conclusive in the matter. For these reasons, I hold that the decision of the Courts below is correct.

The appeal fails and is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2944 OF 1916.

June 4, 1920.

Present :—Mr. Justice Chevis and Mr. Justice Dundas.

LACHMAN DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SUNDAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 6, 9—Extension of limitation in favour of one person, whether can be tacked on to extension in favour of another—Alienation—After-born son, right of, to sue—Limitation.

The only case in which, under section 6 of the Limitation Act, an extension of limitation in favour of one person may be tacked on to an extension in favour of a second person is where the first person dies while still under a disability and the second person is his legal representative who is also under a disability at the time of his death. [p. 679, col. 2.]

Where the right to challenge an alienation accrues before the birth of a plaintiff he cannot claim an extension of limitation under section 6 of the Limitation Act. [p. 679, col. 2.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 11th July 1916, reversing that of the Subordinate Judge, Rawalpindi, dated the 25th May 1914.

Mr. *Horgopal*, for the Appellants,

The Hon'ble Pandit *Sheo Narain*, R. B., for the Respondents.

JUDGMENT.—This is a suit by the four sons of Harbhagwan for a declaration that the sale of 53 *kanals*, 5 *marlas* of land effected by him on the 27th of August 1900 shall not affect their reversionary rights. The suit was decreed by the first Court, but the learned District Judge on appeal held that the claim was time-barred and dismissed it. The plaintiffs appeal to this Court. While the case has been pending in this Court, Harbhagwan, who was a defendant, has died ; this however, makes no difference to the case.

It is admitted that the Article of the Limitation Schedule applicable to this case is Article 120, which lays down as the period of limitation six years from the time when the right to sue accrues. The right to sue undoubtedly accrued when the sale was effected, *i. e.*, on the 27th of August 1900, but at that time only the oldest of the four sons was in existence. This son, Lachhman Das, was born on the 27th of October 1891, so he was over 21 years of age when this suit, which was instituted on the 6th of May 1913, was lodged. Lala Hargopal, who appears for the plaintiffs-appellants in this Court, admits that the suit is barred so far as Lachhman Das is concerned. The second son, Sundar Singh, was born in or about 1904 ; the third, Saran Das, in or about 1909, and the fourth, Bodh Raj, in or about 1911. Thus, all three of these were born after the alienation, but Sundar Singh and Saran Das were born before their eldest brother had attained the age of 18. Lala Hargopal claims that the suit is within limitation so far as all three are concerned. He relies on section 6 of the Limitation Act, which lays down that where a person entitled to institute a suit is, at the time from which the period for limitation is to be reckoned, a minor, he may institute the suit within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the First Schedule. Lala Hargopal argues from the words of the section that time did not begin to run against Lachhman Das until he attained the age

of 18 years, and that, therefore, the time from which the period of limitation is to be reckoned is the date when Lachhman Das attained the age of 18 and that the minor plaintiffs are, therefore, entitled to the benefit of section 6. We are unable to agree with this contention. In our opinion, the words in section 6, "the time from which the period for limitation is to be reckoned," refers simply to the time specified in the third column of the Schedule to the Limitation Act. Lala Hargopal is really making an attempt to tack on an extension allowable to the eldest brother to an extension in favour of the younger brothers. Reading the whole of section 6, we are of opinion that the only case in which an extension in favour of one person may be tacked on to an extension in favour of a second person is, where the first person dies while still under a disability and the second person is his legal representative who is also under a disability at the time of his death (see clauses 3 and 4 of the section). There are various rulings which lay down that an after-born son is, like all other persons, bound by the law of limitation, but none of them seem to be exactly on all fours with the present case. Lala Hargopal raises the old argument that the right to sue cannot accrue until the plaintiff is born, but this is confusing the right to sue with the *power* to sue. In some cases the after-born son entirely loses his right to sue by the fact that he is not born until after the period of limitation has expired. So it is clear that the date from which limitation is to be reckoned cannot be postponed until the subsequent birth of the claimant.

Lala Hargopal has referred us to the Privy Council ruling published as *Ramkishore* v. *Jainarayan* (1). At the foot of page 978* the following paragraph occurs:—

"On appeal to the Court of the Judicial Commissioner, the learned Additional Commissioner held that as the first plaintiff had instituted the suit within three years of attaining the age of 21, he was entitled to the benefit of section 7 of the Limitation Act of 1877, and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of what he regarded as the adverse possession of the defendant, Jainarayan. It was, however, conceded before this Board, and, as their Lordships think rightly conceded, that if the first plaintiff succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief."

This, however, does not appear to us to be a finding of their Lordships that the suit of the younger plaintiffs was within time, but merely a finding that the first plaintiff single-handed could succeed in the suit.

We hold that the three minor plaintiffs, not having been in existence at the time when the right to sue accrued, cannot take advantage of the provisions of section 6 of the present Limitation Act, and we uphold the District Judge's decision dismissing the suit, and dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 33 OF 1919.

July 13, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Sulaiman.

JAGAT SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BALDEO PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Pre-emption—Mortgage-debt exceeding market-value of property—Mortgagee taking property in lieu of mortgage-debt—Price payable by pre-emptor.

Where the amount of a mortgage-debt exceeds the amount which represents the market-value of the mortgaged property and the mortgagee cancels the mortgage in lieu of the property, the amount paid for the property is not the amount due on the face of the mortgage-deed, but the amount which was recoverable under the bond from the

(1) 20 Ind. Cas. 958; 40 C. 966 at p. 979 (P. C.); (1913) M. W. N 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.).

*Page of 40 C.—[*Ed.*].

security, and it is only this sum that he is entitled to recover from a pre-emptor.

Second appeal from a decree of the District Judge, Bareilly, modifying a decree of the Subordinate Judge.

Mr. *Shiva Prasad Sinha*, for Mr. *J. N. Misra*, for the Appellants.

Dr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.—The sole point in this appeal which has been argued before us is the question of consideration. The vendor owned property, the market-value of which was Rs. 1,250. He had borrowed from the vendee appellant a sum of Rs. 800 many years ago and had hypothecated this property as security. At the time that this sale was transacted, the debt due on the mortgage was Rs. 2,468. The personal remedy against the mortgagor had vanished by lapse of time. Therefore, this sum of Rs. 2,468 could only have been paid by the sale of the property. The vendor was unable to pay the debt and, as far as we can judge from the record, was not the owner of any other property. The vendee gave him Rs. 100 in cash and took a sale-deed of the property ostensibly for a sum of Rs. 3,000 and cancelled the mortgage-deed. A pre-emptor at once arose and the Court below has given him a decree for pre-emption on condition that he should pay Rs. 1,250, the market-value of the property.

It is urged before us that the vendee is entitled to recover the full sum of Rs. 2,568, that being the amount of the mortgage-debt, *plus* the Rs. 100 paid in cash. We agree with the argument raised on behalf of the appellant that the vendee is entitled to recover from the pre-emptor the full amount that he has in good faith actually paid for the property purchased, but we have to see what the appellant-vendee did in the present case actually pay. He gave up the debt due on the bond *plus* Rs. 100 for the propety. The value of the debt due on the bond is clearly limited to the value of the property in question. Nobody would have given to the vendee a price for his mortgage-debt greater than the security afforded by the property. Just as a time-barred debt is practically of no value, so a mortgage-debt, where the personal remedy is barred cannot be greater in value than the security itself. No one in the open market would have given the appellant anything more than Rs. 1,250 for his mortgage-debt. It, therefore, is clear that the amount which the appellant paid for the property is not the amount which was due on the face of the martgage-deed but the amount which was recoverable under the bond from the security. Nothing more than the market-value of the property could have been recovered. We, therefore, think that the decision of the lower Court was quite correct. The defendant-appellant, when he has received payment of Rs. 1,250, the market-value of the property, will be in exactly the same position as he stood after the execution of the sale-deed. On the execution of that deed the mortgage-debt was cancelled and the appellant stood possessed of property to the value of Rs. 1,250. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 480 OF 1920.

December 15, 1920.

Present :—Mr. Justice Martineau.

SAWAN MAL, THROUGH HIS AGENT BIR SINGH, FOR HIMSELF AND FOR THE BENEFIT OF THE OTHER DEFENDANTS—PETITIONERS

versus

THE FIRM KANHAYA LAL GOPAL DAS, LAHORE, THROUGH GOPAL DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—"Case", meaning of—Jurisdiction, decision as to—Revision, whether maintainable.

The word "case" in section 115 of the Civil Procedure Code does not necessarily in every case mean the whole case but may mean a particular branch of a case for which an independent remedy, or a different procedure, is provided by the Code.

Where on the objection of the defendant that the Court has no jurisdiction to entertain the suit the

Court decides it has jurisdiction, the order of the Court does not amount to a decision of a case and no revision lies against it.

Petition, under section 44 of the Punjab Courts Act of 1918, for revision of the order of the Subordinate Judge, First Class, Lahore, dated the 30th March 1920.

Diwan *Mehr Chand*, for the Petitioners.

Lala *Tirath Ram*, for the Respondent.

JUDGMENT.—The plaintiffs, who carry on business in Lahore, sue the defendant, who carry on business in Delhi, for damages for non-delivery of oil which the defendants had contracted to sell. The suit was instituted in the Court of the Subordinate Judge of Lahore, and the defendants pleaded *inter alia* that the Court had no jurisdiction. The Subordinate Judge after taking evidence has held that he has jurisdiction. The defendants have applied to this Court for revision of the Subordinate Judge's order. On behalf of the respondents a preliminary objection is taken that no revision lies, and I am of opinion that the objection must prevail.

The revisional powers of this Court under section 44 of the Punjab Courts Act can be exercised only when a "case" has been decided; so that what has to be determined is, whether the lower Court's decision on the question of jurisdiction is a decision of a "case." If it is not a revision cannot be entertained even though section 21, Civil Procedure Code, may be a hindrance to the defendants from raising an objection as to want of jurisdiction in the appeal from any decree that may ultimately be passed against them.

It was held by a Full Bench of the Chief Court in *Pandit Ram Kant* v. *Pandit Rajdeo* (1) that the word "case" in section 622, Civil Procedure Code does not necessarily in every case mean the whole case but may mean a particular branch of a case for which an independent remedy, or a different procedure, is provided by the Code. In *Mahtab Rai* v. *Kaman Lal* (2) the learned Judges agreed with the construction put by the Full Bench on the word "case" and went on to say (page 241) that it was quite clear that the meaning of the word "case" could not be extended further. Following these authorities, I think it is impossible to hold that the Subordinate Judge's decision on the point of jurisdiction, with regard to which no special procedure is laid down in the Civil Procedure Code, is a decision of a "case."

The learned Counsel for the petitioners has referred me to *Bhargava and Co.* v. *Jagan Nath Bhagwan Dass* (3) which is undoubtedly in his favour. It was there held that the decision of a question of jurisdiction as a preliminary to the hearing of the suit, and after taking evidence and hearing arguments, was a decision of a "case" within the meaning of section 115, Civil Procedure Code. With all respect, however I am unable to agree with the view taken by the learned Judges of the Allahabad High Court, and I notice that in *Sultanat Jahan Begam* v. *Sundar Lal* (4) another learned Judge of the same Court remarked that he found it difficult to follow that view.

I hold that the order of the lower Court determining the question of jurisdiction, not being a decision of a "case", is not open to revision, and I accordingly dismiss this application with costs.

Appeal dismissed.

(1) 60 P. R. 1897.
(2) 51 P. R. 1899.
(3) 51 Ind. Cas. 331; 41 A. 602; 17 A. L. J. 718; 1 U. P. L. R. (A) 120.
(4) 58 Ind. Cas. 90; 42 A. 409; 18 A. L. J. 431.

MADRAS HIGH COURT.

CIVIL APPEAL No. 167 OF 1919.

March 31, 1920.

Present :—Sir John Wallis, KT., Chief Justice, and Mr. Justice Krishnan.

PANDIPATI SUBBARAMI REDDI (MINOR) BY MOTHER AND GUARDIAN THE APPELLANT No. 2—DEFENDANTS—APPELLANTS NOS. 1 AND 2.

versus

PANDIPATI RAMAMMA—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Will—Devise by co-parcener in favour of widow, validity of—Consent of co-parceners—Minor, consent on behalf of.

A testamentary disposition of joint family property by a Hindu co-parcener in favour of his

wife is invalid under the Hindu Law, because on the date of his death, when the Will takes effect, there is nothing for the Will to operate on, his share in the property passing to the other co-parceners by survivorship. [p. 683, col. 2.]

Where a Hindu family consists of a father and his infant son, and the father makes an alienation of the family property, he cannot be said to have consented to the alienation in his capacity of guardian to his minor son [p 684, col 1.]

Appeal against the decree of the District Court, Nellore, in Original Suit No. 22 of 1918.

FACTS appear from the judgment.

Mr. *A. Krishnasawmy Aiyar* (with him Mr. *B. Somaya*), for the Appellants.—A Hindu co-parcener cannot devise property by Will to take effect after his death, as, at the moment of his death, the property passes by survivorship to co parceners and there is nothing in the Will to operate upon.

See *Vitla Butten* v *Yamenamma* (1). It is one thing to make provision for the wife's maintenance during the lifetime of the husband, and another to dispose of a co parcener's share in family properties by Will. See also *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2), *Suraj Bunsi Koer* v. *Sheo Persad Singh* (3) and *Lakshmi* v. *Subramanya* (4).

Messrs. *T. M. Krishnasawmy Aiyar* and *S. Varadachariar*, for the Respondent.—A Hindu co parcener's testamentary capacity is co extensive with the right to make gifts *inter vivos*. The former follows as a corollary, given the existence of the latter right. In *Appan Patra Chariar* v. *Srinivasa Chariar* (5), the right of a co-parcener to make a Will of family properties was recognised.

At any rate, to the extent that it only made provision for maintenance to which the widow has an undoubted right, the Will is valid.

Mr. *A. Krishnasawmy Aiyar* in reply.—The decision in *Appan Patra Chariar* v. *Srinivasa Chariar* (5), does not affect the present case. In that case the former was recognised only where the other co parceners consented to the alienation. Here there is no question of consent at all as the only other member is the testator's minor son.

This appeal coming on for hearing on the 8th January 1920, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—This is an appeal from a decision of the District Judge of Nellore giving the plaintiff a decree in a suit brought by her to enforce the provisions of a Will made in her favour by her deceased husband dealing with properties which, at the time when he made the Will, and at the time of his death were the joint family properties of himself and his infant son. The learned District Judge has held that the provision made by the testator for his wife would have been a proper provision for him to make during his lifetime, that such a disposition of joint family properties during his lifetime would have been good and that if he could make such a provision during his lifetime, he could equally make it after his death and he has relied on the decision of Sadasiva Aiyar and Spencer, JJ., in *Appan Patra Chariar* v. *Srinivasa Chariar* (5), which, as I shall point out presently, is distinguishable from the present case. Mr. A. Krishnaswami Aiyar for the appellants has contended that it is now settled law that a co parcener cannot devise joint family property by Will because, on the date of his death, when the Will takes effect, there is nothing for the Will to operate on because at the moment of his death his share passes by survivorship to the other co parceners. That was very clearly laid down in *Vitla Butten* v. *Yamenamma* (1), where it is said, at page 12, "that the Will in the case referred to cannot take effect. At the moment of death the right of survivorship is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise."

It has been contended before us, and certain general dicta of the Privy Council have been referred to, to the effect that testamentary capacity is co extensive with the right of making gifts *inter vivos*. That

(1) 8 M. H. C. R. 6.

(2) 5 B. 48 (P. C.); 7 I. A. 181; 4 Sar. P. C. J. 173; 3 Suth. P. C J. 778; 3 Shome L. R. 217; 4 Ind. Jur. 472; 7 C. L. R. 320; 3 Ind. Dec (N. S.) 34.

(3) 6 I. A. 88; 5 C. 148; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 765.

(4) 12 M. 490; 4 Ind. Dec. (N. S.) 691.

(5) 40 Ind. Cas. 118; 40 M. 1122; 32 M. L. J. 364; 5 L. W. 544; (1917) M. W. N. 355; 21 M. L. T. 408.

that principle has not a universal application is shown by the decision of the Privy Council in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2), which expressly approved the decision of the Madras High Court to which I have just referred. At that time the view that prevailed in the Madras High Court was that a co parcener might, during his lifetime, make a gift of his undivided share (a view which has since has been overruled) and the Madras High Court held in *Vitla Butten* v. *Yamenamma* (1) that, in spite of that, he could not dispose of his undivided share by Will. The Privy Council in the case in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2), says with reference to the case: "Its reasons for making the distinction between a gift and a devise are, that the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him, and that the title of his co sharers by survivorship resting in them at the moment of his death, there remains nothing upon which the Will can operate. This principle was invoked in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (3), and was fully recognised by their Lordships."

This principle has already been applied to a case exactly such as the present by Muttusami Aiyar, J., in *Lakshmi* v. *Subramanya* (4). At page 492, the learned Judge says: "It is conceded that where a Hindu father disposes by Will of ancestral property, the disposition is inoperative as against his son; but it is argued that when the disposition made is in the nature of a provision for the maintenance of the testator's widow, the Will is valid. I am unable to adopt this view. The ground on which a Will in regard to ancestral or joint family property was held to be invalid in the case of *Vitla Butten* v. *Yamenamma* (1), is that, directly the testator dies, the co-parcener's right of survivorship takes effect and that a testamentary disposition cannot be permitted to prevail against that right. In the absence of the testamentary power, the contention that that power was exercised for the purpose of making a provision for the support of the testator's wife could not, in my opinion, validate the Will."

I respectfully agree with these observations of this distinguished Hindu Judge which, in my opinion are conclusive of the present case.

With regard to the more recent decisions of this Court, beginning with *Kudutamma* v. *Narasimha Charyulu* (6), that a managing member of a Hindu family may lawfully make certain gifts of ancestral properties to the female members of the family, I may merely point out that it is quite a different thing to say that he may do so during his life-time, and to contend that he may do so by a Will operating after his death. Where he does so during his life time, he is acting as manager and as representative of the family. If he is to make such gifts by Will to operate after his death, he is assuming a function which really belongs to the surviving co-parceners and he is purporting to exercise powers and perform duties which have devolved upon them, and it seems to me that if we were to admit the principle contended for, it might have very far reaching results.

As regards the decision in *Appan Patra Chariar* v. *Srinivasa Chariar* (5), I may observe that none of the authorities, which I have cited, are referred to there. Further, the case is distinguishable on the facts. In that case the alienation in favour of the daughter was made by the father with the consent of his adult son who was his co-parcener and also with the consent of the testator's wife who was the mother of an infant co parcener. We have, no doubt, been referred to certain cases in which the Privy Council have suggested that a Will which would otherwise be invalid might become operative by virtue of the consent of those co parceners: but no such question has actually come before them for decision. Looking at the matter on principle, it might seem that a Will made by one co-parcener with the assent of all the other co-parceners would be like a settlement or family arrangement between all the co-parceners to take effect from the death of the co-parcener who was the testator unless that co parcener, in the meantime, revoked it. It is not necessary to consider that question in the present case. After hearing very fully the arguments, I am satisfied that the Privy Council has never had to

(6) 4 Ind. Cas. 1034; 17 M. L. J. 528; 5 M. L. T. 40.

consider either that question or the question now actually before us. As I have said, the question of consent does not arise in this case where the only members of the family were the testator and an infant son. In such a case, I do not think an alienation of this kind can be supported on the ground that the father must be taken to have consented to his own alienation in his capacity of guardian to his minor son.

We must, therefore, modify the decree by declaring that the Will, in so far as it contains dispositions in favour of the plaintiff, is inoperative. The parties have left it to us to say, on the materials before us, what we think is a reasonable rate of maintenance, and I think that Rs. 30 a month is a reasonable sum and that amount is payable by the defendants from the 1st of January 1916.

The parties are not agreed as to the provision, to be made for the residence of the widow which is the subject of the 8th issue. Therefore, before disposing of the appeal, I must ask the Court below to return a finding upon that subject within two months; seven days will be allowed for filing objections. Fresh evidence may be taken.

As regards the 2nd issue, it has been found in favour of the plaintiff and therefore, the decree will be modified by giving the plaintiff the jewels, Items Nos. 1 and 2.

Maintenance will be charged upon a sufficient portion of the joint family properties to be determined by the Court below. A finding should be returned on this point also.

Costs reserved.

KRISHNAN, J.—I entirely agree with the learned Chief Justice in the order that he has just proposed in this case. He has dealt so fully with all the authorities that have been cited before us that it is quite unnecessary for me to go over them again. With all respect to the learned Judges who decided, *Appan Patra Chariar* v. *Srinivasa Chariar* (5), it seems to me that their decision is open to question. I was at first inclined that this question should be referred to a Full Bench for a final settlement, but, as pointed out by the learned Chief Justice, the present case is distinguishable from that case on the ground that in that case the consent of the adult co-parcener was obtained and the decision was, to a great extent, based upon that consent. Such a consent is absent in the present case. I also agree with the learned Chief Justice that the testator in this case cannot be treated as having acted as the guardian of his infant son and given consent to the arrangement made by himself in favour of his widow He did not purport to act as his minor son's guardian with reference to his Will, and to infer from the fact that he was the legal guardian of his son when he made the Will, that he gave consent to the provisions in it as such guardian will be, it seems to me, to introduce an unwarranted fiction into the case. This case being distinguishable from *Appan Patra Chariar* v. *Srinivasa Chariar* (5) we need not express a final opinion about it. As regards the other points in the case, I entirely agree with the learned Chief Justice and have nothing further to add.

This appeal coming on for final hearing, after the submission of the report of the lower Court that the parties filed a compromise petition regarding the two issues remitted by this Court for findings in pursuance of the order contained in the above judgment, upon perusing the said compromise petition, and Civil Miscellaneous Petition No. 1199 of 1920 for leave to enter into a compromise on behalf of the minor 1st appellant and the record in the case, the Court delivered the following

JUDGMENT.—We sanction the compromise as beneficial to the minor.

In the result, we reverse the decree and pass a fresh decree directing the defendants to deliver up to the plaintiff jewels forming Items Nos. 1 to 10 of F schedule to the plaint or pay their value Rs. 1,800 and awarding to the plaintiff maintenance at 30 rupees per mensem from 1st January 1916 to be charged on the properties mentioned in the compromise, and further awarding her the provision for residence contained in the compromise. Parties will pay and receive proportionate costs throughout on the value of the properties claimed under the Will.

M.C.P.

Appeal allowed.

RAM LAL v. GANESHI LAL.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 334 OF 1920.

December 4, 1920.

Present :—Mr. Justice Martineau.

RAM LAL—PLAINTIFF—PETITIONER

versus

GANESHI LAL—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 25—"Case", "decided", meanings of—Order setting aside ex parte *decree—Revision, whether lies.*

The word "decided" in section 25 of the Provincial Small Cause Courts Act means disposed of.

The word "case" in section 25 of the Provincial Small Cause Courts Act, does not necessarily, in every instance, mean the "whole" case, but may mean a particular branch of a case for which an independent remedy, or a different procedure is provided and may include an interlocutory order.

A petition for revision is maintainable against an order of a Small Cause Court setting aside an *ex parte* decree.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Rawalpindi Cantonment, dated the 3rd January 1920.

Mr. *D. C. Ralli*, for the Petitioner.

Lala *Madan Gopal*, for the Respondent.

JUDGMENT.—An *ex parte* decree was passed against the respondent on the 19th February 1917. He applied on the 18th December 1919 to have it set aside. The Judge of the Small Cause Court granted the application on the ground that it was doubtful whether the summons had been served on the respondent. The plaintiff applies for revision of that order.

It is contended for the respondent that no revision lies, as the case has not been "decided" within the meaning of section 25 of Act IX of 1887. The word "decided" in that section means "disposed of" [*Ramanathan Chetty* v. *Maruthuppa Kone* (1)], and it has been held in *Pandit Ram Kant* v. *Pandit Rajdeo* (2), that the word "case" in section 622 of the Civil Procedure Code of 1882 does not necessarily, in every instance, mean the "whole" case, but may mean a particular branch of a case for which an independent remedy, or a different procedure, is provided in the Code and may include an interlocutory order. Following that judgment, the reasoning in which appears to be equally applicable to the construction to be placed on the word "case" occurring in section 25 of Act IX of 1887, I hold that the application for revision is maintainable.

The learned Judge of the Court below set aside the *ex parte* decree because he was doubtful whether the summons had been duly served on the defendant. But he did so without taking the evidence of the process-server or giving the plaintiff a chance of proving that service had been effected. The *ex parte* decree was passed on the 19th February 1917, and it was not till the 18th December 1919 that the respondent applied to have it set aside. The application was barred by limitation unless it was made within 30 days of the date on which the respondent came to know of the decree. The endorsement on the summons was against him, being to the effect that the respondent was present at his house, but refused to take the summons which was, consequently, attached to his door in the presence of witnesses.

I accept this application, set aside the order of the lower Court, and remand the case under Order XLI, rule 23, Civil Procedure Code, directing that Court to pass a fresh order on the respondent's application after taking the evidence that the parties may have to produce. Court fee on the application for revision to be refunded. Other costs to be costs in the case.

Application accepted.

(1) 25 Ind. Cas. 613; 27 M. L. J. 494, 16 M. L. T. 502.

(2) 60 P. R. 1897.

MUTHU REDDI v. CHINNASAWMY REDDI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1043 OF 1919.

August 3, 1920.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MUTHU REDD.—DEFENDANT No. 2—APPELLANT

versus

CHINNASAWMY REDDI—PLAINTIFF No. 2—RESPONDENT.

Hindu Law - Joint family—Debt—Partition after incurring debt—Co-parceners, liability of.

Where after a debt is incurred for the benefit of the members of a joint family, the family property is partitioned, such partition has not the effect of

relieving the co-parceners from liability for the debt to the extent of the family property in their hands. [p. 686, col. 2; p. 687, col. 1.]

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Cuddalore, in Appeal Suit No. 173 of 1918 (Appeal Suit No. 123 of 1918 on the file of the District Court, South Arcot) preferred against the decree of the Court of the District Munsif, Panruti, at Cuddalore, in Original Suit No. 83 of 1914.

FACTS appear from the judgment.

Mr. *S. T. Srinivasagopalachariar*, for the Appellant.—When the *ex parte* decree was set aside, the assignee-decree-holder was not entitled to relief on the re trial of the case. The decree as against 2nd defendant ceased to exist. The 2nd plaintiff should have obtained re assignment from 1st plaintiff of the right to continue the litigation against 2nd defendant. The right revived, on the setting aside of the *ex parte* decree only in 1st plaintiff's favour.

Mr. *K. Bashyam Iyengar*, for the Respondent.—On the assignment the transferee 2nd plaintiff, obtained all the rights of his transferor, the 1st plaintiff, which flow from his position as the holder of the property transferred. He was entitled to obtain a fresh decree if the decree in favour of the 1st plaintiff was set aside. The 2nd defendant impleaded the 2nd plaintiff as party in his application to set aside the *ex parte* decree. The 1st plaintiff consented to the 2nd plaintiff obtaining a decree on the re-trial.

The lower Court erred in not decreeing the claim against all the family properties. Partition between the co parceners after the incurring of the debt does not affect the creditor's rights.

JUDGMENT.

SADASIVA AIYAR, J.—The 2nd defendant is the appellant. The facts are shorlty as follows: The 1st plaintiff obtained a personal decree against the 1st defendant, the brother of the 2nd defendant, for a sum of money due to the plaintiff by both the 1st and 2nd defendants who carried on a family business, the debt sued on being a family debt due by both the defendants. He obtained a contested decree against the 1st defendant for the amount and he also obtained an *ex parte* decree in the same suit against the 2nd defendant to the extent of the family property in the 2nd defendant's hands. This decree (containing two reliefs) was assigned by the 1st plaintiff to the 2nd plaintiff and the 2nd plaintiff was recognised by the Court (on an application in execution) as the transferee decree-holder. But on that same date, on the 2nd defendant's application, the decree, so far as it was passed *ex parte* against him, was set aside and the case was posted for re trial so far as the 2nd defendant was concerned, *with both the original decree holder and the assignee decree-holder as co-plaintiffs.* On the merits, the facts were found against the 2nd defendant but the District Munsif gave a decree for only half the suit amount, against the 2nd defendant, making him liable (as before) to the extent of family properties in his hands, the defendants Nos. 1 and 2 having effected partition after the family debt was incurred but before the suit was brought. The lower Appellate Court confirmed this decree. Hence this appeal by the 2nd defendant, in which he has impleaded as respondent the 2nd plaintiff alone.

The contention on the appellants' side is that the Courts below had no right to award any relief to the assignee-decree-holder because the decree against the 2nd defendant which the 2nd plaintiff obtained an assignment of, was subsequently set aside on the application of the 2nd defendant, that decree, therefore, ceased to exist, and as 2nd plaintiff did not afterwards obtain an assignment from the 1st plaintiff of the right as creditor on which the 1st plaintiff brought the suit or of the right of the 1st plaintiff to continue the litigation against the 2nd defendant, the Court was not justified in giving a decree in the 2nd plaintiff's favour on the claim and on the right which revived in favour of the 1st plaintiff alone.

I think that when a property of whatever kind is transferred the assignee or transferee obtains not only the particular property described in the transfer-deed as transferred, but he also obtains in law all the rights of the transferor which the transferor then had to protect the title to the transferred property and obtains all appurtenant and subsidiary rights and titles flowing from his position as holder of the property transferred. That pro-

position seems to me to flow from a broad principle of general jurisprudence which has been recognised in numerous cases and is also mentioned in section 3, relating to transfer of property, at page 343 of Broom's Legal Maxims, 5th Edition. For instance, where two persons *X.* and *Y.* exchange properties A and B and the person *X.* who got the property B in exchange, afterwards conveys away the property B to a third person *Z.* who then loses his possession of the property owing to the absence of title in *Y.* The purchaser *Z.* can get back the property A from *Y* (to whom it had been given in exchange) on the right on which his vendor *X.* could have got it back, if he had lost possession of B before he sold it to *Z.* This transference of the effects flowing from a legal transaction from the property or right covered by it to another property or right substituted by law for it, or revived by law on the destruction of the property or right covered, can be illustrated by several other instances. It seems to me, therefore, that when the 2nd plaintiff got the assignment of the decree, he became *ipso facto* clothed with all these rights of the original decree-holder (1st plaintiff) which could be enforced by the latter for the protection of his rights, under the decree and for obtaining any fresh decree, if that decree is set aside and further entitled to stand in the shoes of his transferor for all purposes connected with and legally flowing from the right transferred to him (see also sections 8, 44 and 73 of the Transfer of Property Act which are placed on this same general juristic principle). In fact, the 2nd defendant himself recognised such a right in the 2nd plaintiff when he impleaded him as co-respondent with the 1st plaintiff in the 2nd defendant's application to set aside the *ex parte* decree. I am, therefore, of opinion that the lower Courts were justified in treating the 2nd plaintiff, as clothed with all the rights of the 1st plaintiff, when the 1st plaintiff was relegated to his rights, under his original claim, and to his original position, as a plaintiff, whose suit became still pending against the 2nd defendant, when the *ex parte* decree was set aside.

The next question argued was that because the suit was brought against the 2nd defendant, after the partition between the 1st and 2nd defendants, the 2nd defendant cannot be made liable even to the extent of the joint family properties of the 1st and 2nd defedants, which came to the possession of the 2nd defendant on partition. I think there is nothing in this contention, having regard to the decision in *Ramachandra Padayachi* v. *Kondayya Chetti* (1). In the result, the second appeal fails and should be dismissed with costs.

There is a memorandum of cross objections by the 2nd plaintiff. The contention in that memorandum is that the 2nd defendant is liable for the whole of the family debt to the extent of the family properties in his hands and not merely to the extent of half of the family debt. I think this contention is sound. The lower Courts have given no grounds which can be supported by any legal principle, for their confining the plaintiffs' rights against the assets in the hands of the 2nd defendant to half the family debt, the whole of that debt having been found to be binding upon both the defendants Nos. 1 and 2. The memorandum of cross-objections is, therefore, allowed with costs.

NAPIER, J.—I am not so clear as is my learned brother on the first point that was argued before us, namely, that although the decree was set aside, there still remained in the assignee decree-holder, a right of property which entitled him to a decree in his favour in the suit as re-tried. It would seem like this proposition carries with it also the further proposition that the 1st plaintiff would have no interest in the suit at all, and although I recognise the use of the words of section 8 of the Transfer of Property Act, I am not clear that it applies to this case. I am, however, quite clear that the judgment can be supported on the very simple ground which was relied on by the District Munsif. If the 2nd plaintiff was not entitled to a decree, the 1st plaintiff was entitled. He considered himself bound by his contract to assign the benefit of any decree, which would be passed to the 2nd plaintiff and he requested the Court to so pass a decree in favour of the 2nd plaintiff and the Court

(1) 24 M. 555.

has accordingly given a decree in favour of the latter. I know of no reason why the Court should not do so, and I am strongly under the impression that it has been done frequently. I would, therefore, support the decision of the Subordinate Judge on that part of the case on those grounds. I entirely agree with what my learned brother has said about the legal laibility of the property of the 2nd defendant after partition, for it seems to be clearly established by *Ramachandra Padayachi* v. *Kondayya Chetti* (1) and *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (2) which explains that decision.

I also agree with my learned brother that the memorandum of cross-objections should be allowed.

M. C. P.

Appeal dismissed;
Cross-objections allowed.

(2) 43 Ind. Cas. 225; 41 M. 136 at p. 143; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 294 OF 1918.
June 22, 1920.
Present :—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.
BALDEO SINGH—DEFENDANT—APPELLANT
versus
CHHAIL BEHARI LAL—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 10—Khudkasht land, mortgage of—Ex-proprietary rights—Rent, rate of, payable.

A person who owns *khudkasht* lands in a village has the right to make a usufructuary mortgage of those lands, and after the mortgage he becomes an ex-proprietary tenant of the *khudkasht* land which he had cultivated for more than twelve years, and under the law he is liable to pay only ¾ths of the rent which is paid ordinarily in respect of non-occupancy holdings. [p. 688, col. 2.]

Second appeal against the decision of the District Judge, Agra, dated the 29th of January 1918.

Mr. *M. L. Agarwala*, for the Appellant.

Messrs. *Gulzari Lal* and *N. P. Asthana*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for profits against a *lambardar*, under section 164 of the Agra Tenancy Act. It appears that the defendant was in possession of some of the *khudkasht* land in this village and a number of suits for profits were brought against him. The profits of these *khudkasht* lands were calculated at Rs. 241-7-6 per year. On the 10th of August 1914 the defendant purported to make a usufructuary mortgage of the *khudkasht* lands in favour of a third party for a sum of Rs. 1,000. On the same date he executed a *kabuliyat* in favour of the mortgagee agreeing to pay Rs. 100 a year as rent for the ex-proprietary tenancy to which he became entitled in lieu of interests. The Court of first instance, in calculating the profits for the years in dispute, took Rs. 100, the agreed amount, as the profits for these lands. On appeal the District Judge has varied the decree of the Court of first instance and has taken the profits at the former figure, *viz*, Rs. 241-7-6. The defendant comes up in second appeal and on his behalf the decree of the learned District Judge is challenged.

When the defendant owned certain *khudkasht* lands in this village he had a right to make a usufructuary mortgage of those lands. On the making of such a mortgage by the operation of law he became an ex proprietary tenant of the *khudkasht* lands which he had cultivated for more than twelve years. The law gives him a concession and no one can deprive him of his right to pay only ¾ths of the rent that is ordinarily payable in respect of non-occupancy holdings of similar lands. In our opinion, therefore, after the execution of the mortgage deed it is not fair to the defendant that he should be called upon to give credit for the sum of Rs. 241-7-6 which had been taken to be the profits of these lands before the mortgage. The rent which he would have had to pay as an ex-proprietary tenant would be ¾ths of this amount which comes to Rs. 181-6-7½.

It appears, however, that after the execution of this mortgage deed in the mutation proceedings which followed under section 35 or 36 of the Land Revenue Act, the Revenue Court accepted Rs. 100 as the rent which had been agreed to be paid

to the mortgagee. We may note that the present plaintiff was not a party to this agreement nor was he made a party to the proceeding under section 35 or 36 of the Act, and it is difficult to see why he should be held bound by it.

In paragraph 2 of the plaint the plaintiff had alleged that a fictitious rent had been caused to be assessed by all sorts of tricks and machinations in spite of the real amount of rent having been assessed on it, and in his grounds of appeal to the lower Appellate Court he stated that the agreement for payment of rent was collusive and fraudulent and was also void as being against the provisions of section 10 of the Tenancy Act. As this point has not been considered by the learned Judge we thought fit to go into the evidence ourselves and consider the nature of the transactions. On a perusal of the evidence and the terms of the mortgage deed and the *kabuliat* we are satisfied that the agreement was not fair to the other co sharers in the village, and the only inference that we can draw is that its object was to prejudice their rights. As they were neither parties to this agreement, nor were they parties to the proceedings under section 36 of the Act, and the agreement was clearly to their prejudice, they were not bound by this agreement which was entered into between the defendant and his mortgagee.

The correct amount of profits to be taken into account in calculating the profits of this village would be the rent which the defendant as an ex-proprietary tenant of these lands would be liable to pay to the proprietors; that sum, as has been noted above, comes to Rs. 181-6-7½ per year. We accordingly allow this appeal and direct that a fresh account be prepared and in that account the rent of *khudkasht* lands be taken as Rs. 181-6-7½ instead of Rs. 241-7-6 and the interest will be calculated on that amount. The office will prepare a decree in accordance with the above directions. The plaintiff would be entitled to interest at Rs. 12 per cent. per annum up to the date of the suit and thereafter at the rate of Rs. 6 per cent. per annum. The parties will receive and pay proportionate costs of this appeal in all Courts.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3 12 OF 1920.

December 9, 192 .

Present:—Mr. Justice Scott-Smith.

WADHAWA SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUNDAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Finding accepted by appellant—Appellate Court, whether can go behind finding.

Where a finding of the Trial Court is accepted by the appellant in his grounds of appeal, the Appellate Court has no power to go behind that finding. The fact that the appellant's Counsel was careless in drafting the grounds of appeal makes no difference. [p. 690, col. 1]

Second appeal from the decree of the District Judge, Amritsar, dated the 14th July 1919, varying that of the Munsif, First Class, Tarn Taran, District Amritsar, dated the 20th March 1919.

Lala *Fakir Chand*, for the Appellants.

Lala *Bakshi Ram*, for the Respondents.

JUDGMENT.—In the case out of which the present appeal arises Wadhawa Singh and his minor brother sued for possession of a house and a vacant site adjoining it on the ground that the property belonged to them and had been given in exchange by one Budh Singh acting as their guardian during their minority to the defendants. Sundar Singh pleaded that the house was his own property and was not received by him in exchange. The first Court found that both the house and the vacant site were given in exchange by Budh Singh and, secondly, that Budh Singh had no power to exchange on behalf of the minors of whom he was not the guardian. The plaintiffs were, therefore, given a decree for the property claimed. Sundar Singh appealed to the District Judge who held that the exchange of the house had not been proved and that the oral evidence was not strong enough to justify the dispossession of Sundar Singh who had been in possession for many years. He accepted the appeal and modified the decree to one for possession of the vacant site only.

From this plaintiffs have filed a second appeal to this Court, and it is urged on their behalf that in his grounds of appeal to the lower Appellate Court Sundar Singh accepted the finding of the Trial Court to

the effect that the house in dispute had been given in exchange, and that, under these circumstances, the lower Appellate Court had no authority to go behind that finding at all. The second ground of appeal shows that Sundar Singh did accept this finding. It is urged on his behalf that his Counsel in the lower Appellate Court must have made a mistake in drafting the grounds of appeal. It is possible that he was careless in drafting them, but they must be taken as they stand and in their presence, I hold that the lower Appellate Court could not interfere with the finding of the first Court upon this point. Budh Singh is not shown to have been a guardian of the plaintiffs who had power to dispose of their property and they are, therefore, entitled to repudiate his act. The Courts have concurrently held that Wadhawa Singh was under 21 years of age when he instituted this suit and this finding cannot be disputed in second appeal.

I accordingly accept the appeal and, setting aside the order of the lower Appellate Court, restore the decree of the first Court with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 330 OF 1919.

July 29, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

CHINNA PICHU IYENGAR *alias* K. VEERARAGAVA IYENGAR —PLAINTIFF—APPELLANT

versus

PADMANABHA IYENGAR, MINOR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Succession—*Bandhu—*Last male owner paternal grandfather's mother's brother's grandson of claimant.*

A person cannot be regarded as the *bandhu* of his paternal grandfather's mother's brother's grandson, and cannot, therefore, succeed to the latter's estate. [p. 690, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, in Appeal Suit No. 53 of 1917 (Appeal Suit No. 511 of 1917, on the file of the District Court, Tinnevelly), preferred against the decree of the Court of the Additional District Munsif, Tinnevelly, in Original Suit No. 266 of 1914.

The Hon'ble Mr. *K. Srinivasa Aiyangar*, (Advocate General), for the Appellant.

Mr. *S. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.

NAPIER, J.—In this suit the plaintiff claims to be entitled as an heir to a moiety of the estate of one Ramsawmy Iyengar, deceased, and to set aside certain alienations as not binding on him. The sole question before this Court in second appeal is, whether the plaintiff is a heritable *bandhu* and is entitled to the estate of the last male owner.

The District Munsif has found, and there is no dispute on this point, that the last male owner is the plaintiff's paternal grandfather's mother's brother's grandson and has held that as such he is not entitled to inherit. The lower Appellate Court accepted that view.

It is argued before us that the statement to this effect in Dr. Sarvadhikari's Book on Hindu Law is not correct and that, even if it was thought good law previously, the decision of the Privy Council in *Buddha Singh* v. *Lallu Singh* (1) renders this view no longer tenable. I do not propose to consider the principles underlying *sapinda* relationship on which this plaintiff is excluded. It seems to me sufficient to say that the view taken by this learned text-writer is supported by a decision of the Calcutta High Court as long ago as *Umaid Bahadur* v. *Udoi Chand* (2). In that case the question which is at issue here was not directly at issue, but the Full Bench used this relationship as an illustration of a case in which *sapindaship* did not exist, and the principle they laid down was as follows:—"Although *F.* is within six degrees from the common ancestor yet *B.*, the propositus, not being a descendant of the line of the maternal grandfather either of *F.* or of his father or mother they are not *sapindas* to each other." *F.* in the Calcutta case would represent the plaintiff in this case. It is contended

(1) 30 Ind. Cas. 529; 37 A. 604; 29 M. L. J. 434; 2 L. W. 897; 18 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 20 C. W. N. 1; 22 C. L. J. 481; (1915) M. W. N. 772; 42 I. A. 208 (P. C.).

(2) 6 C. 119 (F. B.); 6 C. L. R. 500; 5 Ind. Jur. 585; 3 Shome L. R. 146; 3 Ind. Dec. (N. S.) 78.

before us that this dictum is *obiter*, which is true. But it is used by the Bench as axiomatic of the principles governing the relationship between the *bandhus*. Mr. Sreenivasa Iyengar, for the respondents, finds authority for it in Chapter II, section 6, placitum *i*, of the Mitakshara. His argument, is that cognates to be heirs must be one of the three classes referred to in the passage, *i. e.*, related to the person himself, or to his father or to his mother. He admits that the persons enumerated in the placitum can be extended but he contends that the classes cannot be extended. The appellant contends that, on a proper reading of the passage, the plaintiff does come within the class.

I can only deal with this question on authority. If I found that the dictum in *Umaid Bahadur* v. *Udoi Chand* (2) had ever been doubted or departed from the matter would be different. But where I find it treated as axiomatic, and where there is no case in which it has ever been doubted, I cannot treat it as a mere *obiter dictum*.

In a later case in *Babu Lal* v. *Nanku Ram* (3) the decision in *Umaid Bahadur* v. *Udoi Chand* (2) and the rule expounded in Dr. Saravadhikari's Book to the same effect were referred to with approval, and the principles underlying *bandhu* relationship laid down in that case accepted. It was suggested before us that the decision in *Umaid Bahadur* v. *Udoi Chand* (2) was peculiar to Calcutta. But *Babu Lal* v. *Nanku Ram* (3) shows that it is based on the Mitakshara. Unless, therefore, a different view has to be taken based on the authority of the Privy Council in *Buddha Singh* v. *Liltu Singh* (1), the law laid down in *Umaid Bahadur* v. *Udoi Chand* (2) must, I think, be followed. The appellant contends that the decision of their Lordships in that particular case, that the term '*putra*' includes grandson and great-grandson, must be generally applied and relies on a passage at page 616.* The words are: "having regard to the fact that this great legist, whose logical acumen, judging from his work, seems to have been remarkable, has used the term *putra* in previous parts of his book on inheritance in a comprehensive and generic sense, their Lordships find it difficult to conceive why he should arbitrarily and without any explanation have used the word towards the end in quite a different and restricted sense, or why, if his intention was to confine the descent in the case of the collaterals to the actual sons of brothers and uncles, he did not employ terms which would have exactly conveyed his meaning, such as *atmaja* or *aurasa*, which their Lordships understand, mean 'son of one's loins'." He contends that their Lordships intended to rule that in the Mitakshara whether the words of the Commentator or an original text are being construed the word *putra* must always include grandson and great-grandson. This is a very extreme contention. Their Lordships in that case were not dealing with sisters' or aunts' sons but with the case of sons *ex parte paterna*. It seems to me that the language of their Lordships at page 623* is the real summing up of their Lordships' decision. It is as follows: "They have already given reasons for holding that in the Mitakshara, as expounded in the Benares School, the word *putra* and its synonym employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted, at any rate, to the third degree before making the ascent to the line next in order of succession." Their Lordships were undoubtedly dealing with a case of succession among agnates, as laid down in section 5 of Chapter II, and it is, if I may say so, perfectly understandable that, where the word *putra* is being used in connection with sons of males, it should always be given an extended meaning to include grandson and great-grandsons. But very different considerations arise in a case of succession of *bandhus* and I do not think we are entitled, from the general language used by the Privy Council on one page, to apply the principles enunciated with regard to agnate's succession to a case of cognate kindred where such application would result in the destruction of the principle to be found in the section dealing with the succession of cognate kindred. There must surely be a profound distinction between relationship in one *gotra* and the relationship in persons belonging to a different *gotra*. I cannot, therefore, hold

(3) 22 C. 839; 11 Ind. Dec. (N. S.) 228.

*Pages of 37 A.—[*Ed.*]

that the decision of their Lordships in *Buddha Singh* v. *Lallu Singh* (1) has created a law of succession among cognates different from that which seems to have been accepted for a great many years. That is the view of the District Munsif in this case and I see no reason to doubt that it is correct.

I would dismiss the second appeal with costs. One set.

SADASIVA AIYAR, J.—The facts have been set out in the judgment of my learned brother, which I have had the advantage of reading before writing this opinion of mine. I have considered, in *Subramania Mudalior* v. *Ranganathan Chettyar* (4), the *sloka* about *atma bandhus*, *pitru bandhus* and *matru bandhus* which is attributed to *baudhayana* by one commentator and *Vridha Satatapa* by others. I have expressed my considered opinion in that case that the *sloka* is a childish and spurious text and that it is an illogical, incomplete and inconsistent classification of *bandhus*. Mr. Srinivasa Aiyangar, with great legal acumen and a wealth of legal terms of highly subtle meaning, tried to establish that the classification was not so illogical or inconsistent as I thought. I can only say that he has merely confirmed me in my view, though it may be that the subtlety and (what he called) the intricacy of the ideas involved in the classification make it so elusive as to escape the grasp of ordinary minds including my own.

As regards the case in *Umaid Bahadur* v. *Udoi Chand* (2) I recognise that it contains the opinion of a Full Bench of five Judges, of whom Mr. Justice Romeshchunder Mitter was one. But, as my learned brother points out, the passage in that judgment of the Full Bench relevant to the question which we have to consider is an *obiter dictum*. There is no discussion of the subject, and the *obiter dictum* is laid down as if it is an axiomatic truth. In the phrase 'maternal grandfather either of *F.* or of his father and mother,' found in the relevant passage, the word 'and' seems a clerical error for 'or'. The enumeration (in this sentence of the judgment) of the persons within whose category the male claimant's male ancestor (who is the nearest common male ancestor of the propositus and the claimant) should be found in order that the male claimant can be recognised as a heritable male *bandhu* is very incomplete. The persons enumerated are, (1) the maternal grandfather of the claimant, (2) the maternal grandfather of his father, and (3) the maternal grandfather of his mother (the claimant being lettered *F.* in the tree found in the end of the judgment.) The *atma bandhus*, *pitru bandhus* and *matru bandhus*, as given by the text already referred to, include the descendants not only of the three ancestors mentioned in the above sentence in *Umaid Bahadur* v. *Udoi Chand* (2) (which is the first sentence in the last paragraph of the judgment at page 128) but also of several others. The full enumeration of the male ancestors of the claimant *F.* (whose descendant is traced through a female or females from the common male ancestor) should, therefore, have been as follows (confining ourselves to that text for the moment): —

	Name.		Class.	Remarks.
1.	Father's Paternal grandfather	... ...	*Atma bandhus.*	
2.	Father's Maternal grandfather	... ...		
3.	Father's Father's Paternal grandfather	... ...	*Pitru bandhus.*	
4.	Father's Father's Maternal grandfather	... ...		
5.	Father's Mother's Paternal grandfather	... ...	*Matru bandhus.*	
6.	Father's Mother's Maternal grandfather	... ...		

The male heritable *bandhus* should be found among the descendants of these six ancestors, if the text is taken to impose a further restriction on the number of the

(4) 18 Ind Cas. 506; 24 M. L. J. 301; 13 M. L. T. 213; (1913) M. W. N. 202.

heritable *bandhus* than the restriction already imposed by the general rule of restriction, that where the claimant claiming through a common male ancestor has a female or females intervening in the line of descent, he should be within five degrees of the common male ancestor. It is clear that several *bandhus* nearer than some of those enunciated in the text, such as maternal uncle, sister's son and son's daughter's son of the propositus, do not find a place in the text. I can only again express my regret that in *Umaid Bahadur* v. *Udoi Chand* (2) the learned Judges did not even indicate the chain of reasoning by which they arrived at the conclusion that the enumeration of *bandhus* in the text was not merely illustrative but restrictive and, if restrictive, how far and on what principles the restriction proceeded. The *atma bandhus* mentioned in the text are descended from the paternal or maternal grandfather alone but it has now been settled by decisions that *atma bandhus* might be the descendants of the father, such as sister's son or even of one's self, such as son's daughter's son.

However, I am reasonably certain that neither the old spurious text nor the commentators intended to impose any restriction on the number of heritable *bandhus* based on the limitation of the classes of the (male) ancestors of the claimant (in whose descent there is female intervention) from which ancestors the propositus ought also to be descended. But *Umaid Bahadur* v. *Udoi Chand* (2) by great ingenuity, did derive three such classes as following from the text. Mr. Sarvadhikari extended them and such farfetched deductions remained unquestioned for long. I might here remark that the text classifies only the claimant—*bhandhus* of the propositus, into three classes. If propositus *A*. is a *bandhu* (blood relation by cognate affinity) of the claimant *B*. claimant *B*. is also clearly a *bandhu* of propositus *A*. The relation of *bandhuship* of the claimant to the propositus is alone considered in the text relating to the class of heritable *bandhus*. But a further ingenuity has been elaborated, namely, that not only should the claimant be a heritable *bandhu* that is a *bandhu* restricted by the ingeniously evolved limitations deduced from the text but the propositus must also be a heritable *bandhu* of the claimant with the same limitations (that as we must hypothetically assume that the propositus was living and claiming to succeed as heir to the claimant who must be supposed to be dead for that purpose). In other words, the principle of so called 'mutuality' was to be further considered in these cases. Ingenuity calculated to make this branch of the law so obscure as to lead to mere gambles in litigation, cannot go further than this. I, therefore, consider, with the greatest respect, that the conclusion in *Umaid Bahadur* v. *Udoi Chand* (2) is fallacious. As I said in *Subramania Mudaliar* v. *Ranganathan Chettyar* (4), "when two irrational principles become the foundation of all further reasoning, it is no wonder that a branch of law based upon reasons themselves founded upon unreason becomes most unsatisfactory." But I do not wish to differ from the precedents unless I am convinced that any broad principles of equity, justice and good conscience are contravened thereby.

I feel that no such principles are at stake in considering these claims by remote relations to succeed to the property of a deceased man. In olden days, when the ties of relationship were very strong, and when agnates, even to the 14th generation sometimes lived together in one family commensality, the claim of a remote relation to succeed might have a basis on broad principles of justice, equity and good conscience. But in these modern days, when even first cousins rarely live together, I do not see any justice or equity in claims to inherit made by very remote relations, and I should be glad if legislation is initiated to prevent claims by *bandhus* not descended from the propositus himself or his father or his paternal grandfather or his maternal grandfather, so that even the persons specially mentioned in the spurious text of *pitru bandhus* and *matru bandhus* may be excluded.

In the result I agree that the second appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

UMDA BEGUM *v.* ZAIB-UL-NISA.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1550 OF 1916.

December 7, 1920.

Present :—Mr. Justice LeRossignol and Mr. Justice Abdul Raoof.

Musammat UMDA BEGUM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat ZAIB-UL-NISA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Vighmal Khojas *of Shahdara*—*Females, exclusion of.*

In the case of a family which belonged originally to a non-agricultural Hindu tribe, there is no initial presumption that the family is governed by custom. Among *Vighmal Khojas* of Shahdara, females are excluded from succession by custom. [p. 695, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 21st of February 1916.

Sheikh *Niaz Muhammad* and Sayad *Mohsin Shah*, for the Appellants.

The Hon'ble Mr. *Fazl-i Hussain*, K. B., and *Sheikh Asim Ullah*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the daughters and one widow of one Muhammad Bakhsh *Sheikh* (Khoja) for 81/192nd their shares under Muhammadan Law in property of great value left by Muhammad Bakhsh and his father Chiragh Din who died, the former on the 17th, the latter on the 22nd of December 1912.

The chief defendant is Muhammad Fazal Elahi, son of Muhammad Bakhsh, and the other defendants, *viz.*, another widow of Muhammad Bakhsh and the widow of Chiragh Din, support him.

The defendants' main contentions were that, as he was a co-owner with his father and grandfather, the plaintiffs at the best were entitled to their shares in 2/3rds only, of the whole property, but that the family was governed not by personal law but by agricultural custom which excluded daughters from succession; further that the parties were *Hindu Jats* and not *Sheikh* Khojas.

The Trial Court found for the defendants on the first two points and against them on the third, and dismissed the plaintiffs' suit on the ground that they were excluded from succession by custom.

The plaintiffs have appealed to this Court and their main ground of attack is that the custom alleged by the defendants does not exist; that the attempts by the defendants to prove that they belonged to an agricultural tribe have failed hopelessly; that the evidence adduced by them is untrue and, even if true, is vague and insufficient to warrant a finding that the alleged custom exists.

The Court below has come to the following detailed findings :—

(1) that the family settled in Shahdara village and that it is comparatively unimportant whether the original settler came from Lahore or from Gopi Rai;

(2) that Hafiz Kamal, the ancestor of the parties and the first convert of the family to *Islam*, was a Vighmal Khatri and the parties are Khojas, *i.e.*, converted Khatris;

(3) that the plaintiffs, by documentary evidence, have proved 21 instances among Khojas in which females secured their rights of succession according to personal law, of which instances one occurred in this very family, but that the defendants have proved nine instances in the family and 77 other instances among Khojas of other *gots* living in or having connections in Lahore, in which succession had been governed not by personal law but by custom;

(4) that the parties' family has agricultural traditions and associations and that the custom recited by the defendants has been proved.

We have heard Counsel for either side at very great length and the instances referred to by either side have been most meticulously and laboriously dissected.

Ground No. 4 of the appeal was withdrawn on an assurance given by the respondents' Counsel and accepted by appellants' that the necessary formalities have been completed.

There thus remain only two questions for decision :—

(1) Whether the family observed custom or personal law in matters of succession; and

(2) Whether the heritable property was two-thirds or the whole of the estate left by Muhammad Bakhsh and Chiragh Din.

On the second question the sole argument addressed to us is that the admission of Fazal Elahi into partnership should have been evidenced by some formal deed; but we need not do more than adopt the arguments of the Court below, especially as we hold that the appeal fails on the first point.

At pages 571 to 574 of the paper-book will be found a pedigree table put in by the defendant with his pleas, but not proved by him, whilst at pages 614, 619, 623 and 631 will be found pedigree tables proved by defence witnesses. Those pedigree-tables support to illustrate the instances of succession in the defendants' family.

With regard to the question whether Hafiz Kamal came and settled in Shahdara from Lahore or from some other place, we regard as the best evidence the statement in the Shahdara pedigree-table of 1868 that he came from Lahore. Oral evidence to the contrary must of necessity be of little value.

We find then that Hafiz Kamal about 1768 left Lahore and settled down in Shahdara where he acquired land by clearing the jungle. Many years later, his grandson, Chiragh Din, migrated back from Shahdara to Lahore where he was formally or informally adopted by Pir Bakhsh, his maternal uncle, and married a neice of his adoptive father. Though there is no proof of a formal adoption, there is clear and inconvertible evidence that Chiragh Din was known simultaneously as the adopted son of Pir Bakhsh and also the son of his natural father.

On these facts, inasmuch as Chiragh Din was a Vighmal Khoja and came originally from a non agricultural Hindu tribe, there is no initial presumption that the family is governed by custom, but having regard to the fact that its original religion (Hinduism) excludes females from succession in the presence of males and that the family took up land and lived for several generations outside a town it would be no matter of surprise to find that it had followed custom rather than a personal law involving the morcellement of landed property.

Now, the Court below finds that the defendants have established the occurrence in this very family of nine instances in which females were excluded and in addition have cited 77 other instances occurring in the brotherhood. As against this, the plaintiffs are found to have established 21 cases in which Muhammadan Law was observed, but of these only one relates to this family.

The lower Court, however, appears to have been mistaken in supposing that Exhibit P. W. 48 referred to this family. The Alla Bakhsh therein mentioned was not the Allah Bakhsh of Chiragh Din's family but belonged to quite a different family, so that we must hold that not a single instance, of the operation of Muhammadan Law has been proved within the family of the parties.

The lower Court, moreover whilst dealing with the defendant's oral instances has ignored the oral instances recited by the plaintiffs. These also we have had to consider in detail. They are, however, open to the objections which appellants have levelled against the oral instances recited by the defendants, namely, the evidence regarding them is vague; many cases are cited by only one witness and all the circumstances surrounding them are not disclosed. This being so, parties before us agreed that the oral instances recited by the one side might fairly be set against the oral instances recited by the other, so that we have to deal in the result merely with the documentary instances.

Now, a consideration of those instances shows that among Khojas Muhammadan Law is observed in some cases and custom in others, but the crucial test is that, whereas in this family, daughters in several cases have been excluded, in not one single case have they taken a share according to their personal law. It has been suggested by the appellants that the existence of some of these females mentioned by name, is mythical and that it is not clear that they survived their fathers. But even if the oral evidence on this point be discredited, it would be very strange if, in the many generations since Hafiz Kamal, there had been in this large family no females capable of inheritance.

If we examine the revenue record and pedigree-tables of the family in the villages of Shahdara and Gopi Rai, we find no trace whatever of succession by females according to Muhammadan Law, but we do find females

succeeding under custom to a life-tenure on the death of their husbands, *e g.*, *Musammat* Murad Bibi, widow of Arura, (page 238), who on her demise was succeeded by her husband's collaterals (page 594).

The defendant's instances Nos. 1, 2, 4, 8, 9 and 11, as marked by the Court below, are instances of the observance of custom in this very family and are established by clear documentary evidence. Moreover, the *wajib-ul-arz* of Shahdara village as well as that of Gopi Rai excludes daughters from succession in very clear terms.

The other instances proved by both sides are instances which occurred among the brotherhood in families with which the parties may or may not be connected by marriage; but it does not follow that the custom prevailing in those families would be followed by this family which, as we have seen, has had a peculiar history.

For the appellants it was urged that the late Chiragh Din had performed a *Haj* and, on more than one occasion, had expressed his adherence to Muhammadan Law. But those circumstances in themselves prove nothing, for all over the Punjab we find instances of Muhammadans who observe Muhammadan Law strictly on the religious side but in matters of succession most undoubtedly observe custom from the instances proved by the parties which have occurred outside this family, it is clear that among Khojas (who almost invariably are residents in urban areas) some follow custom and others their personal law, and on behalf of the appellants it is urged that, that being so, the instances occurring in this family are not sufficient to warrant a finding that the family follows custom, especially in view of the fact that, with the exception of Chiragh Din who achieved wealth, the other members of the family were poor and the shares that would have fallen to females of the family, had Muhammadan Law been observed, were of such little value that the failure of the females to insist upon their rights of succession under Muhammadan Law was susceptible of the explanation that the rights did not merit any serious struggle to obtain them.

It is true that in all the cases of exclusion of females proved in this family the value of the property which under Muhammadan Law would have fallen to each female was small but it must be remembered that to necessitous persons a property of even small value would appear something considerable and desirable. Moreover, the indications that the family followed custom do not consist merely of cases of exclusion of females from succession but also of other cases in which the succession that did take place was in accordance with custom but entirely opposed to the principles of Muhammadan Law, *e. g*, case No. 9 that of Miraj Din who succeeded his grandfather, Imam Din, in spite of the fact that Abdullah, father of Miraj Din, had predeceased his father, Imam Din.

From the foregoing it follows that the family of the parties, unlike most Khoja families, has agricultural traditions and that within recent times it inhabited not a city but a village and depended, at any rate, in some degree, upon agriculture for its maintenance. Indeed, many of its members are still villagers. Before its conversion to Islam, the family was familiar with the principle of the exclusion of females from succession and since the conversion not one single instance has been proved to have occurred in the family of a female succeeding along with or to the exclusion of males. On the other hand, there is, at any rate, one clear instance of the succession of a female to her deceased husband's estate on a life tenure in accordance with custom.

On this ground we consider that the finding of the Court below that the family to which the parties belong observes custom and not Muhammadan Law must be upheld and we, therefore dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 937 OF 1919.

July 28, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THE SOUTH INDIAN RAILWAY COMPANY, LIMITED, BY ITS AGENT—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL COUNCIL, TRICHINOPOLY REPRESENTED BY ITS CHAIRMAN—DEFENDANT—RESPONDENT.

Madras District Municipalities Act (IV of 1884), ss. 113, 117, 216 to 221—Municipalities, right of, to levy fees for transport of night-soil, from owner's premises.

Under the provisions of the Madras District Municipalities Act, IV of 1884, as amended by the Act of 1897, it is not the duty of the rate-payers to carry their night-soil from their premises to the Municipal depôt wherever situated. It is the duty of the Municipal Council to remove the rubbish and offensive matter from outside the occupier's building or land to the depôt which they are bound under the Act to provide, and they are bound to have covered vehicles or vessels for the removal of offensive matter, and it is illegal for them to charge any fees for such transport. [p. 700, col. 2.]

Second appeal against the decree of the District Court, Trichinopoly, in Appeal Suit No. 430 of 1917, preferred against the decree of the Court of the Subordinate Judge, Trichinopoly, in Original Suit No. 46 of 1916.

Mr. *D. Chamier*, instructed by Messrs. *Brightwell* and *Moresby*, for the Appellant.

Mr. *V. Ramesam* (Government Pleader) for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff, the South Indian Railway Company, Limited, is the appellant before us. The suit was brought for recovery of the total of the sums paid by the Railway Company to the Municipal Council of Trichinopoly between March 1912 and November 1914 for what are called private scavenging services performed by the Municipality for the Railway Company. I find that they are called 'scavenging fees' in the relevant notices, reports and bills (See for example Exhibit J).

The Railway Company own stations and offices at the Junction and Fort of Trichinopoly. There are several latrines and urinals in these places, and the washings and the night soil are collected by the Railway authorities through the Railway coolies into certain receptacles and a repository and into cisterns, the urinals being drained into cisterns. The Municipality owns carts and bulls and employs drivers to drive the carts to the Municipal night-soil-depot, which is situated at a distance of 5½ or 6 miles from the junction station. The so-called scavenging fees recovered from the Company seem to be the hire charged for the supply of the night-soil cart and urinal carts with bulls and drivers. Three night-soil carts and four urinal carts seem to have been usually supplied in the year 1913 and the hire charged for three night-soil carts is Rs. 55 a month and for the four urinal carts Rs. 62 a month. (See Exhibit A.2). (The requirements in previous and subsequent years have, of course, varied from what they were in 1913) The 2nd paragraph of Exhibit A.2 says:—"The nature of the service rendered is carting away the night soil and urine collected by Railway scavengers and kept in readiness in receptacles for removal." After going through the records carefully, I am satisfied that the claim of the Municipality relates to the cost of transport to the Municipal depot from just outside the Railway premises and that the removal of the night-soil and urine in the receptacles and cisterns from within the Railway compounds to just outside the compounds were treated as a negligible preliminary to the main work of transport to the depot. It may be that the hired carts proceed some distance into the Railway premises to receive the offensive matter and then go out to the Municipal road outside the premises and are then driven off to the Municipal depot at a distance of six miles, but the transport from inside the Railway premises to just outside those premises, assuming that it is done in the Municipal carts, does not seem to have been considered as a separate service chargeable by itself, any more than a cart driven charges for removing things from the verandah of a bangalow to the gate separately from the charge of conveyance to the Railway station. It is the employment of the carts, bulls and drivers in transporting the stuff to a distance of six miles which is the service which has been charged for and objected to in this case.

The plaintiff (Railway Company) contends

in paragraph 6 of the plaint "that the provisions of the District Municipalities Act do not entitle the Municipal Council to charge fees for the transport of night soil etc., to their rubbish depot; and also that, in levying the fees in dispute from the Railway Company, the Municipality has not complied in substance and effect with any of the provisions of the District Municipalities Act. The Council in their written statement contended, among other defences which are unsustainable and which, therefore, need not be further noticed, (*a*) "The services rendered are such that the defendant Council is not in any view of the law bound to do the same free of charge. These services have been rendered throughout by special agreement between the parties and the defendant Council and avers that it would not have rendered them but for such agreement. (*b*) From the year 1889 the defendant Council has been doing the work of removal in and from the premises of the plaintiff Company under special agreements between the parties by which the plaintiff requested such specific services to be done in the manner and to the extent required by the plaintiff Company to suit their own convenience and by which they agreed to pay the defendant Council specified sums per mensem. (*c*) The defendant Council submits that the above said agreements are legal and binding on the parties and are further in substantial compliance with the provisions of the District Municipalities Act. (*d*) The suit is barred by limitation

As regards the removal "in the premises" as distinguished from removal from the premises of the Railway Company, I have already stated that the charge was not intended for removal "in the premises" themselves.

The learned Subordinate Judge's findings and the reasons for his finding are as follows : (*a*) Under section 216 of the District Municipalities Act, V of 1884 (as amended in 1897) the duty of making arrangements for the regular removal from the latrines and private houses of night-soil and other offensive matter is cast on the Municipality. The clause in section 216 "so far as the funds at their disposal permit" does not in any way detract or omit from the duty of the Municipality laid down in the section but has reference only to the extent to which the Municipality ought to make arrangements for the regular removal. The latter part of the section directs the Municipality to provide depots for the deposit of night-soil and other offensive matter "and also covered vehicles or vessels for the removal of the same." The duty of providing carriers, drivers and bulls, if required, for the removal of the night-soil and offensive matter from latrines and premises is also clearly laid on the Municipality in the discharge of the duty laid down in general terms in section 216. There is no duty laid on the rate-payers to provide their own bulls, carriers and drivers at their own cost for the removal of the night-soil and other offensive matter from their latrines and premises to the distant Municipal depots, and the contention of the Municipality that such a burden is placed primarily on the rate-payers is (to use the words of the Subordinate Judge himself) "as absurd as it is ingenious." (*b*) The contention of the Municipality that there was an agreement between the Railway Company and the Municipality for payment of the charge is unsustainable. No such contract has been proved and the contract set up is also unlawful, as a contract about scavenging fees can be made by the Municipal Council only under section 218 of the Act (as amended in 1897) and the payment of fees under such contract could be demanded only at such rate or rates as the Municipal Council may have prescribed with the approval of the Governor in Council ; and as the approval of the Governor in Council has not been obtained to the rates at which the hire for carts, drivers and bulls in this case has been charged against the Railway Company, the charge was illegal. On these findings the Subordinate Judge decreed the claim for the amounts paid within three years before suit dismissing the portion of the claim which related to the amounts paid more than three years before suit as barred by limitation.

On appeal the learned District Judge gave findings as follows :

(*a*) "My reading of the effect of the provisions" of the District Municipalities Act "is that the Municipal Council is ordinarily obliged to provide depots for the disposal of the night-soil, means of

transport and an agency for assisting occupiers in collecting night-soil, etc., from their premises." (*b*) As occupiers of buildings or land are prohibited from keeping night-soil for more than 24 hours on their premises or land (*vide* sections 221 and 220) and they are liable to penalties for retaining it for even a shorter period if it be not kept in a proper receptacle it is the primary duty of the occupier to get rid of the night soil and "as I understand the Act he may make his own arrangements to convey it to the place of deposit" provided for by the Municipal Council. (*d*) "It is not disputed that the Railway Company entered into a contract with the Municipal Council under the provisions of the original section 209. It is clear from the correspondence that the charges were levied not for collection only but for transport as well. The charges were varied and increased from time to time. The contract was originally made in 1888 and payments on the basis of this contract continued to be made without objection till long after the amendment of the law by Act III of 1897. The first objections were raised in 1906. Then the Municipality required the Railway Company to enter into contracts under section 218 and was demanding fees for its services under section 218. They were admittedly paid and there is no proof that the payments were made under protest prior to 1912."

I think it must be held that an implied contract existed between the parties. There was, however, a defect, in that the fees had never received the approval of the Governor-General in Council. This approval was accorded in pursuance of Government Order No. 1322 of 5th August 1908. I am unable to agree that this approval was inadepquate. (*d*) It is further urged that the fees are illegal because they were not prescribed by the Council. As far as the record goes there is nothing to show that any resolution was passed by the Municipal Council as to the amount of the fees. (*e*) "I think the provisions of the Act were substantially complied with. A contract was entered into under section 218 and the fees were levied under this agreement."

On these findings which I have noted down mainly in the words of the learned District Judge himself, he allowed the appeal and dismissed the suit with costs throughout.

We have heard elaborate arguments on all the questions in issue in this second appeal preferred by the plaintiff Company. After careful consideration, I have come to the conclusion that this appeal ought to succeed. I am unable to agree with the learned District Judge that, under the provisions of the Act, as amended in 1897, it is the duty of the rate payers to carry their night soil from their premises to the Municipal depot wherever situated. I have compared the provisions of Act V of 1884, as originally passed, with the same provisions of that Act, amended by the Act of 1897. But it is unnecessary to set out the difference in detail as the learned District Judge himself does not rely on any contract entered into under the provisions of section 209 of the unamended Act, but only what he considers implied contract which he considers to be established under the provisions of section 218 of the amended Act. The whole correspondence in 1888 is not produced in the case and the single letter, Exhibit 2, written by the Collector, as Chairman of the Municipal Council, in 1888 states merely that "there should be a contract between the Municipality and the Railway Company to remove their night-soil and urine at a fixed rate," and that he proposed a rate of Rs. 12 per month for one night soil cart and Rs. 9 12-0 per month for one urinal cart, the rates being liable to variation in future years. Having regard to the language of section 209 of the old Act (which says that the Chairman may, *subject to the approval of the Municipal Council*, contract with the owner or occupier of any building or land to supply him on payment *with a scavenger* for the removal of night soil, etc.,) and to the fact that the Chairman did not get the approval of the Municipal Council, and supplied not a scavenger or scavangers, but carts, bulls and drivers, I do dot think that the contract implied by the payment by the Railway Company (or even expressly entered into as is said to have been admitted before the District Judge) at the rates mentioned in Exhibit II between 1888 and

1897 can be treated as made in accordance with any lawful contract (or contracts as the rates have varied) contemplated by section 209. However, as I said, section 209 was omitted when the Act was amended in 1897. The Railway Company objected in 1906 to make any payments thereafter and the District Judge relies, therefore, not on section 209 of the old Act, but on section 218 of the amended Act and finds an implied contract established under that section because, between 1906 and 1913 the Railway Company made payments without any formal protest. Section 218 says: "The Chairman may contract with the occupier of any building or land to remove night soil from latrines or cess pools therein or thereon, or to remove any other offensive matter or rubbish generally from such building or land, on such terms as to times and periods of removal and other matters as, to the said Chairman, seem suitable and on payment of fees at such rate or rates as the Municipal Council may have prescribed with the approval of the Governor in Council." I am clear that the contract intended under section 218 is an express contract and not an implied contract. Further, section 45 of the Act says: "Every contract made by, or on behalf of, a Municipal Council, whereof the value or amount exceeds Rs. 100 *shall be in writing*, and, except in the case of contracts made under the provisions of sub section (3) of section 44," (which has no reference to the present case) "shall be signed by the Municipal Councillors, one of whom shall be the Chairman or Vice-Chairman." There is no such written contract produced in this case and any contract which contravenes the express provisions of the Statute Law is clearly illegal and cannot be enforced.

I am further of opinion that section 218 relates to contracts with a rate payer for removal of offensive matter and rubbish from inside his building or land to outside the building or land with a view that that matter may be transported in the covered vehicles and vessels mentioned in section 216 (2) (which ought to be provided by the Municipality) and not the transport of the matters so placed in the Municipal covered vehicles or vessels from outside the building or land to the depots mentioned in section 216 (1). Even as regards the removal from within the building or land to the Municipal covered vehicles or vessels, fees can be charged only after the approval of the Governor in Council has been obtained. There is nothing to show that such approval was obtained in this case. The learned District Judge refers to Government Order No. 1322, dated 5th August 1908 as furnishing an 'adequate' approval by the Governor in Council. That Government Order is not on record, and even if it furnishes adequate sanction and was intended to be a sanction under section 218, the absence of a written contract signed by two Councillors and the fact that section 218 does not relate to the transport to the depot which is the contract now in dispute renders the levy illegal.

I am also clear that the District Judge was in error in holding that sections 220 and 221 imply that it is the duty of the occupier of a building or land to remove his night soil to the Municipal depot. Reading sections 216 to 221 together, I am satisfied that it is the duty of the Municipal Council to remove the rubbish and offensive matter from outside the occupier's building or land to the depot which they are bound under the Act to provide, that they are bound also to have the covered vehicles or vessels for the removal of the offensive matter placed at or pass by convenient positions on the road so that when what is collected by the occupants of the buildings or lands is placed by them in convenient spots (outside their buildings or lands) the matter can be taken into such covered vehicles or vessels by the Municipality and transported to the depots, and that it is illegal for the Municipality to charge any fees for the transport of such covered vehicles or vessels to the depôt. Even a written contract for such transport to the depot would, in my opinion, be void for want of consideration.

In the result, I would reverse the judgment of the District Judge and restore that of the Subordinate Judge with costs here and in the Court below payable by the respondent to the appellant.

NAPIER, J.—This second appeal arises out of a suit by the South Indian Railway Company to recover from the Municipal Council of Trichinopoly sums levied from

them as scavenging fees and paid by the Company under protest. The Subordinate Judge gave a decree for Rs. 2,457-0 0 with interest. The decree was reversed by the District Judge. Hence this second appeal.

It is clear from the judgments in the case that the fees were levied for removal of night soil from the premises of the plaintiffs to the Municipal depot about six or seven miles from the town and it is admitted that, unless the levy of these fees can be justified under section 213 of the District Municipalities Act, it was illegal. The lower Appellate Court has suggested that they were payable under an implied contract. But no attempt has been made in this Court to support this view. The Subordinate Judge, in a long and elaborate judgment, has found that the Municipality have no right under the Act to charge the plaintiffs for removing night soil to their depot, and in this view, I entirely concur.

A minor question has arisen during the hearing as to whether the Municipality could charge the Railway Company for carting night soil over their premises as far as the public road. I do not think it necessary to express any final opinion on this point because Mr. Chamier for the appellants stated that the Railway Company would have no objection in coming to an arrangement with the Municipality for this limited work or, if such an arragement could not be made, would be prepared themselves to place the night-soil in convenient access to the public road.

As far as we can ascertain, the basis on which these fees were calculated was the supply of a certain number of Municipal carts and drivers for the removal of night soil to the depot above referred to. We have not got any account showing exactly how the figure was arrived at, but it appears from the previous correspondence and previous payments that this was the basis. Mr. Chamier contended that, under section 216, it was the duty of the Municipailty themselves to remove the night-soil to any place they chose over the public roads. Mr. Ramesam on behalf of the respondent stated two propositions: (1) that the Act intended to impose upon the house-holders in a Municipality the primary duty of removing night soil to any place, (I assume within reasonable limits) chosen by the Municipality and (2) that the Act threw no duty whatsoever on the Municipal Council in connection with the removal of night soil even though the funds at their disposal permitted. It is sufficient to say that an examination of the scheme of the Chapter containing the provisions which we have to construe negatives these contentions completely. Chapter II of the District Municipalities Act, 1884, as amended, creates Municipal Councils, vests property in them and states their mode of doing business, and Chapter III permits levying of certain taxes and tolls and provides the mode of realising them. Chapter IV lays down the purposes to which the funds raised under this Act shall be applied. We are concerned with the sections in Chapter IV. Section 113 says: "The funds raised under this Act shall.....be applicable within the Municiplities in which they are raised" to certain purposes one of which is "measures of public utility calculated to promote the safety, health, comfort or convenience of the people." From section 117 onwards are a series of specific provisions for the application of Municipal funds. Some of them are compulsory and some are permissive and all of them are, so far as the funds at their disposal may admit. The purposes are education, medical relief, vaccination, water-supply, repair of public streets and bridges, erection of buildings, provision of slaughter-houses and markets and public latrines and construction of drains." The 12th clause, beginning with section 216, is headed "General Sanitary Regulations" and section 216 is in the following terms: "The Municipal Council shall, so far as the funds at their disposal permit, make arrangements for (*a*) the regular sweeping and cleansing of the streets; (*b*) the regular removal from latrines and private houses of night soil, the carcasses of animals and other offensive matter; and (*c*) the regular removal from dust bins and private houses of dust, ashes, kitchen refuse and other similar offensive matter." It is to be noted that the removal from the latrines and private houses of night soil is put in the same classification as regular sweeping and cleansing of the streets. Therefore, unless the Municipality can show that the funds at their disposal do not admit of their doing the

work of removal of night soil they are by Statute required to sweep and clean the streets. The section continues as follows: "and with this object, they shall, so far as the funds at their disposal permit, provide depots for the deposit of street sweepings, of night soil, the carcasses of animals and other offensive matter, and of dust, ashes, kitchen refuse and other similar inoffensive matter." These are the three classes referred to in the previous sub sections. They shall also provide covered vehicles or vessels for the removal of night soil and other offensive matter; vehicles or other suitable means for the removal of the carcasses of large animals and of dust, ashes, kitchen refuse and other similar inoffensive matter. This provision covers also the classes above referred to. And, lastly, they shall provide dust bins for the temporary deposit of dust and other similar inoffensive matter. This last provision applies only to one of the above mentioned classes. So that there is no duty under the section thrown on the Municipality to provide receptacles for night soil, carcasses of animals and other offensive matter, their duty being only to provide suitable vehicles for the removal. Then comes section 217 under which the Municipal Council may, by notification, require all occupiers of buildings to provide, within a period specified in such notification, moveable receptacles for the temporary deposit of night soil or other offensive matter. This section gives the Municipality the right to compel house-owners to provide the receptacles for offensive matter whereas under the previous section they are themselves compelled to provide dustbins for inoffensive matter. They may further, under section 217, require that such receptacles shall be in readiness screened from public view for the removal of the contents thereof free of charge by the Municipal servants. These provisions in section 217 are alternative to the Council having made a contract with a house-holder for the removal of nightsoil or other offensive matter. It was suggested that though section 217 might throw on the Municipality the duty of removing over the public streets night soil kept in temporary receptacles, yet if they did not choose to make any such notification the whole burden of such removal was thrown on the occupier. And, in aid of this construction, reliance is placed on section 218 which is the alternative to section 217, the language of which is as follows: "The Chairman may contract with the occupier of any building or land to remove night soil from latrines or cess-pools therein or thereon or to remove any other offensive matter or rubbish generally from such building or land on such terms as to times and periods of removal and other matters as to the said Chairman seem suitable and on payment of fees," etc. I am quite clear that sections 217 and 218 cover the same ground and that it is impossible to infer from section 218 that if the Chairman does not contract and if he does not by notification "require" under section 217 the duty is cast on the occupier of the building of removing night soil along the public road in spite of the fact that this duty is thrown on the Municipality by section 216.

Another section relied on by the respondent is section 221, which provides that: "Every occupier of a building or land who keeps for more than twenty-four hours, or otherwise than in a proper receptacle any night soil or other offensive matter in such building or on the roof thereof or in any out-building or yard or on any pavement or verandah attached or belonging to such building or on such land, shall be liable to a fine." This is the section relied on by Mr. Ramesam as being the legislative provision for which this portion of the Act, headed "General Sanitary Regulations," was enacted. As was pointed out above, this method of construction ignores the scheme of the Act and it is necesary, therefore, to read the section in such a manner as not to conflict with section 216, the opening section of this group of "General Sanitary Regulations." There is no difficulty in doing this. The duty of removal being thrown on the Municipality by section 216, the object of this section is to penalise persons who do not make arrangements necessary for the Municipalities carrying into effect their duty of removal. It also punishes the improper deposit of night-soil in any building which is offensive to public health. Section 220 which immediately precedes it indicates that section 221 must have a

limited meaning for section 220 enacts that when a notification has been issued under section 217 and the house-holder has provided a moveable receptacle as required by the Municipality, then if he does not deposit therein all night soil or other offensive matter or keep the same in readiness, screened from public view, he shall be liable to fine. Section 220 having provided for cases arising after notification section 221 applies to cases where no contract has been given for the removal from a building or land and also I have no doubt for cases where such a contract has been made. It would be impossible to contend that, where a notification under section 217 has been issued and a suitable moveable receptacle supplied and kept in readiness screened from public view, there still remained the duty on the house-holder of removing the night soil from such receptacle over the public road. This has not been suggested but the alternative suggestion is, to my mind, as great a violation of the provisions, as this would be; for it amounts to this, that where a Municipality has not issued such a notification for the provision of the receptacles there is cast on the public the duty of removing the night soil from the latrines the whole way to the depot. It is obvious that if such a duty had been intended by the Act no Municipality would be so foolish as to incur the liability for carrying the night soil from the private premises to the depot in return for a provision by the house-holder of a moveable receptacle kept in readiness. I have little doubt that section 217 was intended to make the execution of the duty cast on the Municipality under section 216 of removal from latrines more simple in operation and I am clear that if the Municipalities do not choose to issue such a notification they cannot impose upon the occupier of the building a higher liability where no such notification has been issued then there remains the duty cast on the house-holder of making such arrangements as will enable the Municipality to perform the duties cast on them by section 216. This can be done either through a contract by the house-holder with the Municipality under section 218 or, in the absence of such a contract, the house-bloder may by himself make such a provision Whether the Municipality, in the absence of a notification under section 217, can be compelled to enter the premises and remove the night soil, etc., over the private land of a house-holder is a matter I do not propose to decide at present. But, bearing in mind that section 218 enables the Municipality to contract for this work, I am inclined to think that a house-holder cannot even under the wide words of section 216 throw this duty on the Municipality. Where we find two provisions, sections 217 and 221, under which a Municipality may by notification give directions for the removal to a place of access by carts of night soil and where under section 218 the house-holder can enter into a contract for this work with the Municipality, it would be strange if, in the absence of such a notification and in the absence of a contract, this duty was imposed on the Municipality. This question is not, however, before us and I express no final opinion on it. The fees were admittedly levied for the removal over the public roads to a Municipal depot and I am clear that the levy of such fees is beyond the powers of the Municipality. I agree, therefore, with the Subordinate Judge that the plaintiffs are entitled to recover three years' fees paid under protest and would restore his decree with costs of the plaintiffs throughout here and in the lower Appellate Court.

K. C. P.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 450 OF 1920.

December 9, 1920.

Present :—Mr. Justice Martineau.

THE FIRM KNOWN AND STYLED AS *Haji* PIR MUHAMMAD-SADR-UD-DIN, AMRITSAR, THROUGH SHAMS-UD-DIN—PLAINTIFF—PETITIONER

versus

KHAIR UD-DIN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. L, r. 1 (a)

PIR MUHAMMAD SADR-UD-DIN *v.* KHAIR-UD-DIN.

(iii)—Small Cause Court—Procedure—Issues not struck—Case involving many questions—Duty of Court.

Although under the law a Small Cause Court is not required to frame issues, yet where the matter in dispute is not very simple and various questions arise for decision, the Court should indicate to the parties what the points are on which evidence has to be adduced and give them an apportunity to produce their evidence thereon.

Petition under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Amritsar, dated the 20th March 1920.

Sheikh *Niaz Muhammad*, for the Petitioner.
Mr. *Ghulam Rasul*, for the Respondent.

JUDGMENT.—The defendant bought a certain quantity of skins and took them to the shop of the plaintiffs, who are commission agents. The plaintiffs paid for the defendant the price due to one firm from which the defendant had bought some of the skins, and they sold all the skins for Rs. 262 2-3. They sue for what they allege is due to them on the account.

The lower Court has dismissed the suit on the ground that the plaintiffs acted without authority in selling the skins for so low a price.

The plaintiff applies for revision and the main argument on his behalf is that he was not given a proper apportunity of proving his case, the lower Court not having indicated the points which he was required to prove.

There seems to be force in this contention. It is true that, under the law, a Small Cause Court is not required to frame issues but the present case was one in which it was necessary to indicate to the parties what the points were on which evidence had to be adduced. The matter was not a very simple one, as there were various questions which arose. The defendant admitted in his statement of the 20th March that he had left the skins at the plaintiffs' shop for sale. He said he never permitted them to sell the lot for Rs. 262-2-3. But did he give any instructions at all or fix a reserve price? If not, were the plaintiffs justified or not in selling the skins for Rs. 262-2-3? The lower Court says they ought not to have taken the responsibility of selling so many skins for that price when they had paid a much higher price for a smaller number of skins to the persons from whom the defendant had bought the skins. But the skins were sold by plaintiff several months after the defendant had bought them, and questions may arise as to whether the price obtained for them by the plaintiffs was a fair one at the time when they sold them, whether or not they acted with reasonable diligence whether they should have sold the goods earlier than they did, or whether they should have waited longer than they did before selling.

Then, it is to be observed that in the pleas filed by the defendant on the 10th March the question of the authority of the plaintiffs to sell the goods for Rs. 262 2-3 was not raised, so that the plaintiffs could not be expected to produce evidence on the point at the next hearing. It was only on the 20th March that the defendant said he had not permitted plaintiffs to sell the skins for Rs. 262 2-3. The plaintiffs replied that it was not their custom to obtain such authority and that they had sold at the market rate. They were not, however, given time to prove that authority was not necessary, or what the market rate was on the day of the sale, but the Court at once proceeded to give judgment.

I think the case is one in which the points which have to be determined should be stated for the information of the parties, who should then be allowed to produce their evidence thereon.

I accept the application, set aside the decree of the lower Court, and remand the case to that Court, under Order XLI, rule 23, Civil Procedure Code, for fresh disposal with reference to the above remarks. Court fee on the application to be refunded. Other costs to be costs in the case.

Application accepted;
Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 133 OF 1919.

July 17, 1920.

Present :—Mr. Hallifax, A. J. C.

GANPAT RAO MOHITEY—AUCTION-PURCHASER—APPLICANTS

versus

KESRICHAND AND OTHERS—AUCTION-PURCHASER, DECREE-HOLDER AND JUDGMENT-DEBTOR—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 86—Execution of decree—Sale—Auction-purchaser, deposit by—Failure to deposit balance of purchase-money—Deposit, when may be refunded.

Where an auction-purchaser, after depositing the required quota of the purchase-money, fails, for some good reason to the satisfaction of the Court, to deposit the balance, the matter is one in which the discretion given to the Court by Order XXI, rule 86 of the Civil Procedure Code, should be exercised in his favour, and the amount deposited refunded to him.

Civil revision against the order of the Additional District Judge, Nagpur, dated the 20th March 1919, in Execution Case No. 26 of 1917.

Mr. *B. R. Pendharkar*, for the Applicant.

JUDGMENT.—Ganpatrao Mohitey, the applicant for revision, purchased a house at Nagpur in auction-sale for Rs. 3,030 on 29th November 1918 and deposited Rs. 875 on the same day as one fourth of the purchase money. This is slightly in excess of the sum required, which is only Rs. 757-8-0. He had to deposit the balance in fifteen days, that is, by 14th December 1918, but did it on 19th December 1918, five days late. His explanation which is accepted by the Additional District Judge and seems true enough, is this. Ten days after the sale he received a message to say that his brother and daughter had been attacked by influenza at Khursapar, about 30 miles from Nagpur, and he was obliged to go there at once and remain in attendance on them for some time. Also, while there, he suffered himself from an attack of malaria. He was unable to arrange for the payment of the money from Khursapar, but did so as soon as he was able to return to Nagpur.

On 6th February 1919, the date fixed for confirmation of the sale, the Court ordered the property to be re-sold because the balance of the purchase money had not been paid within the time allowed by law, and issued notice to the purchaser to show cause why the one-quarter which he had deposited should not be forfeited under Order XXI, rule 8[illegible], of the Civil Procedure Code. A payment of Rs. 3,500 by the judgment-debtor in part satisfaction of the decree was also recorded. On 20th March 1919 the learned Judge heard the purchaser but rejected his application for a return of the Rs. 757-8-0 and ordered its forfeiture, remarking that he ought to have deposited the balance during the ten days before the sale and his departure for Khursapar. He appears to have had in mind the principles laid down by Stanyon, A. J. C., in *Kedarnath* v. *Zumberlal* (1), that a litigant who leaves a matter to the last moment is guilty of negligence, and is not entitled to any consideration if some unexpected or unforeseen contingency takes him beyond the last moment. It is to have this order of forfeiture set aside that the auction-purchaser now applies in revision.

I doubt very much whether rule 86 of Order XXI makes it compulsory that a re-sale shall be ordered in circumstances like those of the present case, and leaves the Court no power to confirm the sale. This appears to have been assumed in the lower Court but we are not concerned with that matter, as the applicant asks for nothing but the setting aside of the order of forfeiture and the return of his Rs. 757-8-0, and this appears to me very clearly a case in which the discretion given to the Court by Order XXI, rule 86, ought to have been exercised in his favour. Leaving the payment to the tenth day of the fifteen allowed does not indicate that negligence of which Stanyon, A. J. C., spoke in *Kedarnath* v. *Zumberlal* (1). It is accepted as true that he was unable to send the money from Khursapar or get it paid in by some other person, and his good faith is sufficiently established by his having deposited it immediately on his return to Nagpur only five days late.

It is further to be noted that the wording of rule 86 of Order XXI clearly indicates an intention that it is not forfeiture which is to be regarded as the

(1) 37 Ind. Cas. 503; 12 N. L. R. 171.

normal course in the absence of cause shown to the contrary, but rather the return of the money to the auction-purchaser. Forfeiture, the rule says, *may* be ordered if *the Court thinks fit* and such forfeiture can only be justified as a penalty in order to prevent that laxity and delay which result in waste of the time of the Court and the parties. It must not be used as a means of bringing money into the coffers of the Government. Here there was delay but no laxity. For these reasons, I think the learned Judge was wrong in exercising the discretion vested in him by Order XXI, rule 86, in the way he did. The order of forfeiture is accordingly set aside and it is ordered that the sum of Rs. 757 8 0, after defraying the expenses of the sale thereout, shall be refunded to the applicant. As the non-applicants were not really interested in the matter at all and made no appearance, I make no order as to costs.

Application allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 611 OF 1920.

November 25, 1920.

Present:—Mr Justice Wilberforce.

NARAIN DAS—PLAINTIFF—APPELLANT

versus

MAHNGA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Separation—Re-union—Question of law.

The question of the re-union of a Hindu family and the facts relevant to prove such a re-union are matters of law.[p. 707, col.1.]

Second appeal from the decree of the District Judge, Montgomery, at Lahore, dated the 7th January 1920, affirming that of the Munsif, 1st Class, Montgomery, dated the 4th August 1919.

Mr. *Kanwar Narain*, for the Appellant.

Mr. *Badar-ud-Din Qureshi*, for Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—In this case one Bul Chand had four sons of whom plaintiff and defendant No. 3 were the issue of one mother and defendants Nos. 1 and 2 of another mother. There were constant disputes between the two branches of the family and Bul Chand in his lifetime divided the bulk of his moveable property, giving outstanding debts of Rs. 9,000 to the plaintiff and defendant No. 3 and the same share to defendants Nos. 1 and 2 who were both minors. After this, Bul Chand and his two minor sons continued to live together and Bul Chand managed their property for them. He has now died and the dispute is with regard to the property left by him. Defendants Nos. 1 and 2 stated that Bul Chand remained joint with his two minor sons and that they were therefore, entitled to the property left by him. This was found to be the case by the first Court, and the lower Appellate Court, in a judgment which has dealt little with the point in dispute, has agreed with the first Court and against this decision a second appeal has been preferred on the ground that the decision is not based on the evidence on the record and that, although it is a finding of fact, it is liable to be set aside.

After a perusal of the record I find that, as a matter of fact, there is no justification whatever for the finding of the lower Appellate Court. Defendant No. 2 as a witness himself admitted that all the four sons were heirs of their father. Defendant No. 1 in a case decided after Bul Chand's death Punjab Ram *versus* Bul Chand, made two applications for the decree being set aside and for the impleading of Bul Chand's four sons as his legal representatives. There were only two witnesses for the defence produced in the case, *viz.*, Dogar Ram, a grand-uncle, and Mangu Ram. They both stated that, after the partition of the moveable property, Bul Chand kept some outstandings as his own share. Further, after the division of the outstandings during Bul Chand's lifetime he himself sold on behalf of his minor sons their share, *viz*, Rs. 9,000, to the plaintiff. A dispute followed and Bul Chand had to sue defendant No. 1 and in his suit he described himself as the next friend of the minors. All these facts show beyond any doubt whatever that Bul Chand did not remain joint or re-unite himself with his two minor sons. The judgment of the

lower Appellate Court is, therefore, contrary to law, inasmuch as it is entirely opposed to the evidence on the record. It is also liable to be set aside on second appeal as the question of the re-union of a Hindu family and the facts relevant to prove such a re-union is a matter of law.

The lower Appellate Court also erred in deciding that "there is no evidence as to the amount said by the plaintiff to be due under *bahis*, etc., no such *bahis* being produced nor deeds, etc. As to the ornaments and cattle, etc., there is no evidence on the record as to this, what it is or where it is." This point was not in issue between the parties, as the first Court merely framed one preliminary issue as to whether Bal Chand remained joint with his minor sons.

I accept this appeal and hold that the plaintiff has proved that he is entitled to a share of the moveables left by Bal Chand and remand the case to the Trial Court for a decision as to the value of these moveables. The costs of this appeal will be costs in the cause and the Court-fee on the memorandum of appeal be refunded.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 153-B OF 1919.

June 25, 1920.

Present :—Mr. Macnair, A. J. C.

CHANDOO—DEFENDANT—APPELLANT

versus

PARBHOO—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 116—Lessee denying title of lessor to lease—Estoppel.

Where a person executes a lease in favour of another, he is estopped from denying that other's title to grant the lease, it being immaterial whether he was the tenant of some other person before the execution of the lease.

Appeal from the decree of the Additional District Judge, Akola, in Civil Appeal No. 7 of 1919, dated the 12th April 1919.

Mr. *D. T. Mangalmurti*, for the Appellant.

The Hon'ble Sir *Bepin Krishna Bose*, for the Respondent.

JUDGMENT.—The plaintiff alleged that the fields in suit had been leased to the defendant for one year. The defendant denied the lease and denied plaintiff's title to lease. He stated that he had been holding from the rightful owner for about 25 years. In a rejoinder the plaintiff did not deny that the defendant had been in possession for many years but relied on the fact that the lease was in his favour. The learned Sub-Judge held that the defendant had executed the lease in favour of the plaintiff and that the defendant was estopped from questioning plaintiff's right to sue. He, therefore, passed a decree in favour of the plaintiff. This decree was upheld in first appeal.

In second appeal it is urged that, as the defendant had been in possession for long, section 116 of the Indian Evidence Act had no application. The point in issue is discussed on pages 799 and 801 of Woodroffe and Ameer Ali's Law of Evidence, 6th Edition. A tenant who was already in possession but had paid rent or otherwise acknowledged the tenancy is entitled to show that he did so through ignorance, fraud, misrepresentation or mistake. But where in a suit for rent the tenant denied the execution of the *kabuliyat* propounded by the plaintiffs, pleaded that it was forged and denied payment of rent under it to the plaintiffs and failed to establish these pleas, it was held that the tenant was not entitled to prove that the plaintiffs were not his landlords although he had not been inducted into the land by the plaintiffs.

In the present case the first question to be considered is, whether the defendant was a tenant of the plaintiff. As he did not come into possession by the license of the person in possession he is not debarred from challenging the title of the plaintiff unless he is a tenant, but there is a finding of fact, which is binding upon me, that the defendant executed the *kabuliyat*. He might have urged that he had executed under fraud or coercion but he has not done so. In virtue of the admission in the *kabuliyat* it must be held that he is the tenant of the plaintiff. This tenancy commenced when the *kabuliyat* was executed. It is

immaterial whether he was the tenant of some other person before execution. He cannot, therefore, deny the title of the plaintiff.

The remaining grounds of appeal need no further consideration. Section 116 of of the Evidence Act estops the defendant from disputing the facts which these grounds urge should have been decided.

The appeal, therefore, fails and is dismissed. Costs on appellant.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 130 OF 1920.

December 1, 1920.

Present:—Mr. Justice Wilberforce.

THE FIRM LADHA RAM-WADHAWA RAM, THROUGH LADHA RAM—PLAINTIFF—APPELLANT

versus

MUHAMMAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Interest—Agreement to pay interest, absence of, effect of—Delay in bringing suit, effect of.

A creditor is entitled to a reasonable rate of interest where it is obviously not the intention of the parties that the money should be retained by the debtor free of charge.

Delay in bringing a suit is no good ground for refusing interest.

Second appeal from the decree of the District Judge, Lyallpore, dated the 5th August 1919, reversing that of the Munsif, First Class, Jhang, dated the 31st March 1919.

Messrs. *Des Raj Sawhney* and *Mukand Lal Puri*, for the Appellant.

Mr. *Devi Dayal*, for the Respondents.

JUDGMENT.—In this case the plaintiff sued upon a balance of Rs. 500. The lower Appellate Court has held that this balance is not proved but that a previous entry of Rs. 402-2-4 is proved and has accordingly granted a decree for this sum but has refused any claim to interest. The balance in question was dated 27th December 1913. The lower Appellate Court has refused interest on the grounds that it is not shown that any rate of interest was specifically agreed upon; that the plaintiff has unnecessarily delayed the case, and that he has already charged some interest as *kat*. Finally, he says that he is not sure whether the item of Rs. 292 was paid in full. As for the lower Appellate Court's remark that it is not sure that Rs. 292 were paid in full, this remark cannot be considered seriously owing to the fact that the defendants themselves admitted this item. The delay in bringing the suit is no good ground for refusing interest; the defendants have had the use of the plaintiff's money. Lastly, the District Judge was uncertain whether interest was specifically agreed upon, and this appears to be a finding of fact that no specific rate of interest was agreed upon. It, therefore, remains to consider whether, legally, interest should have been granted or not.

Counsel for the appellants urged that the Interest Act was not exhaustive and that the Court had power to grant interest. On this point he cited *Muhammad Abdul Gaffur* v. *Hamida Beevi Ammal* (1), also *Murlidhar* v. *Mulchand* (2), and *Khetra Mohan Poddar* v. *Aswini Kumar Saha* (3). Paintiff is entitled to a reasonable rate of interest when it is obviously not the intention of the parties that the money should be retained by the defendants free of charge, *vide Raghu Mal* v. *Bandhu* (4). I consider, therefore, that the lower Appellate Court was legally in error in not granting interest, and I accept the appeal to this extent that I award interest at the rate of 12 per cent. per annum from the date of the balance till the date of the decree. Plaintiff will get his proportionate costs in all Courts.

Appeal accepted.

(1) 52 Ind Cas. 505; 25 M L. T. 242; 36 M. L. J. 456; (1919) M. W. N. 484; 42 M. 631.

(2) 52 Ind. Cas. 953.

(3) 45 Ind. Cas. 667; 22 C. W. N. 498.

(4) 110 P. R. 1908; 196 P. W. R. 1908.

JAGO v. MAHADEO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 102 OF 1919.

July 20, 1920.

Present:—Mr. Hallifax, A. J. C.

JAGO—DEFENDANT—APPLICANT

versus

MAHADEO—PLAINTIFF—NON-APPLICANT.

Limitation Act (IX of 1908), s. 20—Payment of interest 'as such', when may be availed of to obtain extension of time—Appeal, second—Question of payment, whether can be raised.

In order to obtain the benefit of an extension of the period of limitation under section 20 of the Limitation Act by virtue of a payment of interest "as such" there must be something to indicate that the debtor made the payment with the intention that it should be taken in reduction or satisfaction of interest due; the mere appropriation of the payment by the creditor towards interest is not such an indication nor is the fact that interest was due at the date of the payment. The fact that the amount paid and the amount due for interest were exactly the same, may amount to such an indication. [p. 709, col. 2.]

The question of the payment of interest "as such" is a question of fact, and a plea that such a payment has been made cannot be raised for the first time in second appeal.

Revision of the order of the Additional District Judge, Nagpur, in Civil Appeal No. 237 of 1918, decided on 18th February 1919.

Mr. *M. R. Bobde*, for the Applicant.

Mr. *D. P. Tiwari*, for the Non-Applicant.

JUDGMENT.—The plaintiff sued the defendant for payment of money due to him, bringing his suit within time by producing a *ruju* or acknowledgment of the debt executed by the defendant on Jeth Badi 14th of the Fasli year 1324, corresponding to 12th July 1915. He filed his suit on 8th July 1918, that is just four days before it was time barred, and he further alleged a payment of Rs. 40 on 30th July 1916, out of which in the plaint he appropriated Rs. 29-11-0 to the payment of interest and the rest towards principal. On an allegation made by the defendant it was found that the date had been wrongly entered on the *ruju* which had really been executed on Jeth Sudi 14th, corresponding to 27th June 1915, so that the suit was filed eleven days too late. On appeal to the Court of the District Judge the finding in regard to the date of execution of the *ruju* was upheld but the plaintiff's claim was held to be in time under section 20 of the Limitation Act,

The sixth paragraph of the judgment of the Appellate Court which contains all there is on this point is as follows:—

"Payment of Rs. 40 was made on 30th July 1916 and this payment was not denied specifically and, according to rule 5 of Order VIII of the Civil Procedure Code, it must be deemed to have been admitted. Part of the payment was made towards interest as such and, therefore, the suit is within time according to section 20 of the Limitation Act."

It is clear that the learned Judge entirely overlooked the very important words "as such" in the section to which he refers. In *Mohammad Abdullah Khan* v. *Bank Instalment Company Limited in Liquidation* (1) these words were explained to mean that there must be something to indicate that the debtor made the payment with the intention that it should be taken in reduction or satisfaction of interest due and that mere appropriation of the payment by the creditor to interest is not such an indication. The same principle was laid down earlier by Ismay, J. C., in *Gopal Rao* v. *Chindhu* (2). It is now urged that the mere fact that the interest was due at the date of the payment is sufficient indication of the intention of the debtor. It appears to me to be an indication of an exactly contrary intention, if it can be called an indication at all, because where simple interest is payable, as here, it is to the debtor's advantage to have the payment taken in reduction of the principal, and in a case of compound interest it makes no difference in the amount of the debt but payment towards interest gives a fresh start for limitation. Such an indication might conceivably be found in the fact that the amount paid and the amount due for interest were exactly the same, but that is not the case here.

This matter of the payment of interest as such is obviously a matter of fact and the plea that such a payment had been made could not be decided or even raised in the Appellate Court. There were no materials whatever before that Court for a decision of the issue and it was too late for the plaintiff to make this allegation of fact which he had all along omitted to

(1) 2 Ind. Cas. 379; 31 A. 495; 6 A. L. J. 611,
(2) 15 C. P. L. R. 29,

make. This particular allegation it was specially incumbent on him to make in his plaint under Order VII, rule 6, of the Civil Procedure Code, and the necessity for it was brought to his notice later by the defendant's plea that the suit was barred by time counting from the date of the *puju*, the plea on which the whole case was fought. For these reasons, I do not think that he is entitled to ask that the case should be remanded for the production of evidence and a decision on the issue whether the payment of Rs. 40 was a payment of interest as such. Indeed, it is hard to say from the case as it stands how there could possibly now be any unfabricated evidence on the point to produce. If the plaintiff has to forego payment of a debt otherwise justly due to him it is through his own negligence. The extraordinary habit of postponing every kind of business in the Courts to the last possible moment was so described by Stanyon, A. J. C., in *Kedarnath* v. *Zumberlal* (3). He has only himself to thank and is not entitled to any consideration. The suit was barred by time and should have been dismissed. The decree of the Appellate Court is accordingly set aside and that of the first Court dismissing the suit is restored. The plaintiff must pay the costs of this application and of the appeal in the Court of the District Judge.

Appeal allowed.

(3) 37 Ind. Cas. 503; 12 N. L. R. 171.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 936 OF 1917.

December 14, 1920.

Present:—Mr. Justice LeRossignol and Mr. Justice Wilberforce.

KISHEN CHAND—DEFENDANT—APPELLANT

versus

SOHAN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 16—Mortgage-decree—Application for personal decree, whether new proceeding—Grant of personal decree, whether remedy.

An application under rule 6 of Order XXXIV of the Civil Procedure Code for a personal decree is not a new proceeding but a continuation of the original suit, and does not come under the bar of section 16 of the Provincial Insolvency Act. [p 711, col. 1.]

The issue of a personal decree against a mortgagor is not the grant to the mortgagee of a remedy against the mortgagor within the meaning of section 16 of the Provincial Insolvency Act. [p. 711, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, First Class, Delhi, dated the 5th February 1917.

Mr. *Manohar Lal*, for the Appellant.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are as follows:—

The appellant was adjudicated insolvent in January 1911. At that time he was defending a case for recovery of Rs. 69,346 8 0 on a mortgage-deed, in spite of his adjudication he continued the defence of the suit and the first Court decreed it against him.

He then came up to this Court in appeal and was successful in obtaining a modification of the original decree, in that a preliminary decree for the sale of the mortgaged property was passed but plaintiff was left at liberty to apply, subsequently, for a personal decree against appellant in the event of the sale proceeds proving insufficient to meet the principal and interest due on the mortgage and the costs of the case.

On the happening of this contingency the plaintiff moved the Court of first instance to take action under Order XXXIV, rule 6, Civil Procedure Code, and a personal decree for the balance due issued against defendant.

In appeal it is contended that the defendant's insolvency was a bar to the grant of the decree and section 16 of the Provincial Insolvency Act of 1907 as well as *Mamraj* v. *Birjlal* (1) are referred to.

Section 16 of the Act provides that no creditor in respect of any debt provable under the Act shall, during the pendency of insolvency proceedings, have any remedy against the insolvent, nor shall he commence any suit or legal proceeding without the leave of the Court.

The Act is silent with regard to the continuation of a suit, but the continuation

(1) 12 Ind. Cas. 587; 34 A. 106; 8 A. L. J. 1241.

of a suit or defence by the Receiver is contemplated by section 20 (*d*) of the Act.

Now the application by the plaintiff under Order XXXIV, rule 6, Civil Procedure Code, was clearly not a new proceeding, but a continuation of the original suit and such was held to be its nature in *Mamraj* v. *Birjlal* (1), so that it does not come under the bar of section 16 of the Provincial Insolvency Act as a new proceeding.

We hold further that the issue of the personal decree was not the grant to the plaintiff of a remedy against the appellant within the meaning of the section.

A decree is not a remedy for a civil money (*sic*) but merely a step towards the remedy. The remedy is the benefit accruing to the creditor through the execution of his decree, *i e.*, the compensation secured to him in execution. That remedy he can secure only through the Insolvency Court by proving his debt.

The Allahabad ruling above cited, with all deference, we are unable to accept both because we do not regard a decree as a remedy and also because all the provisions of the English Act have not been reproduced in the Indian.

Section 10 (2) of the English Bankruptcy Act empowers a Court to stay any action, execution or other legal process against the debtor, or to continue them, if it sees fit, but there is no similar provision in the Indian Act; consequently the decisions of the English Courts in questions of stay of action owing to insolvency are not sure guides for the Courts of this country.

Moreover, if the words shall 'have any remedy' are a bar to the continuation of a suit, then they are irreconcileable with the provision that a suit may be continued on terms.

On grounds of expediency, it is obviously desirable that the Court which has fully considered all the evidence and has studied all the aspects of the case should decide on the merits and then leave the decree-holder to seek his remedy in the Insolvency Court.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 115-B OF 1919.

July 17, 1920.

Present :—Mr. Kotval, A. J. C.

DATTATRAYA—PLAINTIFF—APPELLANT

versus

RAJAYA—DEFENDANT—RESPONDENT.

Hyderabad Assigned Districts Land Revenue Code, 1898, ss. 72 (2), 78 (4), scope of—Section 78 (4), whether confined to cases under section 72 (2).

Section 78 (4) of the Hyderabad Assigned Districts Land Revenue Code, is general in its application to tenants and is not confined to cases where the rent of tenants falling under section 72 (2) alone is sought to be enhanced. Once the rent of a tenant of whatever class he may be, is sought to be enhanced, provided it can be legally enhanced, clause (4) of section 78 comes into operation. [p. 712, col. 1.]

Appeal against the judgment of the District Judge, Amraoti, in Civil Appeal No. 181 of 1918, decided on 18th January 1919, arising out of Civil Suit No. 57 of 1917, decided on 28th August 1918, by the Subordinate Judge Yeotmal.

Mr. *M. V. Joshi*, for the Appellant.

Messrs. *M. Gupta* and *S. C. Dutt Choudhary* for the Respondent.

JUDGMENT.—The finding that the defendant was an annual tenant was accepted in the lower Appellate Court and is not challenged here. On the 6th July 1912 the plaintiff-appellant gave the defendant a notice of enhancement of rent from the 1st April 1913 under section 78, clause (8) of the Hyderabad Assigned Districts Land Revenue Code, asking him to vacate the land by the 31st March 1913 in case he did not agree to the enhancement. The present suit is for rent for three years at the enhanced rate with interest and for possession.

The first Court passed a decree for such rent as it deemed just and reasonable with interest, and declared that the defendant was liable to be ejected if he failed to pay the sum decreed by a fixed date. The District Judge confirmed the decree.

In second appeal it is contended that, in a case where the annual tenant is required to pay an enhanced rent, clause (4) of section 78 does not apply, and the Court cannot go into the question of the reasonableness of the enhancement and decree ejectment only in default of payment of such rent as

it deemed reasonable. I am unable to accept this contention. Clause (4) is general in its application to tenants and is not confined, as contended by the learned Advocate for the appellant, to cases where the rent of tenants falling under section 72, clause (2), alone is sought to be enhanced. In my opinion, once the rent of a tenant, of whatever class he may be, is sought to be enhanced, provided it can be legally enhanced, clause (4) comes into operation.

It is next urged that, inasmuch as the plaintiff notices the tenant to vacate in default of his agreeing to pay the enhanced rent, it must be deemed to be one also under section 79, clause (2). This contention cannot be sustained. The plaintiff himself professes to issue the notice under section 72, clause (8), as the heading of the notice, Exhibit P 2, shows and it is also clear that his intention was primarily to claim an enhancement and continue the tenancy at the enhanced rent and not to eject the tenant unconditionally.

The appeal fails and is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 160 OF 1920.
December 9, 1920.
Present:—Mr. Justice Martineau.
HIRA AND OTHERS—DEFENDANTS—APPELLANTS
versus
SARDARA—PLAINTIFF, HAZARA—VENDOR—GIANA AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale to several vendees—Indivisible transaction—Some vendees having rights equal to pre-emptor—Transfer by other vendees in favour of person having similar rights, effect of.

The effect of a sale being indivisible is merely to prevent some of the vendees from defeating a claim for pre-emption by pleading that their rights are not inferior to the plaintiff's although the rights of the others are infeiror. But the claim can nevertheless be defeated if, before the suit is instituted, those vendees whose rights are inferior sell their share to a person who has an equal or superior right to that of the plaintiff. [p. 713, col. 1.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 16th October 1919, modifying that of the Munsif, First Class, Ludhiana, dated the 14th May 1919.

Lala *Har Gopal*, for Dr. *Nand Lal*, for the Appellants.

Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—Hazara, defendant No. 1, sold the land in suit for Rs. 600 to defendants Nos. 2 to 8. The plaintiff, a collateral of the vendor, has sued for pre-emption. Defendants Nos. 2 to 5 are also collaterals of the vendor. Defendants Nos. 6 to 8 are not, but they say they sold their half share to Bhag Singh, another collateral of the vendor, and Bhag Singh was consequently added as a defendant.

The Munsif found that the plaintiff was more nearly related to the vendor than defendants Nos. 2 to 5 and Bhag Singh were, and that whatever rights Bhag Singh had he had lost by not buying the entire property. He also found that the alleged sale to Bhag Singh was fictitious, and that the transaction, which consisted in an entry in the *patwari's roznamcha*, took place after the institution of the suit. He passed a decree for possession of the land subject to the payment of Rs. 300. Defendants Nos. 2 to 5 and Bhag Singh appealed to the District Judge.

It was admitted by plaintiff's Counsel at the hearing of the appeal before the District Judge that the plaintiff and the appellants had equal rights of pre emption, but it was contended that Bhag Singh's title was defective because he had purchased only half the land from those vendees who were not related to Hazara, (namely, defendants Nos. 6 to 8), although the sale by Hazara was an indivisible transaction.

The District Judge agreed with this contention and held that the plaintiff's title was superior to that of the vendees. He then went on to find that the full price entered in the deed had been paid, and he modified the decree to the extent of enhancing the amount payable by the plaintiff to Rs. 600.

Defendants Nos. 2 to 5 and Bhag Singh have filed a second appeal in this Court, and the plaintiff has filed cross-objections in regard to his costs.

No authority is cited before me which supports the view of the learned District

Judge that, because the sale by Hazara was an indivisible one, the purchaser from some of the vendees of their share is not entitled to resist the claim on the ground that his right of pre-emption is equal to the plaintiff's. The effect of the sale being indivisible is merely to prevent some of the vendees from defeating the claim for pre-emption by pleading that their rights are not inferior to the plaintiff's although the rights of the others are inferior. But the claim can, nevertheless, be defeated if, before the suit is instituted, those vendees whose rights are inferior sell their share to a preson who has an equal or superior right to that of the plaintiff and this has been held in *Mughal* v. *Jalal* (1), which is a case on all fours with the present one.

If, therefore, Bhag Singh purchased the share of defendants Nos. 6 to 8 before the institution of the suit, the plaintiff's claim would fail. It is urged for the respondents that Bhag Singh is more distantly related than the plaintiff to the vendor Hazara, and that, therefore, his right of pre emption is inferior, but I cannot entertain this argument as it was admitted at the hearing of the appeal before the District Judge that the plaintiff and Bhag Singh had equal rights of pre emption.

The question whether there was in fact a sale to Bhag Singh before the institution of the suit has yet to be gone into by the lower Appellate Court. It is true that the District Judge says, near the beginning of his judgment, that the vendor's non-relatives sold their share to Bhag Singh on the 16th November 1917, but it would seem that he was only assuming this to be a fact for the purpose of his argument, for he has not attempted to consider the evidence on the point, notwithstanding that the finding of the Trial Court was that there was no genuine sale at all, and that the transaction which took place was of a date subsequent to the suit.

The case will, therefore, have to be remanded.

I accept the appeal, set aside the decree of the lower Appellate Court, and remand the case to that Court under Order XLI, rule 23, Civil Procedure Code, for a fresh decision of the appeal before it after the question of the alleged sale to Bhag Singh has been determined. I dismiss the cross objections as the finding on the question of price was against the plaintiff.

Court-fee on the appeal in this Court to be refunded. Other costs to be costs in the case.

Appeal accepted.

(1) 69 P. R. 1898.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 273 OF 1917.

July 22, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

VISHNU DHONDDEV PALKAR—PLAINTIFF—APPLICANT

versus

RAMPRATAP DAULATRAM MARWADI—DEFENDANT—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXVIII, r. 10—Attachment before judgment—Property sold—Decree passed—Proceeds of sale attached and recovered by another decree-holder against same judgment-debtor—Suit to recover share, dismissal of—Revision.

Certain perishable property belonging to a defendant having been attached before judgment and sold, the sale-proceeds were paid into Court to the credit of the suit. Eventually, a decree was passed in the suit, but before the decree-holder could apply for execution a person who had previously obtained a decree against the same judgment-debtor obtained an order of attachment and payment of the sum lying in Court, and the money was paid to him. The subsequent decree-holder thereupon brought a suit to recover from the prior decree-holder the amount which he would have got out of the moneys attached if there had been rateable distribution. The suit was dismissed. In revision:

Held, that the plaintiff not having at once applied for execution of his decree to make his position secure his suit had been rightly dismissed. [p. 714, col. 2.]

Civil extraordinary application against the order passed by the District Judge, Satara, in Miscellaneous Application No. 71 of 1917, confirming the decree passed by the First Class Subordinate Judge at Satara, in Suit No. 779 of 1915.

VISHNU DHONDDEV PALKAR v. RAMPRAT.P DAULATRAM MARWADI.

Mr. *Nilkanth Atmaram*, for the Applicant.

Mr. *K. N. Koyajee*, for the Opponent.

JUDGMENT.

MACLEOD, C. J.—The petitioner filed Suit No. 71 of 1916 in the Subordinate Judge's Court at Satara against one Kondanmal and applied for attachment before judgment. The attachment before judgment was granted and the property, being of a perishable nature, was sold and the sale-proceeds, *viz*, Rs. 420, were paid into Court to the credit of the suit. Eventually, a decree was passed in the suit on the 10th of April 1916. The plaintiff should then have applied for execution, but it was not necessary to apply for a re-attachment of the property, because after the decree was passed the property remained in detention. Then the opponent, who had previously got a decree against the same defendant, applied for execution on the 7th of April and asked that the sale-proceeds, which were lying in Court to the credit of the petitioner's suit, be attached. That he could do under rule 10 of Order XXXVIII. The opponent's application for attachment was heard on the 12th of April and an order was made for attachment. On the 19th of April the opponent obtained an order for payment and the money was paid to him. The petitioner meanwhile had not applied for the execution of his decree as he had not got a copy of the decree. Then he brought Suit No. 779 of 1916 against the opponent to recover the amount of Rs. 174-5 0 which he said he would have got out of the moneys attached if there had been rateable distribution. His suit has been dismissed by the learned Subordinate Judge and also by the District Judge in appeal.

The question before us is, whether there has been any material irregularity which would entitle us to interfere in revision. No doubt, on the face of it, it seems a very hard case, and if the attaching Court had clearly done what it ought not to have done, or left undone what it ought to have done, and the lower Courts in the present suit filed by the petitioner had failed in their duty to observe that, then it might be said that there was a material irregularity which would entitle us to interfere. But, although it may be said that the attaching Court, before it paid out the proceeds of the petitioner's attachment to the opponent, ought to have given the petitioner notice as a matter of equity, still I cannot see anything in the Code which makes it necessary for the attaching Court to give such notice. Until the petitioner applied for attachment, no doubt the money was lying in Court, detained for his benefit, but still available for any decree-holder of the same defendant. If a decree-holder applied for attachment of those moneys which were being detained, the Court was bound to grant such an application. If the Court had given notice to the petitioner, and he had made an application for the execution of his decree, the Court might then have said that he was entitled to rateable distribution. It seems to me that the petitioner, having got his decree, failed to observe that there was a risk of his losing the fruits of his attachment. He did not apply to the Court at once to confirm the previous attachment; in other words, he did not apply for the execution of the decree, so as to make his position secure. I cannot say, therefore, that there has been any material irregularity in the proceedings of the lower Court in dismissing the petitioner's suit.

The Rule, therefore, will be discharged with costs.

FAWCETT, J.—I agree. But I think the case suggests the advisability of a Rule being made under the powers conferred on the High Court, requiring a Court in such a case to issue notice to the person at whose instance the property sought to be attached is already under attachment before judgment prior to directing a disposal of such property in execution of a decree.

Rule discharged.

HONDA RAM *v.* HOTU RAM.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1226 OF 1919.

December 6, 1920.

Present:—Mr. Justice LeRossignol and Mr. Justice Abdul Raoof.

HONDA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

HOTU RAM AND OTHERS—PLAINTIFFS—RAM KISHEN—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (4)—Appeal from order of remand—Findings of fact, whether can be questioned.

The policy of the Legislature being not to allow a second appeal on facts, the appellant, on an appeal from an order of remand is not entitled to question the findings of fact recorded by the Appellate Court.

Miscellaneous second appeal from the order of the District Judge, Multan, dated the 14th April 1919, reversing that of the Senior Subordinate Judge, Multan, dated the 17th June 1918.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the redemption of a mortgage dated the 25th of June 1897. The suit was resisted upon various grounds, one of which being that the document though in appearance a mortgage-deed, was really a sale deed, and the transaction was that of a sale and not that of a mortgage. In support of this contention, the terms of the mortgage deed were relied upon and oral evidence was called to prove the intention of the parties. The Court of first instance gave effect to this contention and dismissed the suit.

An appeal was preferred by the plaintiff to the lower Appellate Court which, after going into the evidence, has come to a different conclusion and has set aside the decree of the Court of first instance on the preliminary point on which the judgment of the Court of first instance was based. The lower Appellate Court has made an order of remand under Order XLI, rule 23, Civil Procedure Code, remanding the case to the Original Court for the decision of the remaining questions arising in the case.

RAMCHANDRA GOVIND *v.* JAYANTA RAVJI.

An appeal has been preferred to this Court under Order XLIII, rule (1) (*u*). Mr. Sheo Narain Counsel for the appellant has attacked the finding of fact arrived at by the lower Appellate Court and has contended that this being a first appeal from order, he is entitled to challenge the findings of fact of the Court below. He has also contended that the lower Appellate Court has wrongly excluded oral evidence under section 92 of the Evidence Act.

This argument ignores the fact that, in spite of holding that oral evidence was inadmissible, the Court has actually considered the evidence and has held it to be insufficient and unreliable. The question whether on an appeal from an order of remand an appellant is entitled to question the findings of fact recorded by the Appellate Court was considered by a Bench of this Court in *Sawan Singh* v. *Mothu* (1), and was answered in the negative. The learned Judges of the Calcutta High Court also expressed the same opinion.

We ourselves feel not the slightest difficulty in coming to the same conclusion. The policy of the Legislature being not to allow a second appeal on facts, it is difficult to see how the appellant coming in appeal under Order XLIII, rule (1) (*u*) can question findings of fact in this Court.

We are clearly of opinion that the findings arrived at by the lower Appellate Court are findings of fact and cannot be questioned. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 23 Ind. Cas. 817; 85 P. R. 1914; 162 P. L. R. 1914; 120 P. W. R. 1914.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 799 OF 1919.

July 26, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

RAMCHANDRA GOVIND THOWARE—DEFENDANT—APPELLANT

versus

JAYANTA RAVJI PARAWAT—PLAINTIFF—RESPONDENT.

Execution of decree—Executing Court, whether can go behind decree—Jurisdiction of Court.

RAMCHANDRA GOVIND *v.* JAYANTA RAVJI.

The only question with which an executing Court has jurisdiction to deal is the question whether the application for execution should proceed, it has no jurisdiction to deal with the question whether the decree should stand or whether it should be set aside on any of the grounds on which a decree can be set aside.

Second appeal from the decision of the District Judge, Sholapur, in Appeal No. 22 of 1918, reversing the decree passed by the Second Class Subordinate Judge at Madha, in Darkhast No. 222 of 1917.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *K. N. Koyajee*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—In this case a decree was passed on a private award directing the judgment debtor to pay the decree-holder Rs. 900 by annual instalments of Rs. 100 each. It also directed that in case two instalments were in arrears, the decree-holder should recover the whole sum at once by sale of two lands belonging to the judgment debtor. Default having been made the decree-holder filed a *darkhast* for the recovery of the whole sum. The judgment-debtor contended that before the award was made, which resulted in the decree in question, the decree holder agreed to advance him Rs. 200 as a fresh loan and that that sum was included in the total of Rs. 900. He thus practically said that as Ramchandra, the decree-holder, had not paid him Rs. 200 as agreed, the decree was vitiated by fraud. The Trial Judge came to the conclusion that it was not open to the judgment-debtor to raise this contention in the case. He also found that it was not proved that the decree-holder had agreed to advance the judgment-debtor Rs. 200 or that that sum was included in the decretal amount. He, therefore, directed that execution should proceed.

In appeal both these findings were reversed, the learned Judge coming to the conclusion that the judgment-creditor agreed to advance Rs. 200 to the judgment-debtor as consideration for his consenting to a decree passed in terms of the award. He also came to the conclusion that the award was a bogus one, and that, therefore, the Court had, on the true state of facts coming to its notice, the power to vacate the decree passed on such a bogus award and to prevent the abuse of the process of the Court. The Judge, therefore, vacated the decree, reversed the decree of the lower Court and dismissed the plaintiff's application with costs throughout.

Whatever powers the Court had to decide questions relating to the execution of the decree, we are of opinion that it is perfectly clear that the Court had no power to deal with the decree itself. The Court executing the decree cannot deal with the question whether the decree should stand or whether it should be set aside on any of the grounds on which a decree can be set aside. In *Chintaman* v. *Chintaman Bajaji* (1) it was held that the validity of a decree where execution is sought cannot be disputed in execution proceedings under section 244 of the Civil Procedure Code. It will be noted that in this case all that the judgment debtor pleaded was that he had not received the Rs. 200 additional advance which was the inducement held out to him to consent to the decree for Rs. 900 instead for Rs. 700. But the learned Appellate Judge went a great deal further than that and dealt with the question whether the Court which passed the decree on the award was justified in so doing. It is quite true that cases have been known where a money-lender, as a condition for advancing money, induces his borrower to consent to a bogus award on which a decree is passed. It may be that in this case this particular award decree was passed by means of such an arrangement. But whether that was so or not it is perfectly clear that the executing Court had no jurisdiction to deal with the question, and the only question with which it had jurisdiction to deal was the question whether the *darkhast* should proceed.

The decree of the lower Appellate Court must, therefore, be set aside and the order of the Trial Court restored with costs in the first Appeal Court and in this Court. Costs of the Trial Court to be determined in execution.

FAWCETT, J.—I concur. Section 151 of the Civil Procedure Code was cited as giving the lower Appellate Court authority to interfere in the way it did. But, as was ruled in *Bhausing Ragho* v. *Ghaganiram*

(1) 22 B. 475; 11 Ind. Dec. (N. s.) 899.

Harchand (2), that section was clearly not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by section 115 of the Code. The only legitimate ways in which the decree award could, so far as I can see, be set aside are under section 115, Civil Procedure Code, as was done in the case of *Velchand* v. *Liston* (3), or by a separate suit.

Decree set aside.

(2) 45 Ind. Cas. 552; 42 B. 363; 20 Bom. L. R. 348.
(3) 25 Ind Cas. 371; 16 Bom. L. R. 517; 38 B. 639.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 321 OF 1919.
July 30, 1920.

Present:—Mr. Halifax, A. J. C.

HANSKUARBAI—DEFENDANT—APPELLANT

versus

IMAM ALI—PLAINTIFF—RESPONDENT.

Muhammadan Law—Wakf—Mutawalli—*Minority, whether absolute bar to valid appointment—Appeal—Plea of minority not taken in Trial Court, whether permissible in appeal.*

A minor can be validly appointed a *mutawalli* of *wakf* property under Muhammadan Law if he has attained puberty (*bulug*) and has understanding (*aql*) and a person who has completed his fifteenth year may fairly be presumed to have attained both these, both under section 114 of the Evidence Act and the Muhammadan Law.

A plea as to the incompetency of a plaintiff, who describes himself as a minor suing through his next friend, to be a *mutwalli* of a *wakf* on account of his minority, which is not taken in the Court of first instance nor mentioned in the petition of appeal, cannot be raised for the first time in the course of argument in the appeal.

Appeal against the decree of the District Judge, Nagpur, in Civil Appeal No. 135 of 1918, decided on the 24th March 1919.

Mr. *N. K. Vaidya*, for the Appellant.

Dr. *H. S. Gour* and Mr. *K. L. Daftari*, for the Respondent.

JUDGMENT.—The plaintiff sued as *mutawalli* of a *wakf* and described himself in the plaint as a minor suing through his next friend. In the course of the argument in appeal in the Court of the District Judge, it was sought on behalf of the defendant to take the plea for the first time that the plaintiff was not competent to be a *Mutawali* on account of his minority. This plea had not been taken in the Court of first instance nor mentioned in the petition of appeal, and the learned Judge held that it was then too late to raise it. On this point the defendant has come up in second appeal. The plaintiff was stated in evidence by his own father to be 15 or 16 years old on 31st January 1918. That would make him very near or over 18 to day. He appeared in this Court during the hearing, and his appearance fully justifies this conclusion.

2. It is, however, by no means clear that the plea of minority if taken would have the immediate success the defendant seems to anticipate. It certainly was held in *Hasan Raza Sahib* v. *Hasan Ali Sahib* (1) that a child of 11 could not be a *mutawalli*, but that was not because he had not attained the age of 18 but because, as had been laid down by Mr. Justice Ameer Ali at page 219, *et seq* of the report of his judgment in *Piran* v. *Abdol Karim* (2), "puberty (*bulug*) and understanding (*aql*) are necessary in all cases to a valid appointment," and a child of 11 could not be supposed to have attained either. It is not minority that is required in a *mutawalli*, but puberty and understanding, and the plaintiff may fairly be presumed to have attained both these on the completion of his fifteenth year, both under section 114 of the Evidence Act and also under the personal law to which he is subject, as explained at page 42 of Ameer Ali's Muhammadan Law.

Further, in the judgment in *Piran* v *Abdool Karim* (2) cases are mentioned where, according to the custom of a particular *dargah*, a child might hold the office of *mutawalli* and if the defendant had taken the plea, now sought to be put forward, at the proper time, the plaintiff would have had an opportunity of answering it by one or more pleas of fact. It was, therefore, much too late to ask to be allowed to put forward

(1) 38 Ind. Cas. 528; 40 M. 941; 5 L. W. 419; (1917) M. W. N. 389; 33 M. L. J. 348.
(2) 19 C. 203; 9 Ind. Dec. (N. S.) 581.

this plea of mixed law and fact in the Court of the District Judge in appeal. In any case, as has been shown above, the plea would be of no avail.

The third ground of appeal is a direct attack on a clear finding of pure fact and cannot be supported in this Court. The fourth and last urges that the plaintiff's decree for possession should be made conditional on his refunding the Rs. 300 found to have been paid to Gous Ali Shah, his predecessor on the *gaddi*. In regard to this the learned District Judge wrote: "On the fourth ground it is enough to say that there is no proof that the money given to Gous Ali Shah benefited either the trust or the plaintiff personally." To this I might add that it has all along been the defendant's case that Gous Ali Shah was selling the land to her husband as his own personal property, and in that case the natural inference would be that he treated the sale-proceeds as his own. The appeal fails and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 558 OF 1919.

July 27, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

BABUSING RAMCHANDRA RAJESHIRKE—PLAINTIFF—APPELLANT

versus

PANDU TATYA KATE—DEFENDANT—RESPONDENT.

Landlord and tenant—Tenant acquiring permanent rights by adverse possession—Burden of proof—Notice to landlord.

Where a tenant wishes to acquire permanent rights of tenancy by adverse possession, he must give the landlord specific notice of his claim.

Appeal from the decision of the First Class Subordinate Judge, A. P., at Satara, in Appeal No. 683 of 1917, amending the decree passed by the Subordinate Judge at Patan, in Civil Suit No. 558 of 1919.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *K. N. Koyajee*, for the Respondent.

JUDGMENT.—This appeal must be allowed.

The plaintiff sued to recover possession of the suit land from the defendant. The Trial Court found that the defendant had perfected his claim to *mirasi* rights by adverse possession, but that the plaintiff was entitled to claim enhanced rent. In appeal the finding as regards the *mirasi* tenure was affirmed, but plaintiff's claim for enhanced rent was disallowed, the Judge holding that the defendant ought to have been given an opportunity to lead evidence as regards that claim. The plaintiff could only claim enhanced rent by local usage, or prescription or agreement.

We think that the decision of both the Courts that the defendant had succeeded in proving his claim to hold as a permanent tenant by adverse possession cannot be supported. Reference may be made to *Budesab* v. *Hanmanta* (1) where it was held that where a landlord seeks to recover from his tenant possession of land in his tenant's occupancy, and the latter alleging a perpetual tenancy, successfully resists on that ground the landlord's attempt to dispossess him, the tenant may, after the statutory period has expired, plead limitation in bar of a subsequent suit in ejectment by the landlord. The question then arises, if the person in occupation of the land as a tenant can assert permanent rights of tenancy and can acquire such rights by adverse possession, when does time begin to run against the landlord? The Judges said (page 516):

"We do not say that a tenant by a false allegation as to the terms of his tenancy, though continuously repeated, can alter those terms. Such allegations do not necessarily throw upon the landlord the onus of refuting them by suit,..... But where a landlord seeks to recover possession of land in his tenant's occupancy from the tenant, and the latter, on the allegation of a perpetual tenancy, successfully resists the landlord's attempt to dispossess him for the statutory period, the current of authority to which we have referred, in our opinion, establishes that the law of limitation can be successfully pleaded in bar of a suit in ejectment by the landlord."

We do not think that the history of this case is a sufficient indication of the

(1) 21 B. 509; 11 Ind. Dec. (N. S.) 341.

tenant's claim to set up a permanent tenancy against the landlord, so that the onus of refuting the claim by suit is necessarilly thrown upon the landlord. Neither the suits referred to by the lower Court, which were merely rent suits, nor the suit of 1913 support the defendant's contentions. What is required is that when a tenant wishes to set up a larger claim by adverse possession, the landlord must have specific notice of his doing so. In the last suit, which was filed in 1913, it was directly in issue whether the plaintiff could recover the rent claimed or whether the defendant was a *mirasdar* and had already paid the fixed rent which she stated was all that she was liable to pay. It was nowhere suggested in that suit that the tenant had acquired a right to remain in possession as a permanent tenant at a fixed rent by adverse possession. It is only when this suit for possession has been filed that it is asserted that the defendant is entitled to resist the claim for possession on the ground that, since the time of his ancestors, he and his family had been in possession of the land as *mirasdars*.

The decree of the lower Court must be set aside and a decree must be passed in favour of the plaintiff for possession of the suit land with rent at Rs. 24 8 0 for one year prior to the suit and after suit until possession.

The defendant must pay the plaintiff's costs throughout.

Decree set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1382 OF 1918.

July 5, 1920.

Present :—Mr. Justice Teunon and Mr. Justice Newbould.

HARISH CHANDRA GUHA—DEFENDANT No. 1—APPELLANT

versus

NRIPENDRA COOMAR CHAKRAVARTI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66, scope of —Execution sale—Benami purchase - Certified purchaser kept out of possession—Real purchaser in possession—Title of certified purchaser, extent of—Bengal Tenancy Act (VIII of 1885), Sch III.

Section 66 of the Civil Procedure Code is not restricted to *benami* purchases made by or on behalf of judgment-debtors. [p. 720, col. 2.]

P., the landlord, purchased a holding at an execution sale *benami* in the name of *D.* and the latter was certified as the purchaser. *P.*, however, remained in possession of the holding for more than three years when he was dispossessed by *D. P.* thereupon brought the present suit to recover possession :

Held, that as *D.* had been kept out of possession for a period of two years his title had become extinguished by virtue of the Third Schedule to the Bengal Tenancy Act. [p. 720, col. 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Dacca, dated the 28th of February 1918, affirming that of the Munsif, 4th Court at Munshigunj, dated the 17th of February 1917.

FACTS appear from the judgment.

Babu *Upendra Kumar Mitter*, for the Appellant.—The suit is barred by the provisions of section 66 of the Code of Civil Procedure. The holding was purchased by the plaintiff at an execution-sale in the *benami* of my client. The plaintiff is, therefore, precluded from denying the title of the certified purchaser.

Dr. *Sarat Chandra Basak* (with him Babu *Urukramdas Chakravarty*), for the Respondents.—The object of section 66 of the Code of Civil Procedure is to prevent *benami* purchases by judgment-debtors in fraud of their creditors. See *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen* (1) and *Ganga Sahai*

(1) 12 B. L. R. 317 (P. C.); 19 W. R. 356; 3 Sar. P. C. J. 253.

v. *Kesri* (2). That section is, therefore, not applicable to the present case. Then, again, I rely on my possession for more than two years after the auction-purchase. Admittedly, I am the landlord of the appellant. My possession for more than two years is sufficient to extinguish the title, if any, of the appellant. See Bengal Tenancy Act, Schedule III. Moreover, the failure of the appellant to assert his rights against me during my possession of the holding should be regarded as a waiver or transfer. See *Monappa* v. *Surappa* (3).

Babu *Upendra Kumar Mitter* in reply.—There is no authority for the proposition that the general language of section 66 of the Code of Civil Procedure must be restricted to *benami* purchases by judgment-debtors. Refers to *Hanuman Persad Thakur* v. *Jadunandan Thakur* (4). The doctrine laid down in *Monappa* v. *Surappa* (3) was not approved in *Musammat Buhuns Kowur* v. *Lalla Buhooree Lall* (5). See also *Bishan Dial* v. *Ghazi ud-din* (6).

JUDGMENT.

TRUNON, J.—This appeal arises out of a suit brought by the plaintiff to recover possession of a certain holding.

The facts, as found by the Courts below, are as follows:—The original tenant was defendant No. 6. In execution of a decree for arrears of rent the holding was purchased by the landlord-decree-holder the present plaintiff, the plaintiff was put into possession on the 19th of March 1911, and continued in possession until April 1914 when he was dispossessed by defendant No. 1, the certified purchaser acting in collusion with the other defendants. On these findings the suit was decreed in both the Courts below. Defendant No. 1 now appeals to this Court, and his contention before us is that the suit is barred by reason of the provisions of section 66 of the Civil Procedure Code. The plaintiff-respondent, on the other hand, contends that section 66 is not applicable, and further relies on his possession for more than three years after his purchase.

In support of the plaintiff-respondent's contention reference has been made to certain observations by their Lordships of the Judicial Committee in the cases reported as *Bodh Singh Doolhooria* v. *Gunesh Chunder Sen* (1) and *Ganga Sahai* v. *Kesri* (2) to the effect that the intention of the section is to prevent or check *benami* purchases made by judgment-debtors in fraud of their creditors. But we have not been referred to any case in which their Lordships have definitely decided that the general language of section 66 must be restricted to *benami* purchases made by or on behalf of judgment-debtors, while there is a decision to the contrary by a Divisional Bench of this Court in *Hanuman Persad Thakur* v. *Jadunandan Thakur* (4).

We have next been referred by the plaintiff respondent to the case reported as *Monappa* v. *Surappa* (3). It is contended, on the authority of that case, that defendant No. 1 being the father of the plaintiff's *tahsildar*, his failure to assert his rights against the plaintiffs during the latter's three years' possession should be regarded as a waiver or transfer. But that case was decided before the Transfer of Property Act and, as pointed out in *Bishan Dial* v. *Ghazi-ud-din* (6), the doctrine therein laid down was disapproved by their Lordships of the Privy Council in *Musammat Buhuns Kowur* v. *Lalla Buhooree Lall* (5).

The question then remains whether plaintiff has acquired title by his possession for three years. In the eye of the law, and on the case of defendant No. 1 that defendant is the purchaser of the holding and *raiyat* of the plaintiff, plaintiff, the landlord, kept him out of possession for a period of three years. The period of limitation under the 3rd Schedule to the Bengal Tenancy Act in such a case is two years. The title of the defendant has, therefore, been extinguished. In this view, this appeal is dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

(2) 30 Ind. Cas. 265; 22 C. L. J. 508; 19 C. W. N. 1175; 18 M. L. T. 203; 29 M. L. J. 329; 2 L. W. 837; 13 A. L. J. 999; 17 Bom. L. R. 998; 37 A. 545; (1915) M. W. N. 713; 42 I. A. 177 (P. C.).
(3) 11 M. 234; 4 Ind. Dec. (N. S.) 163.
(4) 29 Ind. Cas. 787; 20 C. W. N. 147; 43 C. 20.
(5) 14 M. I. A. 496; 18 W. R. 157; 13 B. L. R. 159; 3 Sar. P. C. J. 69; 20 E. R. 871.
(6) 23 A. 175; A. W. N. (1901) 44.

INDAR SINGH *v.* FATEH SINGH.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 907 OF 1917.

May 15, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

INDAR SINGH—PLAINTIFF—APPELLANT

versus

FATEH SINGH—DEFENDANT—RESPONDENT.

Religious institution—Darbar Sahib *at Amritsar*—Granthi, *office of, whether religious—Appointment of* granthi, *mode of—Office, whether descendible inheritance—Son, whether can succeed*—Singh, *who is—Infant, whether can be* Singh.

The office of the *granthi* of the *Darbar Sahib* at Amritsar is a religious office and is not a descendible inheritance, so that a son, merely as a son, is not entitled to succeed to the office. [p. 730, col. 2.]

Initiation as a *chela* is a necessary condition for the appointment of a *granthi*. The other necessary conditions are nomination, election and installation. [p. 729, col. 2.]

In order to be qualified for the office of a *granthi* it is necessary that the candidate must be a good *Sikh* and a properly initiated *Singh*. A *Sikh* is created a *Singh* by the ceremony called *khanda ka pahul* or baptism by the sword. This ceremony involves the uttering of certain *mantras* by the candidate and the wearing of the five Ks, therefore, an infant cannot become a *Singh* [p. 724, col. 1; p. 725, col 1]

First appeal from the decree of the Senior Subordinate Judge, Amritsar, dated the 28th June 1916, dismissing the suit.

Messrs. *Santanam*, *Muhammad Rafi* and Lala *Moti Sagar*, R. S. for the Appellant.

Messrs. *Bevan-Petman*, Bakhshi *Tek Chand* and *Hari Chand*, for the Respondent.

JUDGMENT.—This was a suit brought by *Bhai* Indar Singh, minor son of *Bhai* Harnam Singh, deceased, head *granthi* of the Sikh Golden Temple at Amritsar, for succession to the office of the head *granthi* in the place of his father on the following allegations:—

That *Bhai* Jawahar Singh, uncle of the plaintiff, was the head *granthi* of the Temple for about 25 years; that before his death, which took place on the 14th of November 1835, he had appointed *Bhai* Harnam Singh the father of the plaintiff, as his successor, having already initiated him as his *chela* (servant or disciple); that after the demise of *Bhai* Jawahar Singh, *Bhai* Harnam Singh, his brother, succeeded to the office of the head *granthi* and was installed on the *gaddi* of *Sri Darbar Sahib*; that he occupied the office for about 23 years and continued to perform the duties of the office during the period; that *Bhai* Harnam Singh before his death, which took place on the 30th July 1907, initiated the plaintiff as his *chela* and nominated him as his successor; that accordingly the plaintiff had the right to succeed to the office of the head *granthi* of the Temple on the ground that he was the son and duly initiated *chela* and nominated successor, and that his claim to succeed was in accordance with the rule of succession obtaining at the Golden Temple at Amritsar. The defendant to the suit is *Bhai* Fateh Singh who is actually in possession of the office and is performing the necessary duties in connection with it. Before the institution of the suit *Bhai* Fateh Singh had instituted a suit on the 22nd of April 1913 against the present plaintiff for the recovery of possession of certain properties to which he laid claim by virtue of his right as the head *granthi*. The suit for possession was based on the following allegation:—That *Bhai* Harnam Singh in his lifetime had initiated *Bhai* Fateh Singh as his *chela* and had nominated him as his successor, and that, accordingly, he had been formally installed on the *gaddi* of the *Darbar Sahib* with due formalities.

The present suit was instituted on the 27th of May 1913, *i.e.*, more than a month after the suit for possession. It was resisted on the following pleas:—

(*a*) That *Bhai* Harnam Singh never initiated the plaintiff as his *chela* or appointed him as his successor, he being only about a year old at Harnam Singh's death.

(*b*) That the plaintiff was not entitled to succeed to the *gaddi* merely because he was a son as this was against the custom obtaining in the religious institution of the *Darbar Sahib* regarding the succession to the *gaddi* of head *granthi*.

(*c*) That the defendant Fateh Singh was the *chela* as well as the nominated successor of *Bhai* Harnam Singh, and that as such he had been installed on the *gaddi*, his title to succession being publicly acknowledged by *sants*, *mahants*, *sadhs*, *pujaris*, *granthis*, the manager of the institution and the Deputy Commissioner, and that the plaintiff's mother and his other relations had acquiesced in his installation.

In this suit for succession the following reliefs were claimed:—

(*a*) A declaratory decree in favour of the plaintiff against the defendant to the

effect that the plaintiff is entitled to the office of head *granthi* and *gaddi nashin* of the *Darbar Sahib*, Amritsar, in place of the late *Bhai* Harnam Singh, and that the defendant's occupation of the office is quite unlawful and by way of usurpation ;

(*b*) The defendant may be removed from the office of the head *granthi* and the plaintiff appointed to it ;

(*c*) The defendant may be required to render account of the entire income from offerings received by him as head *granthi* and *gaddi nashin* since the time of his appointment and a decree for the sum that may be found by that account to have been received by him may be passed in favour of the plaintiff.

In the suit for possession by Fateh Singh the relief claimed was for recovery of possession of properties detailed in the lists A. B. C. D. and E. on the ground that, as the lawfully appointed head *granthi*, Fateh Singh was entitled to the relief claimed. In addition to certain preliminary issues regarding the sufficiency of stamp on the plaint and the maintainability of the suit with reference to section 92 of the Code of Civil Procedure, the following main issues were framed by the Trial Court :—

* * * *

(3) What was the custom obtaining at the Golden Temple, Amritsar, regarding the succession to the *gaddi* (office) of head *granthi* of the *Darbar Sahib* ?

(4) Whether the plaintiff, Indar Singh, was initiated as his *chela* and appointed as his successor by Harnam Singh, deceased, head *granthi Sri Darbar Sahib*, Amritsar ?

In order to indicate more clearly the points raised by the parties, the following additional issues were added at a later stage :—

(5) If *Bhai* Fateh Singh alone was made a *chela* and appointed as successor by the deceased, is he entitled by custom to succeed to the office of head *granthi* in the presence of his *Guru's* son, namely, the plaintiff ?

(6) If both were made *chelas* and nominated successor by the deceased, then has the plaintiff a preferential right over a mere *chela* though installed publicly ?

(7) Is the defendant liable to dismissal, from the office of the head *granthi* in spite of the fact that the plaintiff is still a minor ?

(8) Is plaintiff entitled to ask for rendition of accounts *re* the offerings of the *Sri Darbar Sahib* collected by the defendant as head *granthi* ?

The Trial Court, after considering all the evidence, both documentary and oral, dismissed the suit of Indar Singh, plaintiff, *in toto* by its judgment, dated the 28th of June 1916. The result was that the defendant *Bhai* Fateh Singh was held to have been lawfully appointed as the successor of *Bhai* Harnam Singh to the office of the head *granthi*. As a corollary to this decision, the suit for possession by Fateh Singh was decreed in part. From the decree in the suit for possession Appeal No. 3009 of 1916* was instituted by Indar Singh in this Court, while Appeal No. 569 of 1916 against the decree in the succession suit was preferred by him to the Court of the District Judge, Amritsar. This latter appeal was transferred to this Court by an order, dated the 26th of January 1917, and was numbered as Civil Appeal No. 907 of 1917. Both these appeals have come up before us for decision as connected appeals. The evidence in one case has been treated as evidence in the other and at the hearing, the Counsel for the respective parties have freely used and discussed the evidence to be found on the record of both the cases. In Appeal No. 300 of 1916 three paper books have been printed. For facility of reference, we have marked paper-book printed on the 9th of September 1919 as book 'A' and the two smaller books as 'B' and 'C.' No evidence has been printed in Civil Appeal No. 907 of 1917, but it has been translated and typed on behalf of Fateh Singh, respondent, and copies thereof have been supplied to the Counsel of the appellant Indar Singh by Mr. Petman, Counsel for Fateh Singh.

From the pleadings stated above, it is clear that the crucial issue arising for decision in this case is relating to the precise rule of succession to the office of the head *granthi* of the *Darbar Sahib*. It is, therefore, necessary to ascertain those conditions which qualify a claimant to the *gaddi*. The first question which requires determination and which

*See *Indar Singh* v. *Fateh Singh*, 59 Ind. Cas. 734, *infra* [Ed.]

has been argued as a preliminary point by the Counsel of the parties is, whether the office of a head *granthi* is a religious office or merely a secular appointment. In order to be able to answer this question one must refer to the history of the Sikh religion, to find out the origin of this office and ascertain the duties which are to be performed by its incumbent. It is well known that the Sikh religion was founded by *Guru* Nanak who is known and styled as the first *Guru* of the Sikhs. After him nine more *Gurus* came in succession, the last of whom was *Guru* Gobind Singh. These *Gurus* were looked upon as incarnations of God. The *Granth Sahib*, or the religious book of the Sikhs, was compiled by *Guru* Arjan. It is stated in the Third Volume of Macauliffe's History of the Sikh religion in Chapter VII, page 55, that *Guru* Arjan felt the necessity of laying down rules for the guidance of his followers in the performance of their daily religious duties and expiatory rights. Accordingly, he made plans for the compilation of the *Granth Sahib*. At Amritsar he constructed a tank, took up his abode near it where he was accompanied by a crowd of Sikhs. He occupied himself with collecting materials for the compilation of the *Granth Sahib* and composing hymns of his own. He, therefore, instructed *Bhai* Budha to take his place in the *Har Mandar* and do duty for him by giving religious instructions to all who presented themselves. At the conclusion of his task the *Guru* told the Sikhs that the *Granth Sahib* was the embodiment of the *Gurus* and should, therefore, be held in extreme reverence. He then considered to whom he should entrust the sacred volume. He, therefore, decided to give charge to *Bhai* Budha (*vide* Macauliffe's History, pages 59, 60 and 65). Thus *Bhai* Budha was appointed the first *granthi*. The other *granthis* will be referred to in succession later on when we come to deal with the line of succession among the *granthis* after *Bhai* Budha the *Gurus*, being the incarnations of God, religious instructions used to be imparted by each of them directly in his lifetime. After the *Gurus* the *Granth Sahib* was to be looked upon as the fountain of religious instructions and inspiration. The head *granthi* was to recite the *Granth* to the devout crowd of Sikhs who were to come to the Sikh Temple at Amritsar. The line of the *Gurus* came to an end at the death of the 10th and the last *Guru*, namely, *Guru* Gobind Singh. As all the *Guru's* sons predeceased him, and as he was disappointed in his envoy Banda, he left no human successor but vested the *Guruship* in the *Granth Sahib* and his seat. (Encyclopedia, Britannica, 11th Edition Volume XXV, page 86). This information gleaned from the Sikh History leaves no manner of doubt as to the religious character of the office of a *granthi*. The duties enjoined upon *Bhai* Budha in connection with the recitation of the *Granth Sahib* according to the injunctions of the *Gurus* are to be performed, and have been regularly performed, by all the successive *granthis*.

In view of the above information gathered from the history of the Sikh religion the contention that the office of a *granthi* is not religious but secular falls to the ground. Another contention in favour of the application of the rule of secular succession was that, whatever may be the rule of succession among the incumbents of an office in the religious institutions, which enjoined the practice of celibacy, the same rule cannot be applied to the succession among the *granthis* of the *Darbar Sahib* as the practice of celibacy, if ever in existence, had ceased to exist, and married life had been introduced into the institution at a very early stage. As a corollary to this contention, it was claimed that natural sentiments of love and affection regarding heredity must be given effect to and that the right of a son must be given preference over that of a spiritual successor. This question, however, must be decided with reference to the evidence relating to the actual practice and custom prevailing at the institution relating to the succession among the *granthis*, for in determining this question the only law to be observed is to be found in custom and practice which must be proved by evidence. In relying on the evidence in this case, both the parties have tried to derive assistance from the analogy afforded by succession among the *Gurus* to the office of a *Guru*. We shall, therefore, examine the rule of succession in the line of the *Gurus* with reference to the evidence to be found in the historical books on the Sikh religion, as it is not possible to obtain any other kind of evidence, oral or documentary, on the subject. For this purpose we have studied

INDAR SINGH *v.* FATEH SINGH.

Macauliffe's History of the Sikh religion and also the article on Sikhism to be found at pages 84 7, Volume XXV, of the Encyclopedia Britannica, Cambridge Edition, 1911. The word 'Sikh' literally means 'learner' or 'disciple' and was the name given by the first *Guru*, Nanak, to his followers. A Sikh must be a devout follower of his *Guru*, and in order to be a true Sikh one must be also a Singh. A man is not born Singh but becomes so by initiation. While there was a good deal of divergence of opinion as to the rule of succession, it was possible to discover from the argument of Counsel that they agreed at least on one point, namely, that in order to be qualified for the office of a *Guru* or a *granthi*, it was necessary that the candidate must be a good Sikh and a properly initiated Singh.

As we have already mentioned *Guru* Nanak was the first *Guru* and the founder of the Sikh religion. He was a *khatri* by caste. His successor was *Guru* Angad. He was also a *khatri* and was chosen by *Guru* Nanak in preference to his sons. *Guru* Angad's successor was *Guru* Amar Das. He, too, was appointed a successor by *Guru* Angad in preference to his sons by reason of being his faithful servant (*chela*). The fourth *Guru* Ram Das became the *chela* of *Guru* Amar Das and was a pious and devoted servant of his *Guru*. Amar Das, therefore, gave him his daughter in marriage and made him his successor. It may be mentioned here that it was *Guru* Ram Das who founded the celebrated Golden Temple of Amritsar, which has ever since been the centre of the Sikh religious worship and to which the office of the *granthi* is attached.

The fifth *Guru*, namely, *Guru* Arjan, was the third son of *Guru* Ram Das. The two elder sons were found by the *Guru* unfit for the duties of *Guru*. The third son, Arjan was, therefore, appointed to succeed him. *Guru* Arjan was succeeded by his son, Hargobind, and the latter by his grand son *Guru* Har Rai.

The eighth *Guru*, Har Kishen, was the second son of Har Rai His elder brother, Ram Rai was passed over in his favour. The ninth *Guru* was Teg Bahadur, the second son of the sixth *Guru*, Hargobind, and uncle of Har Rai. Ram Rai, the elder brother of *Guru* Har Kishen, was again passed over. Teg Bahadur was succeeded by his son, *Guru* Gobind Singh, the tenth *Guru*. This last *Guru* left no human successor, but vested the *Guruship* in the *Granth Sahib* of which the charge had first been given to *Bhai* Budha by *Guru* Arjan, as already mentioned.

From this history of succession among the *Gurus* it is clear that the appointment of three *Gurus* after *Guru* Nanak was made by the election of a *chela* as a *Guru*. With regard to the rest a selection of the best and most suitable relative was made. The right of a son or the nearest relative to succeed as such was never recognised. The analogy derived from the succession of the *Gurus*, therefore, does not support the contention of the plaintiff that the right of a son to succeed as such was deducible from the rule of succession in the line of the *Gurus*.

Two things, however, may be gathered from the above short sketch of the history of succession in the line of the *Gurus*, namely, (1) that the person who was appointed a *Guru* was either a *chela* or a fit relative, and (2) that he was nominated by his predecessor. The qualifications or attributes of a *chela* or the ceremony, if there was any, according to which a *chela* was made, are shrouded in obscurity. *Guru* Gobind Singh, the last *Guru*, however, prescribed a ceremony called *khanda ka pahul*, or baptism by the sword, by which a person was created a Singh. We find this ceremony described in the 25th Volume of Encyclopedia Britannica, at page 86, in these words:—

"This baptism may not be conferred until the candidate has reached an age of discrimination and capacity to remember obligations, seven years being fixed as the earliest age, but it is generally deferred until manhood. Five of the initiated must be present, all of whom should be learned in the faith. An Indian sweetmeat is stirred up in water with a two-edged sword and the novice repeats after the efficient the articles of his faith. Some of the water is sprinkled on him five times, and he drinks of it five times from the palms of his hands; he then pronounces the Sikh watchword *Sri wah Guru ji ka Khalsa, Sri wah Guru ji ki Fateh* and promises adherence to the new obligations he has contracted. He must from that date wear the five Ks. and add the word "Singh" to his original name. The five Ks. are (1) the *kes*, or uncut hair of the whole

body, (2) the *kachh*, or short drawers ending above the knee, (3) the *kara*, or iron bangle, (4) the *khanda*, or small steel dagger, (5) the *kanga*, or "comb."

It may be taken as an axiom that, in order to be initiated as a Singh, one must be a Sikh and in order to become a *chela* one must be a Singh. With these preliminary remarks we proceed to describe the line of succession among the *granthis*.

We have already mentioned that, having compiled *Sri Guru Granth Sahib* (the religious book of the Sikhs), *Guru* Arjan entrusted the duties of the *granthi* to *Bhai* Budha. *Bhai* Budha was succeeded by *Bhai* Gopal Das. How the office devolved upon one *granthi* after the other will appear from the following pedigree table:—

B. CHANCHAL SINGH (BARBER BY CASTE).

B. Atma Singh (*Arora*).

B. Sham Singh (*Arora*)	*B.* Gopal Singh (*Brahmen*)	*B.* Makhan Singh *Arora*)
B. Jassa Singh (not a relation)	*B.* Diwah Singh (a nephew)	*B.* Kanhya Singh son)
B Jawahar Singh (*Jat*)	*B.* Hira Singh (a nephew)	*B.* Bhagat Singh (a nephew)
B. Harnam Singh (brother of Jawahar Singh)	*B.* Partab Singh (brother)	*B.* Sundar Singh (son)
B. Fateh Singh (alleged *chela* and successor of Harnam Singh).		

B Sant Singh (grand-uncle).	*B* Gurbachan Singh (brother).

It cannot be definitely ascertained when the *gaddi* (office) ceased to be occupied by one sole *gaddi nashin* and was divided. From the evidence, however, it appears that *Bhai* Chanchal Singh was succeeded by *Bhai* Atma Singh. They were in no way related to one another as they belonged to different castes. After *Bhai* Atma Singh, the sole incumbent, we find *Bhai* Makhan Singh and *Bhai* Gopal Singh as the *granthis* of the *Darbar Sahib*. A full history of the succession of the *granthis* is given in *Bhai Bhagat Singh* v. *Harnam Singh* (1) and much valuable information can be gathered from it. We quote the following passage from the report of the case, at page 183, as it has a material bearing on the question under consideration :—

"It is clear that both Chanchal Singh and Atma Singh exercised an undivided sway. I am also inclined to believe that Sham Singh succeeded in the first instance to the sole authority. How the authority came to be divided appears to me to be somewhat in this way. No doubt from the earliest times the *gaddi nashin* would be assisted in his less important duties by his disciples and other subordinates, and it is probable that some of these would be entrusted with more important duties than others. It seems to me that, in the days of Sham Singh, Gopal Singh and Makhan Singh managed in this way to obtain such influence that possibly during Sham Sing's lifetime and, at all events, after his death they had themselves obtained the footing of something more than mere assistants, so that when Sham Singh died they succeeded in getting themselves recognised along with Sham Singh's successor, Jassa Singh, as *gaddi nashin* entitled to share with the direct representative of the original branch, the duties and profits of the *gaddi nashin*. At all events, we find from documentary evidence that in 1850-51 Jassa Singh, Makhan Singh and Gopal Singh were all established as *gaddi nashins* with rights which were nearly equal if not altogether so."

The succession to the office in the line represented by Makhan Singh is relied upon by the plaintiff as a proof of hereditary succession. The evidence discloses the following state of these things. In 1855 Makhan Singh finding himself too old to discharge the duties of his office appointed his son Gehna (Kanhya Singh) as his successor during his lifetime. A suit was instituted for the cancellation of the appointment but it was dismissed. Gehna Singh, however, having predeceased Makhan Singh, the latter appears to have resumed his seat on the *gaddi* until his death in 1863. In his lifetime, however, he had

(1) 49 P. R. 1892.

obtained leave to appoint his grandson, Bhagat Singh, as his successor. Consequently, on his death Bhagat Singh was appointed to the *gaddi* in 1863. A suit was instituted by Naurang Singh and *Bhai* Sant Singh claiming the right to succeed to the *gaddi* after Makhan Singh in preference to *Bhai* Bhagat Singh, the following pedigree table will explain the nature of the suit:—

Makhan Singh had two sons, Gehna Singh and Lehna Singh. Lehna Singh's son was Bhagat Singh, and Gehna Singh had two sons, Naurang Singh and Sant Singh. Both Lehna Singh and Gehna Singh having predeceased Makhan Singh, Bhagat Singh was nominated by Makhan Singh as the successor to the *gaddi*. The plaintiffs, Naurang Singh and Basant Singh, as the sons of Gehna Singh, who had been appointed to the *gaddi* in the lifetime of Makhan Singh, claimed the right to succeed to the *gaddi* as the heirs of Gehna Singh. It was held in that case that the office of *gaddi nashin* was not a descendible inheritance and the plaintiff's claim was dismissed. This case had come in appeal to the Chief Court and the judgment of that Court is reported as *Nowrung Singh* v. *Bhagat Singh* (2). The result was that Bhagat Singh remained in possession of the *gaddi*. Bhagat Singh resigned the office of *gaddi nashin* in his lifetime and appointed his son and *chela*, Sunder Singh, as his successor. After his death *Bhai* Sant Singh was appointed as the *gaddi nashin* but *Bhai* Gurbachan Singh, brother and disciple of *Bhai* Sundar Singh, brought a suit for a declaration of right regarding the *gaddi* and succeeded in obtaining a decree by means of a compromise, dated the 3rd of January 1906. The decree provided that *Bhai* Sant Singh shall up to his death or up to the time of his vacating the office of *granthi* of his own accord work as a *granthi* of the *Darbar Sahib*. After his death the plaintiff, namely, *Bhai* Gurbachan Singh, shall occupy the office of *granthi*. *Bhai* Sant Singh shall not be competent to nominate anybody as *chela*. Up to this time he has not nominated any one as his *chela* or *goddi nashin* nor shall he do so in future.

The history of succession in the line of Makhan Singh, therefore, in no way supports the claim of the plaintiff to treat the *gaddi* *nashini* as a descendible inheritance.

In the line of Gopal Singh, *Bhai* Diwan Singh and after him *Bhai* Hira Singh and after the latter *Bhai* Partap Singh succeeded to the *gaddi*. Diwan Singh was a nephew of Gopal Singh. *Bahi* Hira Singh was Diwan Singh's nephew while Partap Singh succeeded as the brother of Hira Singh. Strict rule of inheritance does not appear to have prevailed even in this branch. The evidence shows that the younger member of the family was given preference over the elder member of the branch. This, as remarked by the lower Court, leads to the conclusion that the office was conferred upon the younger members probably on the ground of their being *chelas*. This is prominently brought out by the rule of succession followed in the principal branch of *Bhai* Sham Singh. *Bhai* Sham Singh was succeeded by his *chela Bhai* Jassa Singh who was in no manner related to him. Jassa Singh in his turn was succeeded by Jawahar Singh. Although Jassa Singh, shortly before his death in 1857, had executed a deed of gift (not strictly proved in this case) in favour of Jawahar Singh, whom he had described not as a *chela* but as one whom he had brought up from infancy and treated him as his son, yet the document was treated as an instrument of appointment as a *gaddi nashin* and in fact the evidence shows that Jawahar Singh was installed on the *gaddi* as *chela* with the concurrence of the brotherhood, the *sants*, *mahants* and *pujaris*, etc. After the death of *Bhai* Jawahar Singh, Harnam Singh, his *chela* and real brother, succeeded to the *gaddi* in 1892, but his succession was disputed by a suit which went up to the Chief Court in appeal and resulted in the judgment reported as *Bhai Bhagat Singh* v. *Harnam Singh* (1) already referred to, in which it was held that the rule of succession in the case of the *Darbar Sahib* or Golden Temple at Amritsar had been that the *gaddi nashins* had nominated successors who had been installed in each case without objection. In that case almost similar questions arose for decision as in the present case. The plaintiff there claimed to succeed to the *gaddi* by right of survivorship in preference to Harnam Singh and contested the legality and propriety of the appointment of Harnam Singh as the head *granthi*

(2) 4 P. R. 1870.

after Jawahar Singh. The learned Judges referred to the decision in *Nowrung Singh* v. *Bhagat Singh* (2) and held that the office of *gaddi nashin* was not a descendible inheritance and that the plaintiffs had no right to succeed by right of survivorship. They further held that the plaintiffs having failed to establish their right to succeed they had no *locus standi* to dispossess Harnam Singh who was the *de facto granthi* and in possession of the office.

The above facts relating to the succession in the line of *granthis*, *prima facie*, do not support the case of the plaintiff that the succession has followed the rule of primogeniture or the office has ever been treated as a descendible inheritance. In the face of the above undeniable facts, the onus to prove that he is entitled to succeed as the son of the deceased Harnam Singh according to the practice prevailing in the institution, lies heavily on the plaintiff. As set forth in the pleadings, the plaintiff, in the first place, claims to succeed merely on the ground of sonship and, in the alternative, he claims to have been initiated as *chela* and nominated as successor by his deceased father Harnam Singh. Harnam Singh died on the 30th of July 1907 when the plaintiff was only one year old. Harnam Singh is said to have performed the ceremony of initiating the plaintiff as his *chela* when he was only forty days old. If his right to succeed to the *gaddi* on the ground of sonship alone is made out by the evidence on the record, the plaintiff no doubt is entitled to a decree, but if, according to the evidence, it is necessary that the candidate should be a *chela* as well as nominated successor, the age of the plaintiff at the date of his initiation as a *chela* presents an insurmountable difficulty in his way, as we shall more fully explain hereafter. Independently of his right to succeed to the office of the head *granthi*, the plaintiff has also claimed the right to challenge the legality of the defendant Fateh Singh's right to occupy the *gaddi*. Although in our opinion this last point is in no way relevant or material for the decision of this suit in which Indar Singh is the plaintiff, yet it is material for the decision of the suit for possession which is the subject-matter of the connected Appeal No. 3009 of 1916.* We shall, therefore, discuss and dispose of this question also in our judgment in Appeal No. 907 of 1917.

We have referred to three suits which were instituted and disposed of previously relating to the right of succession among the *granthis*. The judgment and record of those cases form part of the evidence in this case. Some of the documents to be found on the record of these cases are valuable pieces of evidence bearing on the questions raised in this case. We shall, therefore, deal with them in the forefront of our judgment. At page 24 of book A. there are printed two documents, one a petition of plaint of *Bhai* Jawahar Singh, dated 12th of May 1865, in which he describes himself as the *chela gaddi nashin* of Jassa Singh. The other a mortgage-deed, dated the 29th of May 1865, in which at the end he calls himself the *chela* of *Bhai* Jassa Singh, *granthi*. At page 29 of the same book there is a power of-attorney, dated the 17th of March 1870, executed by Jawahar Singh in favour of Hira Singh. In this also the executant describes himself as *Bhai* Jawahar Singh, *chela* of *Bhai* Jassa Singh, *granthi* and *gaddi nashin* of *Sri Darbar Sahib*. At page 26 of book A. there is a mortgage-deed, dated the 29th of May 1865, executed by Jawahar Singh in which he describes himself as *Bhai* Jawahar Singh, *chela* of *Bhai* Jassa Singh *granthi*. At page 31 of the same book there is an order by *Pandit* Behari Lal, Extra Assistant Commissioner, dated the 1st May 1871 (marked as Exhibit P-1) in which Jawahar Singh is described as the *chela* of *Bhai* Jassa Singh. At page 33 is printed an application by Hira Singh (marked as Exhibit P-124) who describes himself as the agent of *Bhai* Jawahar Singh, *granthi*. Again, at page 204 there is a *robkar* of the Court of the Settlement Commissioner in which Jawahar Singh is described as a *chela* of Jassa Singh. At page 210 there is a judgment of Captain Marshall, Assistant Commissioner, dated the 14th of August 1871, in which also *Bhai* Jawahar Singh disciple of *Bhai* Jassa Singh, is mentioned as the plaintiff in the case. The same description of Jawahar Singh is to be found in the grounds of appeal, dated the 21st of July

*See *Indar Singh* v. *Fateh Singh*, 59 Ind. Cas. 734.—[Ed.].

1867, printed at page 212. Again, at page 214, in a judgment of an Extra Assistant Commissioner, Amritsar, dated the 25th of August 1865, Jawahar Singh is described as the *chela* of Jassa Singh. In paragraph 2 of the plaint in this case the plaintiff Indar Singh himself admits that *Bhai* Jawahar Singh had initiated his real brother *Bhai* Harnam Singh, father of the plaintiff, as his *chela* and appointed him as his successor in his lifetime. At the bottom of page 41, in an agreement, dated the 15th of November 1885, executed by *Bhai* Chet Singh, *Bhai* Harnam Singh is stated to be the *chela* of *Bhai* Jawahar Singh, *granthi*. At page 48 there is a deed of a gift (marked as Exhibit P-82) executed by Jiwan Singh in which Harnam Singh is described as the *chela* or disciple of Jawahar Singh, *granthi Sri Darbar Sahib*. At page 51 there is a *kabuliyat* dated the 1st of December 1901 (marked as Exhibit P-81) executed by Maula Bakhsh in favour of Harnam Singh in which, at the bottom of the page, Harnam Singh is described as the disciple of *Bhai* Jawahar Singh, head *granthi Sri Darbar Sahib*. At page 199 there is a written statement of *Bhai* Harnam Singh in which, in paragraph 7, the defendant describes himself as real brother and *chela* of Jawahar Singh. At page 201 there is a copy of the deposition of Harnam Singh in which the witness states that he was made a *chela* by Jawahar Singh in the *Sambat* year 1933. At page 245 there is a plaint of Narain Singh, plaintiff, (marked as Exhibit D-1) in which Harnam Singh is described as the *chela* of *Bhai* Jawahar Singh. In a mortgage-deed, dated the 4th of December 1906, (marked as Exhibit D-111) at pages 261 and 262 Harnam Singh is described as the head *granthi* of *Sri Darbar Sahib*, disciple of *Bhai* Jawahar Singh.

The documentary evidence, therefore, clearly shows that both Jawahar Singh and Harnam Singh claimed their right to the *gaddi* on the basis of their being *chelas*. The plaintiff coming as he does into Court as the legal representative of Harnam Singh can hardly be allowed to assert that his uncle and father succeeded to the *gaddi* merely because the former was adopted by Jassa Singh as his son and the latter was the brother of Jawahar Singh. We have already referred to the judgment of the Chief Court in *Bhai Bhagat Singh* v. *Harnam Singh* (1) in which it was held that the right of Jawahar Singh to succeed to the *gaddi* was recognised on the ground of his being the *chela* of Jassa Singh and not on the ground of his being his adopted son. As regards Harnam Singh, although in his first application he had claimed his right of succession on the basis of his relationship to Jawahar Singh, he had rectified the omission in his second application by relying on the fact of his being his *chela*. We shall show this more clearly when we come to deal with the evidence relating to Harnam Singh's election and appointment. This evidence is consistent with the view we have taken with regard to the intrinsic evidence to be found in the successive appointments of the *granthis*.

On the 14th of November 1885, *Bhai* Jawahar Singh having died, the question of the appointment of his successor arose. *Bhai* Bhagat Singh and *Bhai* Hira Singh, the two *granthis* representing the other two branches, approached the Deputy Commissioner and put forward their claim to succeed by right of survivorship and requested that steps should be taken for the protection of the property attached to the *Darbar Sahib* and left by Jawahar Singh. A copy of the *robkar*, dated the 1st December 1886, which was drawn up on the occasion has been filed in this case. It is printed at page 42 of book A, which shows that *Bhai* Bhagat Singh and Hira Singh were temporarily appointed, but in order that they might not set up a permanent right, an undertaking was taken from them and instructions were issued to the *darga* on duty to the following effect:—

"You should have the services of *Guru Granth Sahib* done by *Bhai* Bhagat Singh and *Bhai* Hira Singh, the two *granthis*, turn by turn till the appointment of a new *granthi* and issue of any further order and keep the offerings of the turn of the deceased *granthi* with you as before. The *granthis* have been directed accordingly. You should also make them understand that in their rendering the service in the place of *Bhai* Jawahar Singh, the deceased *granthi*, no right of theirs would be established, nor will they have any right in the income, and that they are entrusted with this duty, with their own consent for a few days till the appointment of a new *granthi*."

The *robkar* contains a full statement of

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facts leading to the appointment of Harnam Singh as the head *granthi*. He presented two deeds before the *sarbarah* certifying that Harnam Singh, real brother of Jawahar Singh, possessed all the necessary qualifications for the office of the head *granthi*, and that he had been made a *chela* and nominated as his successor by Jawahar Singh, and that the *sadhs*, *sants* and *mahants* expressed their consent to his being appointed. A number of candidates put forward their claims and presented petitions to the Deputy Commissioner. On the proposal of the Deputy Commissioner a general committee of the *Darbar Sahib* for the appointment of *granthi* was held. Six of the candidates were selected, from among whom a suitable candidate was to be elected. After considering the merits of each of the six candidates, the majority expressed their opinion that as the *sants*, *mahants* and *pujaris* of *Panth Khalsa* had appointed Harnam Singh, real brother and *chela* of Jawahar Singh, deceased, according to the practice, considering him to be a rightful person and fit for the post of *granthi*, he should be appointed as the successor of *Bhai* Jawahar Singh. Harnam Singh was accordingly installed on the *gadai* as the head *granthi*. It is evident from this *robkar* that the appointment of Harnam Singh was made because he was the *chela* and nominated successor of Jawahar Singh, and that the *sants*, *mahants* and *pujaris* had elected him as the head *granthi*.

At page 88 of book A. is printed the report (marked as Exhibit P-18) made by *Sardar* Arur Singh, C. I. E., the *sarbarah* of *Gurdwara* of *Darbar Sahib*, Amritsar, recommending the appointment of Fateh Singh, defendant, as the successor of the deceased Harnam Singh. This report contains a historical survey of the practice of succession among the *granthis* and refers to certain documentary evidence showing that Fateh Singh had been described as his *chela* by Harnam Singh himself. It also mentions that in connection with the case relating to the death of *Bhai* Sundar Singh *granthi*, *Bhai* Harnam Singh had stated before the *sarbarah* on the 21st of March 1905 that *Musammat* Bhawan, resident of Lora Lai District, had offered her son to him in the *Darbar Sahib* whom he had initiated as his *chela* by administering to him *amrit* and performing the *pahul* ceremony, and that he had nominated him as his successor. This *Sardar* Arur Singh is the Manager of the Golden Temple at Amritsar. He is a C. I. E., an Honorary Magistrate, holds an influential position, and is generally respected. He is one of the prominent members of the Sikh community and has, on account of his commanding position, a unique knowledge and experience of the affairs relating to the Temple. He has given evidence in the connected Suit No. 22 of 1913 concerning the practice of succession among the *granthis* and the qualifications which are necessary for eligibility of a candidate. Due weight should, therefore, be given to his opinion in a matter of this kind. At the close of his examination-in chief he has described the practice relating to the appointment of a person to the office of *granthi*. According to his evidence, *chelaship*, nomination, election and installation are necessary for the appointment of a *granthi*. His oral evidence fully supports the report which he made as to the appointment of Fateh Singh. He was closely cross-examined as to different successions in the other branches of the *granthis* and with regard to other matters, but his evidence remained unshaken and there is no reason why it should not be believed.

Partap Singh, *chela* of Hira Singh, was also examined and questioned on the point. His evidence generally supports the statement made by Arur Singh. According to him when there are many candidates for the office, the *granthis* recommend a candidate to the *sarbarah* who, in his turn, recommends the nominee to the Deputy Commissioner. The Deputy Commissioner then passes orders for his appointment. *Sants* and *mahants* then gather together and the selected candidate is installed on the *gaddi*. The *granthis* in this instance recommended the defendant. The *sarbarah* as well recommended him in accordance with the wishes of the *granthis*. The Deputy Commissioner passed orders for the appointment of the defendant. Indar Singh, plaintiff, was a mere child at the time.

The documentary evidence, taken along with the evidence of these two witnesses, clearly proves that initiation as a *chela* is a necessary condition for the appointment of a *granthi*. The other necessary conditions, which are to follow, are the nomination, election and installation, and this is also proved by the evidence of Arur Singh and Partap Singh.

Now, we have to see whether the evidence given by the plaintiff Indar Singh in this case establishes either that he is entitled to succeed merely on the ground of his being a son or that he was initiated as a *chela* and nominated as a successor and was, therefore, entitled in any case to succeed. There is practically no documentary evidence in support of this claim. A number of witnesses were called to support his claim to succeed on the ground of sonship and also to prove the fact of his being made *chela* and nominated as his successor by Harnam Singh. None of these witnesses, however, cite any instance to support their allegation.

Sundar Singh (P. W. No. 1), aged 32 years, described himself as the Manager and *lambardar* of *Gurdwara Akal Bunga*, and stated that no *granthi* could appoint anybody as his *chela* in the presence of male issue, nor could the *chela* be an heir and successor of a deceased *granthi* in the presence of a son, and that, according to the custom obtaining in the *Gurdwara*, the plaintiff was the heir to *gaddi* of Harnam Singh. On being questioned as to whether he could cite any instance in support of his statement, he stated that he could not cite any such instance among the *granthis*. This witness has also stated that when the plaintiff was 1½ years old *Bhai* Harnam Singh brought him from Tarn Taran and held a great *Utsav* celebration and then said "I thank the *Akal Purkh*" (Almighty) "that he has blessed me with a son in my old age. When he grows, I will make over the *gaddi* to him, and take to the life of a recluse." He further stated that Harnam Singh had told him and his father that he had nominated his son as his successor, but the witness never mentioned this fact to the plaintiff's mother or to any of his next friends. This witness made a remarkable statement that, in order to create a *chela*, it was necessary to execute a document. This is altogether opposed to the general evidence as to the initiation of a *chela*. Harnam Singh (P. W. No. 2) also stated that a son's right to succeed as a *granthi* was superior to that of a *chela*, but he also was unable to cite any instance.

We do not think it necessary to refer to the evidence of all the plaintiff's witnesses in detail, as they all more or less repeat almost the same story. In our opinion, the oral evidence does not establish that a son merely as a son is entitled to succeed. This conclusion is supported by the two previous decisions already mentioned, namely, *Bhai Bhagat Singh* v. *Harnam Singh* (1) and *Nowrung Singh* v. *Bhagat Singh* (2), where it was clearly held that the office of *granthi* was not a descendible inheritance. In our opinion, therefore, the plaintiff is not entitled to succeed on this ground alone.

There is one piece of evidence which we have yet to consider, as Mr. Moti Sagar, Counsel for the appellant, has very strongly relied upon its provisions. It is the *dastur-ul-amal* of the Golden Temple, dated the 12th of September 1859, and printed at page 271 of the paper book. We shall refer to some of its provisions and shall deal with the argument addressed to us in respect of them. The *dastur ul amal* purports to lay down certain rules and regulations for the management of the affairs of the *Darbar Sahib*, Amritsar. The preamble runs thus:—

"With a view to remove disputes among *Pujaris*, *Rababis*, etc., and to manage the affairs of the *Darbar Sahib* at Amritsar in future, etc."

The reason for the promulgation of the regulation is thus stated:—

"It is evident that a misunderstanding having arisen among the *Pujaris*, *Ragis* and *Kalabis* of the *Darbar Sahib* in respect of the fixed daily allowances (*nanwans*) there have been disputes on the subject for many years. Now, Mr. Cooper, Deputy Commissioner of Amritsar, having regard to the dignity and honour of the *Darbar Sahib*, which is a *Gurdwara* of all the Sikhs, left at our disposal, the decision of the previous disputes and the making of proper arrangement so as to remove disputes in the future, etc., etc."

The framers of the regulations proceed to lay down rules for the guidance of each class of persons doing service at the *Gurdwara* in the following manner:—

Class I, *Granthis*.—It is the duty of the *granthis* to perform services at the *Gurdwara* of *Granth Sahib* as usual. Each of them has a *jagir* granted to him by the Government. They also enjoy the income derived from *ardas* daily made by the people visiting the *Darbar* which is distinct from

the income derived from the offerings deposited in the Treasury of the *Darbar Sahib*. But after the death of these *granthis* who hold *jagirs* for their lifetime it will be proper that an allowance should be fixed for their successors out of the revenue of the *jagirs* granted for lifetime, and partly out of the income derived from the offerings made to the *Darbar Sahib* and kept in the Treasury and partly out of the income of the *jagirs* granted to the head *granthi* in perpetuity as usual from olden times.

Class II, Pujaris.—The *Pujaris* have charge of the safe custody of the offerings and the accounts of receipt and expenditure of the Treasury and of other affairs connected with the *Darbar Sahib* under the control of the officer in charge. Their right is superior to that of the *Ragis* and *Rababis* who have nothing to do with the charge of offerings and of the Treasury, etc. These persons are only *Pujaris*, and daily allowances are fixed for them from offerings made to the *Darbar Sahib* and kept in the Treasury, to be enjoyed generation after generation.

Class III, Ragis and Rababis.—And lastly *class IV Gharalia Treasurer key keeper and munshi.*

It is argued with reference to these provisions that at least with regard to *pujaris* it is laid down in clear words that they are to enjoy the allowance fixed for them *naslan bad naslan* (generation after generation) which indicates a hereditary succession. This argument derives some support from the answer given to the first question put to the framers of the rules. Next, it is contended that the *granthis* are included in the class of *pujaris* and must be governed by the same rules. In the first place, having regard to the general plan on which the *dastur ul amal* has been drawn up, it is not easy to accept the suggestion that *granthis* are not a distinct class from the *pujaris*. They are dealt with as a separate class and quite a different provision is made in respect of them. In the second place, having regard to the duties to be performed by the two classes of persons and the nature of allowances fixed for them, the same rule could not have been intended to be laid down for both the classes. We are unable to discover anything in the clause relating to the *granthis* to indicate that it was ever intended to lay down a rule of hereditary succession among them. Mr. Moti Sagar's argument, in our opinion, receives no support from the provisions of the *dastur ul amal*.

We shall now examine the evidence tendered to prove that, in addition to his being a son, Indar Singh was initiated as a *chela* and nominated as a successor by Harnam Singh. The witnesses, Sukha Singh, Gurbakhsh Singh of Tarn Taran, Sundar Singh of Tarn Taran, Hukam Singh of Tarn Taran, Nihal Singh of Tarn Taran, depose that the plaintiff was initiated as a *chela* at the temple of Tarn Taran by the administration of *amrit*. To the same effect is the evidence of Kirpal Singh and Sucket Singh. Guddu (P. W. No. 12) has simply stated that when he went to offer congratulations to Harnam Singh on the birth of a son he told him that he had offered the plantiff as *ardas*, and that he would succeed to the *gaddi* after him. He stated that *ardas* had been offered at Tarn Taran. To the same effect is the evidence of Nihal Singh (P. W. No. 13).

We consider this class of evidence utterly worthless. We have already referred to the ceremony of the initiation of a *chela* which makes it incumbent upon the candidate to utter certain *mantras* and wear the five Ks. It is impossible to believe that a child of 40 days would be able to perform the ceremony and get initiated as a *chela*. The evidence as to the nomination as a successor is equally unconvincing. P. W. Nos. 1, 3, 12, 13, 15, 20 and 21, who all belong to Amritsar, have undertaken to state that Harnam Singh mentioned to them his wish that his son should be his successor. We entirely agree with the learned Senior Subordinate Judge that if Harnam Singh had really intended to make the plaintiff his *chela* or to nominate him as his successor he would have taken some more formal proceedings and would have invited men of position to witness the ceremony.

After considering the evidence on the record, we have come to the conclusion that the plaintiff has not succeeded in establishing that he was either formally made a *chela* or appointed a successor. The mere fact of tasting *amrit* at the Tarn Taran Temple, to which the witnesses have deposed,

even if true could not make him a *chela*. On this finding the claim of the plaintiff fails and for the purposes of this suit it is not necessary to decide whether the defendant is a duly appointed *chela* and is rightfully in possession of the *gaddi*, but we will decide this issue also as it is material for the decision of the connected appeal. Fateh Singh, when a child of two or three years old, was offered by his mother *Musammat* Bhawan to Harnam Singh and was accepted by him that he was initiated as a *chela* cannot be doubted. Even some of the witnesses of Indar Singh himself have deposed that *amrit* was administered to Fateh Singh at the shrine *Hazur Sahib* at Naudir, Hyderabad, Deccan. It was, however, contended that as the *amrit* was not administered at the Golden Temple, Amritsar, by Harnam Singh, the boy was not properly constituted his *chela*. No authority of custom or law has been cited in support of this contention. There is overwhelming documentary evidence besides oral evidence in the case, which goes to show that both in the lifetime of Harnam Singh and after his death Fateh Singh was recognized and accepted as the *chela* of Harnam Singh by all concerned. In the mortgage-deed, dated the 6th of April 1905, a copy of which (marked as Exhibit P-31) is printed at page 55 of book A. *Bhai* Fateh Singh is described as the *chela* of *Bhai* Harnam Singh, *granthi*. This mortgage-deed was obtained in the name of the minor Fateh Singh by Harnam Singh himself and this description of the minor mortgagee was given in the deed at his own instance. The document is actually signed by him. In the registration endorsement again "*Bhai* Harnam Singh, *granthi Guru*, of the minor mortgagee" is mentioned as being present. To this endorsement also the thumb mark of Harnam Singh is appended. At page 61 of the same book is printed a copy of a lease, dated the 6th of April 1905 (marked as Exhibit P. W. 8) under which the mortgagor, *Musammat* Ishar Kaur, took the mortgaged house on rent from "*Bhai* Fateh Singh, *chela* of *Bhai* Harnam Singh." At page 120 is printed a petition of objection marked as Exhibit P-94 by *Musammat* Malan, widow of Harnam Singh, and the mother of the plaintiff Indar Singh, in which in the heading *Bhai* Fateh Singh is described as the head *granthi* and in paragraph 3 of the petition the following statement is made by *Musammat* Malan:—"*Bhai* Harnam Singh died two years ago. I, with the help of my agents, have been managing the property of Indar Singh, my son, and Fateh Singh, *chela* of my husband, from that time. There is no necessity to appoint any other guardian." At page 115 is printed a power of-attorney, dated the 19th of June 1903 (marked as Exhibit P-90), executed by *Musammat* Malan in favour of *Bhai* Sobha Singh in which *Musammat* Malan describes herself in these words:—"I, *Musammat* Malan, widow of *Bhai* Harnam Singh, *granthi* of the *Darbar Sahib*, Amritsar, caste *zemindar*, resident of Amritsar, *Katra* Harsa Singh, *sirbarah* of Fateh Singh, minor, aged about 17 years, *chela* of *Bhai* Harnam Singh *granthi*." At page 114 there is a receipt, Exhibit P-132, on behalf of *Bhai* Fateh Singh, *granthi* of *Sri Darbar Sahib*, *chela* of *Bhai* Harnam Singh, deceased, under the guardianship of *Musammat* Malan. This receipt is thumb marked by *Musammat* Malan as the guardian of the minor. At page 92 is printed an extract from the day-book of *Darbar Sahib* in which the following entry is to be found:—"*Ardas* Fateh Singh, *chela* of *Bhai* Harnam Singh, who was appointed to day as *gaddi nashin* in place of *Bhai* Harnam Singh," etc.

To the same effect is an entry at page 94 noting the succession of Fateh Singh, *chela* of *Bhai* Harnam Singh, to the *gaddi* of the head *granthi*. At page 96 is an entry showing the payment of Rs. 5 by Fateh Singh, *chela* of *Bhai* Harnam Singh, as *ardas* on his appointment as *granthi*. In order to rebut the evidence as to the *chelaship* of Fateh Singh, evidence was called on behalf of the plaintiff, Indar Singh, to show that the *kirya karam* (death ceremony) was performed by Arjan Singh, and that Fateh Singh was not present on the occasion, and it was argued that had Fateh Singh been made *chela*, it would have been his duty and privilege to have performed the *kirya karam* of his *Guru* Harnam Singh, but this story is falsified by both oral and documentary evidence. At page 362 is printed the evidence of Prem Singh, a witness in Suit No. 22 of 1912. He was called to prove certain entries in account-books. He states that at leaf No. 83 of the *Bahi* regarding *Baba* Atal, under date the 26th *Sawan* 1964, Rs. 2 are entered on the credit side as income

on account of *ardas* made by Fateh Singh at the time the *kirya karam* ceremony of Harnam Singh was performed The plaintiff has there been shown as the *chela* of Harnam Singh. Under the same date an entry of Rs. 10 on account of the price of a *doshala* and turban given to the plaintiff in connection with the performance of *kirya karam* ceremony of Harnam Singh, is made. The plaintiff is shown as the *chela* of Harnam Singh. At page 73 there is an entry showing Rs. 3 on account of *parshad* (food) given to Fateh Singh to taste after the *kirya karam* ceremony was over. Another entry at the bottom of the page shows an item of Rs. 43, on account of a turban given to Fateh Singh, on the *kirya karam* day. At page 84 there is an entry of Rs. 2 on account of the amount received from *Bhai* Fateh Singh who gave it by way of *ardas* to *Sri Darbar Sahib* on the day of *kirya karam* ceremony to *Bhai* Harnam Sihgh, *granthi*. At the next page 85 we find the following entry :—Rs. 12 on account of the price of the *shawl* and turban given to *Bhai* Fateh Singh on the occasion of the *kirya karam* ceremony of *Bhai* Harnam Singh, *granthi* of *Sri Darbar Sahib*.

It must be admitted that the oral evidence on behalf of Fateh Singh in proof of his *chelaship* and nomination as a successor is not as strong as it might have been, but the direct documentary evidence and other circumstances leave no doubt as to his appointment as a *chela* and as a successor. The evidence as to *Musammat* Malan acting as the *sarbarah* and guardian of Fateh Singh, *chela* of Harnam Singh, cannot be easily got over. If Fateh Singh was a total stranger and not a *chela*, what right had he to meddle with the affairs of the *gaddi*. *Musammat* Malan, being the mother of Indar Singh, plaintiff, would have been the last person to admit the claim of a stranger to be the *chela* and successor of her husband. During her guardianship the lady received offerings brought by the defendant. Again, the evidence as to the election of Fateh Singh by the brotherhood, *sants*, *mahants* and *pujaries* is equally convincing. No particular form or procedure has been laid down anywhere as to the election of a *granthi*. All that appears to be necessary and all that is shown to have been done on such an occasion is that, formally or informally, the opinion of the members of the brotherhood is ascertained, a *mahzarnama* is invariably prepared bearing the signature of as many *mahants*, *sants* and *granthis* as possible and then the matter is reported for orders of the Deputy Commissoner. If he is satisfied as to the election, a date is fixed inviting the members of the brotherhood to assemble for the purpose of installing the elected candidate on the *gaddi*. All this is clearly shown to have been done in this case. Arur Singh, a respectable and independent witness, holding the responsible post of the Manager of the Temple, was satisfied as to the wish of the brotherhood by the presentation to him of a *mahzarnama* in favour of Fateh Singh and made a report to the Deputy Commissioner recommending the appointment of Fateh Singh. This report has been proved by Arur Singh by his evidence given in this case. If we believe the evidence of Arur Singh, given as a witness in the case and the statement contained in his report, we must hold that Fateh Singh had been appointed a *chela* and nominated successor by Harnam Singh. In the report of Arur Singh, it is clearly stated that, in connection with the case set up after Sunder Singh's death, Harnam Singh on the 21st of March 1915 had clearly stated that, in order to avoid any of the disputes in future, he had nominated Fateh Singh as his successor. The *Sardar* has, moreover, deposed as a witness in this case that, in his presence, Harnam Singh stated that Fateh Singh would succeed him, see the original statements of which a translation is given on page 371 of paper-book A. In the translation the words "in my presence" are omitted. There is no reason to disbelieve this evidence. There being no clear rule laid down as to the initiation of a *chela* or as to the nomination of a successor or the election of a *granthi*, we ought to uphold the appointment of Fateh Singh as the head *granthi* if we are satisfied that the evidence on the record justifies the finding that he was installed on the *gaddi* with the general support of the brotherhood and sanction of the Government authorities. We hold that the evidence on the record fully establishes that the *sants mahants* and *pujaris*, the relations of Harnman Singh and his widow, *Musammat* Malan, were quite satisfied and agreeable to the appointment of Fateh Singh as the head

granthi. In fact, no objection was taken by *Mussammat* Malan or by any other person on behalf of Indar Singh, plaintiff, denying the right of Fateh Singh and putting forward the claim of the minor plaintiff. In our opinion, the learned Judge of the Court below arrived at a right conclusion and we entirely agree with him.

In view of the definite conclusions at which we have been able to arrive on the positive evidence produced on behalf of Fateh Singh, we are not prepared to accept the negative evidence tendered on behalf of Indar Singh, defendant. This evidence almost wholly consists of oral depositions of witnesses, some of whom belong to Amritsar and have been examined in Court and others belonging to Naudir (Nizam's Dominions) who have been examined on Commisseon? Very little weight attaches to the evidence of this class.

Amritsar witnesses try to show that there was no nomination or election of Fateh Singh. It is very easy to say so, but can this outweigh the documentary evidence on the record? The *mahzarnama* which was signed by *sants*, *mahants* and *pujaris* was a very strong piece of evidence proving the sense of the people to which further weight was given by the sanction of the Deputy Commissioner. It is true the *mahzarnama* has not been produced, but its non-production is not due to any fault on the part of Fateh Singh. It was extracted by some one from the record relating to the appointment of Fateh Singh. The application printed at page 132 of the book A. shows that this fact was brought to the notice of the proper authority. That record has been sent for and from its examination we find that the paper No. 8 on it was the *mahzarnama* and it has been removed and another paper without any signature on it has been substituted in its place. Secondary evidence as to its contents was, therefore, admissible. *Sardar* Arur Singh has deposed to its contents and said that it bore the signatures of *sants*, *mahants*, etc. The document now found on the record, therefore, cannot be the real *mahzarnama* as it bears no signatures. We have already held that positive oral evidence, supported by undeniable documentary evidence, proves beyond any reasonable doubt the fact of the election of Fateh Singh by the brotherhood. We, therefore, do not believe the oral testimony of witnesses who have come forward to prove the negative.

The evidence given by the Naudir witnesses is not of much value. They depose that *amrit* was administered to Fateh Singh at *Hazur* Temple at Naudir. This evidence has been relied upon as showing that the ceremony of the administration of *amrit* at *Hazur* Temple negatives the possibility of Fateh Singh being the *chela* of Harnam Singh. We fail to see the force of this argument. Admittedly, Harnam Singh himself had taken the boy to *Hazur Sahib* and was present there on the occasion of the administration of the *amrit*. It is not suggested or shown that some one else had administered it. These witnesses have also given their opiuion that a son ought to succeed, and that in the presence of a son a *chela* cannot succeed. They have, however, like the Amritsar witnesses, failed to cite any instance. The whole of the plaintiff's evidence, in our opinion, is valueless and fails to establish the case set up by him.

For the reasons set forth above, we affirm the decision of the Court below and dismiss the appeal with costs.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3009 OF 1916.

May 15, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

INDAR SINGH, MINOR, THROUGH ARJAN SINGH, AND ANOTHER—DEFENDANTS—APPELLANTS

versus

FATEH SINGH—PLAINTIFF—RESPONDENT.

Religious Institution—Golden Temple, Amritsar—Granthi—Succession to property acquired by Granthi—Self-acquisition of Granthi—*Judgment, previous, admissibility of.*

INDAR SINGH v. FATTEH SINGH.

A person who holds the office of *granthi* of the Golden Temple at Amritsar is at liberty to spend the income of his office in any manner he pleases, and is not bound to spend any portion of it in charity. If he acquires property out of such income, he is free to dispose of it as he thinks best, and unless such property is dedicated by him to religious purposes, the property descends on his death to his natural heirs according to the usual rule of inheritance. Where, however, a *granthi* succeeds to property from another *granthi* to the exclusion of natural heirs, there is a presumption that such property has been dedicated to religious uses, even in the absence of positive evidence of actual dedication.[p 736, col. 2.]

A judgment in a suit holding that the property attached to the office of *granthi* is *wakf* and inalienable, is admissible in a subsequent suit for the purpose of showing that at the time it was given the right of the *granthi* to alienate was called in question. [p. 737, cols. 1 & 2.]

First appeal from the decree of the Senior Subordinate Judge, Amritsar, dated the 10th of October 1916.

Lala *Moti Sagar*, R. B, Messrs. *Santam* and *Muhammad Rafi*, for the Hon'ble Mian *Muhammad Shafi*, K. B., for the Appellants.

Mr. *O. Bevan-Petman*, Bakhshi *Tek Chand*, and Lala *Hari Chand*, for the Respondent.

JUDGMENT.—The properties in dispute in the case out of which the present appeal arises were in the possession of Harnam Singh, head *granthi* of the Golden Temple, Amritsar, who died on the 29th of July 1907. The plaintiff-respondent, Fateh Singh, who claims to be his *chela* was duly installed in the office of head *granthi* in succession to the deceased on the 4th December 1907. The defendant-appellant, Indar Singh, is the son of the deceased Harnam Singh. His age was about one year at the time of his father's death, and he was, therefore, only about 7 years of age when the present suit was instituted in 1913. Fateh Singh was also a minor at the time of Harnam Singh's death, and the widow of Harnam Singh, who is the mother of Indar Singh, was the guardian of both the present parties. No claim was put forward on behalf of Indar Singh to succeed. Harnam Singh as head *granthi* at the time of the latter's death and Fateh Singh was installed in the office without opposition on the part of any one. About 1909 disputes arose between the parties in respect of the properties left by Harnam Singh, and Fateh Singh instituted the present suit to obtain possession thereof on the 22nd of April 1913. On the 27th of May 1913 a suit was instituted on behalf of Indar Singh to obtain the office of head *granthi* for himself, and for the dismissal of Fateh Singh therefrom. That suit was dismissed by the lower Court, and Civil Appeal No. 907 of 1917,* which we have heard along with the present appeal, was lodged from that order.

In the suit brought by Fateh Singh a decree was given for the properties in list A., filed with the plaint, and for Rs. 5,940 on account of income of the properties in suit out of Rs. 10,423 actually claimed. The suit for the properties contained in lists C, D. and E. was dismissed. From this order an appeal has been lodged on behalf of Indar Singh, Fateh Singh has not appealed as regards the portion of his claim dismissed nor has he filed cross-objections in the appeal of Indar Singh. Our judgment of to-day's date in Civil Appeal No. 907 of 1917 should be read along with the present judgment and our findings recorded therein, so far as may be necessary, should be taken as findings in the present case also. We have dismissed Indar Singh's appeal in the other case, and in our judgment have held, *inter alia*:—

(1) that the office of *granthi* is a religious office;

(2) that a son has no right to succeed his father in this office merely on the ground that he is his son;

(3) that Fateh Singh was the *chela* of Harnam Singh and was duly appointed as head *granthi* of the Golden Temple in succession to him, and that he is entitled to hold that office;

(4) that Jawahar Singh, the predecessor-in-office of Harnam Singh, succeeded thereto as the *chela* of Jassa Singh with the approval of the brotherhood;

(5) that Harnam Singh was the *chela* of Jawahar Singh and succeeded to the office of *granthi* as such, and because he was duly appointed thereto, and not because he was the brother of Jawahar Singh.

There are at present three *granthis* attached to the Golden Temple, whose pedigree is given in the judgment of the lower Court at page 431 of the main paper-book which we call A. It is given more fully in the document relating to the appointment as *granthi* of Fateh Singh dated the 15th August 1907, marked Exhibit P 18

*See *Indar Singh* v. *Fateh Singh*, 59 Ind. Cas. 721 [Ed.]

printed at pages 88, *et seq.*, of the paper book, The two first *granthis* are not shown in these tables. They were Budha and Gowal Das, respectively, the latter having been succeeded by Chanchal Singh. At first there was only one *granthi*, but after Atma Singh there were three. The line of the head *granthi* started with *Bhai* Sham Singh. In that line the succession has always gone from *guru* to *chela* for though Harnam Singh was the brother of Jawahar Singh, it has been found that he succeeded him as his *chela* and not as his brother. In this line Harnam Singh is the first *granthi* who has left a son, and this accounts for the dispute between his son and his *chela*. When Jawahar Singh died, there was a dispute relating to his succession. Harnam Singh's title to succeed was disputed by the other two *granthis* Hira Singh and Bhagat Singh. In 1887 they instituted a suit against him for a declaration that his succession to the *gaddi* should be considered unlawful, and that he should be dispossessed of the properties detailed in the lists filed with the plaint and said to be connected with the *gaddi*, and that the possession of the same should be given to them, the plaintiffs. That suit was eventually decided by a Bench of the Chief Court, the judgment of which is reported as *Bhai Bhagat Singh* v. *Harnam Singh* (1). It was there found that "the rule of succession in the case of the *Darbar Sahib*, or Golden Temple, at Amritsar, has been that the *gaddi nashins* have nominated successors who have been installed in each case without objection." It was held "that no good grounds existed for applying the doctrine of survivorship to the case of succession to the office of *granthi*," and that the plaintiffs had failed to prove that they were themselves the rightful successors to Jawahar Singh, or that Harnam Singh's continuance in the office of which he was in actual possession was opposed to any customary rules governing the institution. The result of this decision was that Harnam Singh continued to hold the office of *granthi* and to remain in possession of the properties previously held by Jawahar Singh. The lower Court has now held that Jawahar Singh was the *chela* of Jassa Singh and succeeded him as such, and did not get his properties and the *gaddi* on account of a deed of gift said to have been executed by Jassa Singh in his favour. It has also held that the properties in the hands of Harnam Singh and his predecessor in-office as *granthi* are *wakf* and attached to the office, and that Indar Singh merely, as the son of Harnam Singh, has no right to succeed to them. The suit has been dismissed as regards certain properties which were acquired by Harnam Singh himself out of his income and in regard to which it has not been proved that they were dedicated to the office of *granthi*. It is common ground that a *granthi* can spend the income of his office in any way he likes; he is not bound to spend any part of it in charity; he can acquire property out of his income, and can dispose of that property in any way he likes. If he acquires property and dies without having dedicated it to religious purposes, there is no reason why it should not descend to his natural heirs according to the usual rule of inheritance. If, however, it is shown that any part of the property has descended from one *granthi* to another to the exclusion of the natural heirs, then it appears to us that a presumption must arise that such property has been dedicated to religious uses even if there be no positive evidence of actual dedication. In this connection, we have been referred to *Ram Singh* v. *Nehal Singh* (2) where, at the bottom of page 470*, the following passage occurs:—

"No one would have any doubt that if a *Sadh* himself acquires property, and does not devote it to religious purposes (and a *Sadh* can acquire property), he remains absolute arbiter of the disposal of the property; but if the property has once passed to a *chela* in virtue of his being *chela* to the exclusion of natural heirs, it certainly would be only reasonable to hold that the *chela* must treat the property as religious."

In the case of *Har Parshad* v. *Sadhu* (3) a Bench of the Chief Court, in considering the case where a trust had been created by the *Nai* community for the maintenance of a *Smadh*, made the following remarks at page 96†:—

'This record is equally consistent with

(1) 49 P. R. 1892.

(2) 136 P. R. 1889.

(3) 32 Ind. Cas. 504; 31 P. W. R. 1916.

*Page of P. R. 1889—[*Ed.*]

†Page of P. W. R. 1916—[*Ed.*].

the allegation that Shib Charan Gir held the property as trustee, and does not, in our opinion, mean that he was the private owner thereof. The oral evidence on the point is altogether worthless; but the fact that the succession to the entire property has been admittedly from *Guru* to *chela* irresistably points to its being a religious trust."

The first two items in list A. dealt with by the lower Court are some shops in the rice market, and in the wheat market in the city of Amritsar. In connection with these, the lower Court has referred to a judgment of Sardar Shamsher Singh, which was given in a suit contesting the right of the then *granthi*, Jawahar Singh, to alienate these shops. The judgment in question will be found printed at pages 207-210 of the main paper-book which we will call A. It is dated 21st April 1870. It was held therein that the property was *wakf* and was attached to the *gaddi*, and, therefore, could not be treated by the *granthi* as his private property. The mortgages made by him were, therefore, cancelled. It has been strongly contended before us on behalf of the appellant that this judgment is inadmissible in evidence for the purpose of proving that the property then in dispute is *wakf* and inalienable. Counsel for the respondent contends that the judgment is admissible under section 13 of the Indian Evidence Act. The admissibility of such judgments is discussed at great length in Amir Ali and Woodroffe's Law of Evidence, 5th Edition, at pages 170, *et seq.* The learned authors referred to the case of *Gujja Lal* v. *Fatteh Lal* (4) in which it was held that such judgments are inadmissible in evidence as "transactions" under section 13 of the Evidence Act or as "facts" under section 11, or under any other section of the Act. The learned authors have gone on to point out that the Madras High Court concurred in the decision in *Ramasami* v. *Appavu* (5) The authors also considered various rulings of their Lordships of the Privy Council, and finally came to the conclusion that such judgments are not relevant as decisions on points at issue. The matter was also elaborately discussed by Mr. Justice Beaman in the case reported as *Mahamad Amin* v. *Hasan* (6). The learned Judge's conclusion will be found at the bottom of page 157, from which the following passage may be quoted:—

"All the best authorities, I think, agree that a judgment *qua* judgment and in respect to its contents, certainly is not such a 'transaction' or 'instance,' but it may be the simplest and most convenient proof of the transaction, namely, the litigation, or the instance, namely, the assertion by the plaintiff, and the denial by the defendant of the right. So limited, there would be no great objection or difficulty in the way of admitting the judgment. Its probative effect would then be no more than this, to establish that, at the time it was given, there had been a transaction between the parties to it in which the right in question had been asserted or denied....It being conceded, as I think on a correct reading of the best authorities, it must be conceded, that if judgments of this kind are admissible at all under sections 43 and 13 they are admissible only as the simplest proof of a transaction or an instance within the meaning of the latter section; it follows, of course, that the proof cannot be taken beyond the thing to be proved, and the thing to be proved is no more than that there was an assertion or a denial, not the grounds upon which a Judge held that the assertion or the denial was good or bad in law."

We have no hesitation in agreeing with this interpretation of the law and we, therefore, consider that the judgment of Sardar Shamsher Singh can only be treated as admissible for the purpose of showing that at that time also, the right of the *granthi* to alienate certain property was called in question. The finding of the Court that the property was *wakf* and was attached to the *gaddi* is, in our opinion, not relevant.

At page 279 of paper-book A. is printed a translation of a copy of a copy of a so-called deed of gift which appoints Jawahar Singh in place of Jassa Singh *granthi*. Now, in regard to this, it has been objected that the deed has not been proved in this case, and Counsel for the appellant has quite failed to show us how it has been proved. But even taking this document at its face value, we do not

(4) 6 C. 171 (F. B.); 6 C. L. R. 439; 3 Shome L. R. 182; 3 Ind. Dec. (N. s) 112.

(5) 12 M. 9; 13 Ind. Jur. 16; 4 Ind. Dec. (N. s.) 353.

(6) 31 B. 143 at p 157; 9 Bom. L. R. 65.

consider that it shows that Jawahar Singh succeeded to Jassa Singh's office and the property held by him in virtue of a gift. The deed purports to convey not only all Jassa Singh's property but also the *gaddi* of the *Darbar Sahib*, *i.e*, the office of *granthi*. It purports to be signed by the *granthis* and *mahants* of other religious institutions in Amritsar, and in our opinion it should really be looked upon as a deed appointing Jawahar Singh as successor of Jassa Singh. In this connection much stress is laid by Counsel for the respondent upon certain admissions of Jawahar Singh contained in the written pleas filed by him in the case of Bhagat Singh and Diwan Singh *versus* Jawahar Singh (see pages 212 213, paper book A). In ground No. 3, he states that all kinds of property attached to the *gaddi* is still held by the appellant, *i.e*, Jawahar Singh. In ground No. 6 he says it is a fact that the appellant's *Guru* (Jassa Singh) with the approval of the *Raises*, the *sardars* and the *sadh sangat* made over to the appellant all the property attached to the *gaddi* including the land in dispute and appointed him a *gaddi nashin* executing a document to the effect which was also signed by the respondent's *Guru* This, in our opinion, shows conclusively that Jawahar Singh considered the so called deed of gift to be a deed appointing him to the *gaddi*, and transferring to him all the property attached thereto. Jawahar Singh was duly installed on the *gaddi* and, therefore, as a matter of course, obtained possession of all the property attached to the *gaddi*.

The lower Court has laid stress on the fact that in the 1887 suit Bhagat Singh and Hira Singh, in their plaint referred to the property in dispute as being connected with the *gaddi*. Harnam Singh, in his written pleas, said that being the real brother and *chela* of Jawahar Singh he was, by law and custom, the rightful heir to the *gaddi*, and that according to ancient custom he was appointed *gaddi nashin* by the *sants*, the *mahants*, the *pujaris*, and the Darbar Committee, and that he could not be dismissed after such appointment. The defendant, in that case never pleaded that, even if he was not entitled to the *gaddi*, he was entitled to inherit the property of Jawahar Singh because he was his brother nor did he dispute the averment in the plaint that the property in dispute was connected with the *gaddi*. Bhup Singh, the father of Jawahar Singh, had three sons, *viz*., Jawahar Singh, Harnam Singh, and Jit Singh. A statement of Bhup Singh made by him in the case of Bhagat Singh *versus* Jawahar Singh on the 27th April 1876 (Exhibit P.120) is printed at pages 33-34 of paper-book A In that statement he said : "my houses and property are not attached to the *gaddi* (*Darbar Sahib*). This property of mine shall not be inherited by Jawahar Singh as he has become a disciple of a *panth*. I have offered him to the *Darbar Sahib*. I have got two other sons, and the property shall be inherited by them." Now, Jawahar Singh, actually succeeded to the office of *granthi* and got all the property held by Jassa Singh during the lifetime of his father Bhup Singh. Jawahar Singh died before his father, and the office of *granthi* together with the property went to Harnam Singh. Bhup Singh died subsequently, and Jit Singh, his son, admittedly inherited the whole of his property, no part of it going to Harnam Singh. Harnam Singh never claimed a share in it, nor did Jit Singh claim any share in the property of Jawahar Singh. These facts are important as showing that the property of Jassa Singh descended to Jawahar Singh, and from him to Harnam Singh to the exclusion of the natural heirs. *Prima facie*, the inference to be drawn from this is that the property, which so descended, is attached to the office of *granthi*, and was dedicated thereto.

It remains for us to consider from whom the property now in dispute has come. The lower Court has satisfied itself by tracing it to Jahawar Singh, and has held that any property which came down from Jawahar Singh to Harnam Singh must be *wakf* and attached to the *gaddi* and must now go to the *gaddi nashin*, *i.e*., Fatteh Singh. We proceed now to discuss the items *seriatim* in the same order as the lower Court has done: —

Items Nos. 1 *and* 2.—These are the shops, six in the rice market, and five in the wheat market, which have already been referred to. It is admitted before us that they are identical with certain shops which were claimed in the suit brought by Bhagat Singh and Hari Singh against Harnam Singh after the death of Jawahar Singh. Their identity is also admitted with those which were the subject of the suit decided by Sardar Shamsher Singh ; but we have already held

that the judgment in that suit is inadmissible in evidence. It is argued on behalf of the appellant that there is no proof that these shops were in the possession of any *granthi* prior to Jawahar Singh. Now in connection with these shops, and other items of property in dispute, Counsel for the respondent has referred us to numerous entries in certain account books said to have been made by *Bhai* Sujan Singh and *Bhai* Jassa Singh, the grandfather and father of Jai Ram Singh, P. W. No 24, whose statement will be found printed at pages 355 and 356 and 375 of paper-book A. Jairam Singh was a servant of *Bhai* Jawahar Singh and *Bhai* Harnam Singh, *granthis*, and is now servant of *Bhai* Fatteh Singh, *granthi*. He states that his father and grandfather were similarly servants of the *granthis* of this line. Their duty was to realise money and to keep accounts. He produced two account-books which he says were found from a box in possession of Fatteh Singh. He says that they contain entries in the handwriting of his grandfather and father. He did not see his grandfather and therefore, cannot, of course, identify his handwriting. But the account-books were, in our opinion, produced from proper custody within the meaning of section 90 of the Evidence Act. The entries relied upon are all much more than 30 years old and we therefore, presume that they are in the handwriting of *Bhai* Sujan Singh and *Bhai* Jassa Singh as they purport to be. The books appear to be regularly kept account books and in our opinion the entries in them are admissible in evidence. In connection with Items Nos. 1 and 2 of the property in dispute, Counsel has referred us to entries printed at pages 160, 162 and 173-175 of paper-book A. The entry on page 160 is one of Rs. 8 9 6 on account of plastering of the shops situate in *kanak mandi*, in the handwriting of Sujan Singh, dated 24th *Sawan Sambat* 1887, corresponding to A. D. 1830. This entry is, therefore at the present time about 80 years old. It is not proved that there is any other shop in the *kanak mandi* other than those in dispute to which this entry could refer. The entry on page 162 is of *Sambat* 1895, and is an entry of Re. 1-2-0 on account of earth thrown in front of a shop situate in *kanak mandi*. The shops in dispute are in *kanak mandi*, and, in the absence of any evidence to the contrary, there is no doubt that this entry refers to these shops. The entries at pages 173-175 also refer to numerous items of expenditure in connection with the shops situate in *kanak mandi* in the year *Sambat* 1912. Jassa Singh *granthi* died in 1913. We agree with Counsel for the respondent that the presence of these entries is quite sufficient to prove that these shops were in the possession of Jassa Singh *granthi*.

Item No. 3.—Two shops in the *Misri Bazar* and two shops in *Chauk* Malla Singh which together constitute one block. On behalf of the appellant it is not admitted that these shops were in dispute in the 1887 suit, but we have carefully compared the plans filed in the present and in the former suits at pages 418 and 187, respectively, of paper-book A., and we have no doubt that they are identical. The situation is the same and we fully agree with the lower Court that the identity has been proved. The old accounts contain numerous entries relating apparently to these shops. The first entry printed at page 160 was one of Re. 1 0-9 on account of reeds for the *chhappar* of the shop situate in *Chauk* Malla Singh. On page 161 there is an entry of Rs. 7-15-0 on account of flooring of the shops situate in *Chauk* Malla Singh bearing date *Sambat* 1895. The second entry on page 162, Rs. 6 6-0 of *Sambat* 1895 also refers to shops in *Chauk* Malla Singh. So does the second entry on page 163 and the second entry on page 164. The accounts on pages 177-180 contain an account of numerous sums spent on shops situate in *Chauk* Malla Singh under date *Maghar Sambat* 1906 These entries all relate to the time of Jassa Singh *granthi*, and, in our opinion, it is clearly proved that these shops were in his possession.

Item No. 4.—These are two shops and a house at the back of them situate in *Katra* Safaid or Chitta. It is admitted that this property was in the possession of Jawahar Singh, *granthi*, but it is contended that he himself bought it. At page 235 of paper-book A. will be found a translation of a registered deed of sale, dated the 26th June 1833, executed by Gurdit Singh and Sundar Singh in favour of Jawahar Singh, *granthi*. This was a deed of sale of two shops together with a roofed *sabat* situate in *Katra*

Sufaid, city Amritsar. The sale was for a consideration of Rs. 750. Mr. Tek Chand, Vakil, for the respondent, admits that item No. 4 of the property in dispute is the same as was transferred by this deed of sale. He refers, however, to the statement of Arjan Singh, D. W. No. 3, page 392, line 26, paper-book A., where the witness stated that he, *i.e.*, Jawahar Singh, gifted two shops in *Katra* Sufaid to *Bhai* Rattan Singh. Rattan Singh got possession of these shops after the gift. He afterwards sold them. The contention is that these are the same shops which Jawahar Singh gifted to Rattan Singh, and which Rattan Singh's sons sold back to Jawahar Singh. Jairam Singh, however, (see page 357, line 6 of paper-book A), stated that *Bhai* Jawahar Singh did not gift two shops in *Katra* Sufaid to Rattan Singh. Counsel has referred us to certain entries in the accounts at pages 163 165 which relate to the property in Chitta *Katra*. It is, however, in our opinion, not shown that Item No. 4 is the same as was in the possession of Jassa Singh. At all events, it is admitted that this property was purchased by Jawahar Singh himself. They are not traced further back than Jawahar Singh.

Items No. 5.—*Haveli Hathiwoli*, situate in *Kucha* Sukhdial, *Katra* Ramgarian, city Amritsar. It is admitted that this property was in dispute in the 1887 suit and, therefore, it came from Jawahar Singh. At page 162 of paper book A. will be found an entry in the accounts of Rs. 0-8-0 on account of earth for the *Hathiwali Haveli*. In the absence of any evidence to the contrary, we hold that this entry refers to Item No. 5. It is of Jassa Singh, *granthi's* time. We have no doubt, therefore, that this item of property was in the possession of Jassa Singh.

Item No. 6.—A *Tawela* in *Bazar* Mai Sewan. It is admitted that this property was in dispute in the 1887 suit; in other words, that it descended from Jawahar Singh but there is no evidence to show that it was in Jassa Singh's possession.

Item No. 7.—A shop in *Kucha* Charat Singh. It was not claimed in the 1887 suit, but Counsel for the appellant admits that it came from Jawahar Singh, *granthi*. It is built on *nazool* property, and the entries on pages 150 151 of paper book A. are said to refer to it. These entries relate to a shop in *Katra* Charat Singh and show that Jawahar Singh, *granthi*, was in possession of the site, the annual rent being Rs. 4. There are numerous entries in the accounts referring to this shop. On page 162 there is an entry relating to the half yearly Municipal tax for the site under the shops situate in *Katra* Charat Singh, though the amount debited is not entered. On page 163 there is an entry showing that Rs. 5-11 0 were spent on account of plastering shops in *Katra* Charat Singh. There is another entry on this page of Re. 1 on account of a log of wood to be used in the shop in *Katra* Charat Singh. At the bottom of page 164 there is an entry of Rs. 3 debited on account of half yearly Municipal tax paid for the site under the shops in *Katra* Charat Singh. There is another entry relating to it on page 165, and we consider it to be fully proved that this item of the property descended from Jassa Singh, *granthi*.

Item No. 8.—A *burjah* with a shop and a room. This property is admittedly *wakf*. No arguments have been addressed to us in respect of it.

Item No. 9.—A two and a half storied shop in *Katra* Harsa Singh. It is admitted that this property was in dispute in the 1887 suit and, therefore, descened from Jawahar Singh. On page 24 of paper book A. will be found printed a translation of a plaint, dated the 12th May 1885 filed by Jawahar Singh, *granthi*, against Nihal Singh in which he asks for possession of this house. The judgment in that suit, which will be found at page 214 of paper book A, refers to this property as attached to the *gaddi*; but this judgment is inadmissible in evidence. The property is not traced further back than Jawahar Singh.

Item No. 10.—A two storied shop in *Chauk* Baba Atal together with a *smadh* and a *thara*. The *smadh* is that of *Bhai* Sham Singh, the predecessor-in office as *granthi* of Jassa Singh. We have been referred to an entry in the Register of *tharas* in the Amritsar city at pages 38 39, paper-book A., which shows that Jassa Singh was in possession of a *thara* with a *smadh* in 1883-84. It is alleged that this entry relates to the *thara* which forms part of this item, but the identity is not established, and it is to be noted that Jassa Singh died long before 1883. It is admitted that this property

was in the possession of Jawahar Singh, but it is contended that though the *smadh* may be *wakf* it does not follow that it and the *thara* and the shop are attached to the office of head *granthi*. This property was not claimed in the 1887 suit, and paragraph 3 at page 435 of the judgment of the lower Court shows that the plaintiff's Pleader stated that it was not claimed in the previous suit as it contained the *smadh* of Sham Singh, *granthi*, and was not a property attached to the *gaddi*. If it was not attached to the *gaddi* at that time we do not quite see how it can be said to have become attached to the *gaddi* during the incumbency of Harnam Singh, *granthi*. The shop was built by Harnam Singh and a suit was brought by Narain Singh and others to restrain him from building it, see page 345 of the paper-book. We have no information as to what the result of that suit was, but apparently Harnam Singh was allowed to build the shop, for it is in existence at the present time. As to the *smadh* of Sham Singh there appears to be force in the contention of the plaintiff's Counsel that it was probably set up in the time of his successor Jassa Singh and it appears probable that Jassa Singh and his successor have been looking after it. We think that the *smadh* and *thara* in front of it should be held to be attached to the *gaddi* but not the shop No. 543.

There certainly is no evidence that Harnam Singh dedicated the latter which he built to religious uses.

Item No. 11.—This consists of a *dharamsala* and the shops at Tarn Taran, a town some 12 miles from the city of Amritsar. It was admittedly in the possession of Jawahar Singh, but Harnam Singh appears to have purchased and annexed to the original property a strip of ground and to have re-built the whole of the property. There was a *baoli* or well in this property and there was a dispute about it between the Municipality of Tarn Taran and Harnam Singh, *granthi*, (see copy of an application by Bhai Harnam Singh marked Exhibit 115, printed at page 50 of paper book A). In this Harnam Singh states: "we have been holding possession of the said *baoli* from the time of our ancestors, that is to say, for six generations back. We have been holding possession of the *baoli* from the time it was built by Budha Mal." Budha Mal is the name of the first *granthi* and it was he to whom Harnam Singh was referring in his application. It has never been contended that this property was in the possession of Harnam Singh's natural family for six generations and when he referred to its having been in the possession of his ancestors for six generations we have no doubt that he meant that it was in the possession of the previous six *granthis*. It was admittedly in the possession of Jawahar Singh *granthi*. At pages 6 and 7 of paper-book A. will be found an extract from the *Khana shumari* papers of Tarn Taran prepared in the Settlement of 1852. This shows that Jassa Singh, *chela* of Sham Singh, *granthi*, was in possession of five shops, Nos. 430-434. No. 430 is shown as lying desolate, No. 434 is shown to be a *dharamsala*, No. 432 is shown to be in possession of Dusandhi, a grain parcher, for the past 12 years; No. 433 is shown as in possession of Hakam, and No. 434 in the possession of Tola Singh, son of Jhanda Singh. Now, in the *Khana shumari* papers prepared in 1883 84, printed at pages 140-141 of the paper-book, we find *Bhai* Jawahar Singh, *granthi*, in possession of five shops or five properties at Tarn Taran, their Nos. being 128 132, No. 128 was shown as occupied by Gurmukh Singh, son of Tola Singh, *khatri*, and, therefore, it probably corresponds to No. 434 shown in the earlier *Khana shumari* as in the possession of Tola Singh, *khatri*. No. 131 was occupied by Amir, son of Sandhi, caste *Bharbhunja*, grain parcher. We have no doubt that this corresponds to No. 432 in the 1852 list occupied by Dusandhi, parcher of grain. No. 132 is a *dharamsala* and doubtless corresponds to the *dharamsala* entered in the 1852 papers. We have been referred to certain entries in the accounts. At page 161 there is an entry of Rs. 1-6-0, on account of a door frame sent to Tarn Taran. At page 163 there is an entry of Rs. 8 on account of wooden planks sent to Tran Taran. There is also on the same page an entry of Rs. 1-2-0 on account of door chains sent to Tarn Taran, also another entry of 8 annas, 6 pies on account of ropes for wells sent to Tarn Taran. All these entries show us that Jassa Singh, *granthi*, to whose period the entries relate had some property at Tarn Taran. They are

not shown to refer to any part of the present *dharamsala* and the shops connected therewith, but it is not alleged that Jassa Singh had any other property at that place. We have also been referred to an application of *Bhai* Harnam Singh, Exhibit P.117, in which he states that the *baoli* and the *dharamsala* at Tarn Taran have been in possession of his family from generation to generation. Kirpal Singh, a witness for Indar Singh in the connected case, stated that this *dharamsala* was in existence since the time of Jassa Singh. The *dharamsala* along with the shops form one block of buildings. The main part has, in our opinion, certainly descended from one *granthi* to another. Harnam Singh no doubt bought a small strip of ground and on this and on the previous site re built the whole property. The mere fact that he re-built it would, however, not alter its character. If it was formerly attached to the office of *granthi*, Harnam Singh's re-building it would not make it his private property, and it must be presumed that when he re built it he did so for the benefit of the religious office and that of his successors in-office.

Item No. 12.—This property is admittedly *wakf* and no discussion about it is necessary.

Item No. 13.—20 *kanals*, 8 *marlas* of occupancy land in the village of Sultanwind. Harnam Singh was recorded as occupancy tenant of this land and, under section 59 of the Tenancy Act, Indar Singh, is in the absence of any reason to the contrary, entitled to inherit it. An entry from the *muntakhib* papers, printed at page 35 of the paper book A., shows that Jassa Singh held the *muafi* of 16½ *kanals* of land (orchard with a well) in Sultanwind in 1852. He is not, however, shown as having occupancy rights in the land. An entry given at pages 22 23 paper book A., Exhibit P.21, shows that in 1865 Jawahar Singh, *granthi*, had occupancy right in 19 *kanals*, 18 *marlas* of land described as a garden in Mauza Sultanwind. It is stated in the entry that the garden was planted by Jawahar Singh who had been holding its possession for a long time and that the proprietors had no right to eject him. There is an entry of 1892-93, given at pages 240-241, paper-book A., which shows Harnam Singh as cultivator and describes him as non-occupancy tenant. We were told that this was a wrong translation, but we referred to the original in vernacular and found Harnam Singh entered as *ghair dakhilkar*. Apparently, occupancy rights in this land were subsequently acquired by or conferred on Harnam Singh. Under the circumstances, we are quite unable to hold that it is connected with the *gaddi* and, in our opinion, Indar Singh is entitled to succeed to its possession.

Item No. 14 is not in dispute in this appeal.

To sum up, then, we hold that the various items of property in dispute have all descended from Jassa Singh with the exception of Nos. 4, 6, 9, 10 and 13. As to No. 4, it is proved that Jawahar Singh bought this property and we do not find any sufficient proof of dedication by him to the office of *granthi*. Out of Item No. 10 the shop was built by Harnam Singh, and we do not find it clearly proved that it was built of *wakf* property. As to Items Nos. 6 and 9, there is no positive proof that they descended from Jassa Singh, but, considering that Jawahar Singh succeeded to the *gaddi* and to so much of other property held by Jassa Singh and that there is no proof that he got any property from his father Bhup Singh, we are of opinion that the onus was upon the defendant to show that these particular items did not come down from Jassa Singh, and this onus he has not discharged. As regards Item No. 13, we hold that it is not proved that the occupancy rights in this land are attached to the *gaddi*.

In calculating the mesne profits of the land in dispute, the lower Court found that the land which is to be excluded from the decree is a little less than one-third of the total area claimed. It, therefore deducted Rs. 112 from Rs. 352 which it took to be the annual profits and found Rs. 660 to be the income for 33 months as claimed. Now, we are excluding 20 *kanals*, 8 *marlas* of occupancy land also from the land decreed. We find that about 152 *kanals* of land should be decreed and 92 *kanals* should be excluded from the decree; in other words, about 5/8ths of the land claimed is being decreed. The total net annual income works out to Rs. 332 and not Rs. 352 as stated by the lower Court. Five-eighths of Rs. 332 is equal to Rs. 207, or, say, Rs. 17 per mensem. The amount, therefore, due to the plaintiff for 33 months on account of mesne profits comes to Rs. 561. From the houses and shops decreed, we

are excluding the shops and the house in *Katra Sufaid* of which according to the local Commissioner (see page 294 of paper-book A.) the monthly rent is Rs. 10-8 0. At page 295 of the report it is also stated that only the *baithak* out of the property in Item No. 10 is let out at Rs. 1 per mensem and that the shop is lying vacant. Deducting, therefore, Rs. 346-8-0 on account of rent of the property in *Katra* Sufaid and Rs. 33 on account of rent of Item No. 10 we find Rs. 4,900 8-0 to be the amount due to the plaintiff on account of rent of houses and shops in Amritsar and Tarn Taran. Adding to this, Rs. 561 on account of mesne profits of the land we find the total amount due to the plaintiff to be Rs. 5,461-8-0.

We accordingly accept the appeal, and modifying the lower Court's order, give the plaintiff a decree for the property in list A. attached to the plaint with the exception of Item No. 4, the shops and the house in *Katra* Chitta, city Amritsar, the shop and the *baithak* attached to the *samadh* of Sham Singh (part of Item No. 11 in the plaint) and the occupancy rights in 20 *kanals*, 8 *marlas* of land in Sultanwind (Item No. 14 in the plaint) and for Rs. 5,461-8 0 cash.

Taking the values of the various properties in list A. as fixed by the local Commissioner and in lists B., C. and D. we find that approximately 11-13ths of the claim has been decreed and we therefore, think it equitable to order that defendant appellant shall pay 2 3rds plaintiff-respondent's costs in both Courts.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 858 OF 1919.

July 16, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

BASVANAPPA SHIVRUDRAPPA—DEFENDANT—APPELLANT

versus

KRISHNADAS GOVARDHANDAS MADIWALE—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 14—Plaint presented in wrong Court on last day of limitation making allowance for vacation—Plaint, return of, for presentation to proper Court—Exclusion of time.

Where limitation for a suit expires during the vacation of a Court and the plaint is presented in that Court on the day on which the Court re-opens, but it is subsequently discovered that the Court has no jurisdiction to entertain the suit and the plaint is directed to be returned for presentation to the proper Court, the suit is within time if the plaint is presented to the proper Court on the same day on which it is actually returned by the wrong Court. In such a case the plaintiff is not only entitled, under section 14 of the Limitation Act, to exclude the period between the first presentation of the plaint and the date on which it is actually returned to him, but is also entitled to take advantage of the fact that the first Court was closed for the vacation when the limitation for the suit expired.

Second appeal from the decision of the District Judge, Dharwar, in Appeal No. 71 of 1918, modifying the decree passed by the Additional Subordinate Judge at Haveri, in Suit No. 48 of 1917.

Mr. *Nilkant Atmaram*, for the Appellant.

Mr. *S. Y. Abhyankar*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff filed this suit to recover a sum of Rs. 866-3-3 alleged to be due on account of cotton dealings with the defendant between 20th May 1913 and 26th June 1913. The suit was filed in the Hubli Court on the 7th June 1916, and admittedly was then within time, because the Court opened after the vacation on the 7th June. The defendant then pleaded that he was an agriculturist, with the result that the suit had to be filed in another Court, and the plaint was ordered, on the 15th January 1917, to be returned for presentation to the proper Court. The plaintiff actually took away his plaint on the 25th January and presented it on the same day in the Haveri Court. Clearly, section 14 of the Indian Limitation Act applies, and the time taken up in the former application from the date on which it was instituted till the date on which the proceedings therein ended, had to be counted. It was first argued that the proceedings ended on the 15th January instead of 25th January when the plaint was returned. Clearly, when a party is ordered to take back his plaint and present it in the proper Court, the proceedings do not end until the party gets back his plaint. But then it is urged that, if we exclude the period from 7th June 1916 to

25th January 1917, and consider whether the suit filed in the Haveri Court was within time, the suit in the Haveri Court will still be four days out of time, the argument being that the period which was allowed to be excluded owing to the Hubli Court being closed for the vacation when the plaint was filed in that Court could no longer be taken advantage of, after the order had been made to take back the plaint and file it in another Court. Reliance was placed on the case of *Mira Mohideen Rowther* v. *Nallaperumal Pillai* (1). With all due respect, it seems to me that the result, if that case were followed, would be most inequitable. Bearing in mind that the suit when filed in the first Court was in time, and that the time which was taken up by the proceedings in that Court can be excluded, it would be a most extraordinary result that, when the suit was filed in the proper Court, it should be held to be time-barred. Clearly, the plaintiff is entitled to take advantage of those days during which the first Court was closed for the vacation, and the calculation should be made in the same way as if the second Court had been closed for the vacation. In my opinion, therefore, the decision of the lower Appellate Court was perfectly correct, and the appeal must be dismissed with costs.

FAWCETT, J.—I agree.

Appeal dismissed.

(1) 12 Ind. Cas. 58; 36 M. 131; 10 M. L. T. 254; (1911) 2 M. W. N. 221; 21 M. L. J. 1000.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 258 OF 1920.
December 20, 1920.
Present :—Mr. Justice Martineau.
BELI RAM—VENDEE—DEFENDANT—APPELLANT
versus
HARI CHAND—PLAINTIFF, AND *Musammat* KARM BIBI—VENDOR, AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Vendee having equal right of pre-emption on date of sale—Subsequent loss of vendee's right, effect of—Decree for pre-emption, effect of—Vendee, when divested of property.

Where on the date of a sale the vendee's right of pre-emption is equal to that of a pre-emptor, the vendee does not forfeit his right by subsequently losing the property by virtue of the ownership of which he claimed an equal right of pre-emption. The mere fact that the vendee loses the property under a decree for pre-emption makes no difference. [p. 745, col. 1.]

Bhupa v. *Kori Mal*, 30 P. R. 1893 (*note*), *Kehr Singh* v. *Mahman Singh*, 25 P. R. 1908; 51 P. W. R. 1908; 128 P. L. R. 1908, dissented from.

A right of pre-emption is a *jus ad rem alienam acquirendam* and not a *jus in re aliena*; or, in other words, the pre-emptor can, if he so wishes, by adopting the proper procedure acquire another person's property in preference to third persons, whose rights to such property are inferior to his. But a pre-emptor has no right or interest in such property until his right of pre-emption is duly established by the decree of the Court and he has satisfied the terms of that decree. [p. 746, col. 1.]

Second appeal from the decree of the District Judge, Lyallpur, dated the 1st of November 1919, reversing that of the Munsif, First Class, Gujrat, dated the 29th November 1918.

Lala *Mool Chand*, R. S., for the Appellant.

Mr. *Lal Chand Mehra*, for the Plaintiff, Respondent.

JUDGMENT.—This is a pre-emption case, in which the point in dispute is whether the plaintiff's right of pre-emption is superior to that of the vendee, Beli Ram.

The house in suit (which may be called house A.) was sold by Karam Bibi to Beli Ram on the 4th April 1917.

The plaintiff, Hari Chand, filed his suit on the 15th May 1917, claiming pre emption on the ground that his house adjoined the house sold. Beli Ram pleaded that his right was equal to that of the plaintiff as he also had a house (which may be called B.) adjoining house A.

Beli Ram had bought house B for Rs. 800 on the 17th April 1916, but on the 14th April 1917 one Sawan Singh brought a suit to pre empt that house. The dispute in that case was only with regard to the price. One Bhag Shah, a witness for the vendee, stated that he was prepared to buy the house for Rs. 1,000. An agreement was then drawn up by which the house was to be sold to Bhag Shah for that amount, of which Rs. 200 were to be paid to Sawan Singh and Rs. 800 to Beli Ram. Sawan Singh denied having entered into the agreement, but the

Munsif found that the parties had entered into it. Ultimately, Bhag Shah was impleaded in the case and the Munsif on the 29th November 1918, passed a decree in the terms of the compromise, and this was upheld by the District Judge on appeal. It is stated that Sawan Singh has filed a second appeal which is now pending before a Division Bench of this Court.

In the present case the argument for the plaintiff is that his right is superior to that of the vendee, Beli Ram, because by the decree passed in Sawan Singh's case Beli Ram has ceased to be the owner of house B., the ownership of which was the basis of his assertion that his right to pre-empt house A. was equal to that of the plaintiff.

The Trial Court did not agree with this argument and held that the fact that Beli Ram was the owner of B. at the time when he bought house A. was sufficient to defeat the plaintiff's claim, the subsequent transfer to Bhag Shah being immaterial.

On appeal the District Judge took a different view, holding that as the vendee lost house B. by the decree of the 29th November 1918 he could not be regarded as having had an indefeasible right in that house at the time when he bought house A. He accordingly gave the plaintiff a decree.

Beli Ram has filed a second appeal in this Court, and I think it must succeed.

Thedecree passed in 1918 in Sawan Singh's case was one based on a compromise and was not a decree for pre emption. Bhag Shah's ownership of house B. could not date back to the 17th April 1916, when the sale took place in favour of Beli Ram, but the latter became the owner on that date, was still the owner on the 4th April 1917 when he bought house A., and remained the owner till the decree of 1918 was passed. That being so, the plaintiff's claim fails, as Beli Ram, having been the owner of house B. on the date on which he bought house A., had a right of pre emption equal to the plaintiff's, and does not forfeit his right through having parted with house B. under the decree of 1918 [*Muhammad Nawaz Khan* v. *Musammat Bobo Sahib* (1)].

(1) 44 P. R. 1903; 75 P. L. R. 1903.

It is, however, contended for the respondent on the authority of *Kehr Singh* v. *Mahman Singh* (2) that in the event of Sawan Singh's second appeal in the case relating to house B. being accepted and his getting a decree for that house by right of pre emption the plaintiff in the present case would be entitled to succeed, and it is, therefore, urged that this case should be postponed until Sawan Singh's appeal has been decided.

If Sawan Singh's appeal were successful the decision in the present case would turn on the question whether his right of ownership in house B. dates back to the 17th April 1916, when that house was purchased by Beli Ram.

Kehr Singh v. *Mahman Singh* (2) is no doubt an authority in the respondent's favour. It was there held by Shah Din, J., that a vendee who, by reason of a prior purchase, had become a land-holder in the village and as such was competent to resist the claim of a pre-emptor with respect to a subsequent purchase could not, if in a pre-emption suit he lost the first bargain, retain the subject-matter of the second bargain. The learned Judge distinguished *Muhammad Nawaz Khan* v. *Musammat Bobo Sahib* (1) because the house by virtue of which the vendee in that case had a right of pre-emption was held by him in full ownership under an indefeasible title not liable to be defeated at the instance of a pre-emptor, and the defendant parted with that house voluntarily after the institution of the pre-emptor's suit, so that the title of the transferee dated from the time when the transfer was made to him and not from a date prior to the date of the pre emption suit. He also referred to a judgment appended as a note to *Bhupa* v. *Kori Mal* (3) in which it was held by Rivaz, J., that the effect of a pre-emption decree was to vest the proprietary right in the pre-emptor from the date of the sale.

There are, however, other rulings of this Court in which a different view of the law was taken. In *Lashkari Mal* v. *Ishar Singh* (4) the learned Judges said : "It is, we think, clear that the pre-emptor's right to or in the property accrues only when he has complied

(2) 25 P. R. 1908; 51 P. W. R. 1908; 128 P. L. R. 1908

(3) 30 P. R. 1893 (*note*).

(4) 94 P. R. 1902; 134 P. L. R. 1902.

with the condition laid down in the decree and paid the purchase-money into Court, and that it is then, and only then, that the property vests in him and is divested from the vendee." Again, in *Darshan Khan* v. *Sohaura Mal* (5) Rattigan, J., said "A right of pre-emption is a *jus ad rem alienum acquirendum* and not a *jus in re aliena*, or, in other words, the pre-emptor can, if he so wishes, by adopting the proper procedure acquire another person's property in preference to third persons, whose rights to such property are, in the eye of customary law, as enunciated in the Punjab Laws Act, inferior to his. But a pre-emptor has no right or interest *in* such property until his right of pre emption is duly established by the decree of the Court and he has satisfied the terms of that decree."

But the matter seems to have been set at rest by the Privy Council in *Deonandan Prasad Singh* v. *Ramdhari Chowdhry* (6). The dispute in that case was whether the pre-emptor or the vendee was entitled to the mesne profits of the land in respect to which a decree for pre emption had been passed. The pre-emptor had been given a decree by the Sub ordinate Judge for possession of the land subject to the payment of Rs. 37,000 and he was put into possession in 1900 on payment of that sum. On appeal the High Court dismissed the suit and the original purchaser recovered possession of the land in 1904. Appeals were preferred to the Privy Council, which restored the decree of the Subordinate Judge except as to the pre-emptive price, which was fixed at Rs. 44,-50 and after the additional sum making up that amount had been deposited possession was again given to the pre emptor in 1909. It was held by the Privy Council that the pre-emptor was liable to the vendee for mesne profits from 1900 to 1904, for which period he was in possession without title. On page 685* their Lordships said: "A person claiming an order of pre emption cannot be regarded in the same light as an ordinary purchaser of an estate. His right is, when an estate has been sold, to acquire the property from the purchaser at the price paid. If the necessary formalities are observed, and the purchaser assents to the claim, possession is given by mutual consent and no difficulty arises; but if the claim be disputed and a suit must be brought, the rights of the parties are regulated by the Code of Civil Procedure." After quoting section 214 of the Code of 1882 their Lordships proceeded: "It, therefore, follows that where a suit is brought it is on payment of the purchase-money on the specified date that the plaintiff obtains possession of the property, and, until that time, the original purchaser retains possession and is entitled to the rents and profits. This was so held in the case of *Deokinandan* v. *Sri Ram* (7), and there Mr. Justice Mahmud, whose authority is well-recognized by all, stated that it was only when the terms of the decree were fulfilled and enforced that the persons having the right of pre-emption become owners of the property, that such ownership did not vest from the date of sale, notwithstanding success in the suit, and that the actual substitution of the owner of the pre-empted property dates with possession under the decree."

In accordance with that judgment, which followed the judgment of Mr. Justice Mahmud, it must be held that even if Sawan Singh succeeds in his appeal in this Court his ownership of house B. will not date back to the 17th April 1916 when the house was purchased by Bali Ram, but will date only from the time when he fulfils the terms of the decree that he obtains, and that, up to that time, Beli Ram remains the owner. It follows that the plaintiff's right of pre-emption in respect of house A. is not superior to Beli Ram's and the suit must fail.

I accept the appeal, reverse the decree of the lower Appellate Court, and restore that of the first Court The plaintiff will pay the appellant's costs throughout.

Appeal accepted.

(5) 124 P. R. 1907; 3 P. L. R. 1907; 48 P. W. R. 1907.

(6) 39 Ind. Cas. 958; 44 C. 675; 32 M. L. J. 459; 1 P. L. W. 527; 15 A. L. J. 375; 21 C. W. N. 796; 25 C. L. J. 573; 19 Bom. L. R. 437; 6 L. W. 65; (1917) M. W. N. 470 & 811; 22 M. L. T. 196; 44 I. A. 80 (P. C.).

(7) 12 A. 234 at p. 236; 6 Ind Dec. (N. S.) 898.

*Page of 44 C.—[*Ed.*]

PRABHULINGAPPA KHANGOUDA v. GURUNATH BALAJI.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 272 OF 1918.

July 19, 1920.

Present:- Sir Norman Macleod, KT, Chief Justice, and Mr. Justice Fawcett.

PRABHULINGAPPA KHANGOUDA DESAI—JUDGMENT-DEBTOR—APPELLANT

versus

GURUNATH BALAJI KALKUNDRI—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Decree passed by Court in Native State transferred to Court in British India—Execution proceedings taken in Court in Native State, whether taken in proper Court—Application barred by time—Objection not taken—Subsequent application, whether barred.

Where a decree passed by a Court in a Native State is transferred for execution to a Court in British India all proceedings taken in the Court which passed the decree must be regarded as having been taken in a "proper Court" within the meaning of clause (5) of Article 182 of Schedule I to the Limitation Act and operate to save limitation. [p. 747, col. 2.]

Where an application for execution is barred by time but no objection is taken to it on that score, and proceedings are taken thereunder, it provides a new starting point for limitation. [p. 748, col. 1.]

First appeal from the decision of the First Class Subordinate Judge at Belgaum, in Darkhast No. 321 of 1917.

Mr. *G. S. Rao*, for the Appellant.

Mr. *J. G. Kele*, for Respondents Nos. 1 and 3.

Mr. *S. Y. Abhyankar*, for Respondent No. 2.

JUDGMENT.—This is a first appeal from the decision of the learned Subordinate Judge in *darkhast* No. 321 of 1917. The original suit was decided and a decree was passed in the Sangli Court on the 18th of September 1907. The first *darkhast* presented to the Sangli Court ended on the 25th of June 1907 without any result as the decree-holder failed to pay process fees. The second *darkhast* was filed in the same Court on the 11th of November 1907 and on the 14th of that month that Court transferred the proceedings to the Court at Shahapur. The *darkhast* ended on the 24th of March 1915 after the recovery of Rs. 11,412-3-0. The third *darkhast* was presented in the Sangli Court on the 9th of August 1915. It proved ineffectual and was disposed of on the 10th of November 1915. The next *darkhast* was presented in the Belgaum Court (*darkhast* No. 476 of 1915) and was disposed of without result on the 26th of May 1917. The *darkhast* under appeal was presented to the Belgaum Court on the 27th of August 1917.

It was contended that the *darkhast* was barred by limitation but the Court ordered the *darkhast* to proceed. It is now argued that the period from 1907 to the 10th of November 1915 during which the execution proceedings were pending in the Sangli and Shahapur Courts does not save limitation as those Courts were not proper Courts within the meaning of Article 182, clause (5), of the Indian Limitation Act. 'Proper Court', under Article 182, Explanation II, means the Court whose duty it is to execute a decree or order. It is difficult, then, to see how it can be said that the Sangli and Shahapur Courts were not proper Courts within the meaning of Article 182. I do not see how the ruling cited—*Nabibhai Vazirbhai* v. *Dayabhai Amulakh* (1)—would affect the question. That case only decided that when a decree was incapable of execution in British Courts owing to its being barred on account of the British Law of Limitation, it made no difference that a different law was applicable to the Courts from whose jurisdiction the decree had been transferred for execution. Under section 44 of the Code, the Governor-General in Council may by notification in the *Gazette of India* declare that the decrees of any Civil or Revenue Courts situated in the territory of any Native Prince or State in alliance with his Majesty and not established or continued by the authority of the Governor-General in Council or any class of such decrees may be executed in British India as if they had been passed by the Courts of British India. Therefore, when this decree was transferred for execution to the Belgaum Court, it had to be treated exactly in the same way as if it had been passed by the Court at Belgaum. The period occupied by the execution proceedings in the Sangli and Shahapur Courts must be treated as if the execution proceedings were pending in proper Courts within the meaning of Article 182.

(1) 36 Ind. Cas. 369; 40 B. 504; 18 Bom. L. R. 481.

Then it was suggested that limitation began from the time the second *darkhast* was filed in the Sangli Court, that fresh proceedings had not been instituted within three years of that date, although, as a matter of fact, the *darkhast* was continued and money was being recovered under it until the 24th of March 1915. If a *darkhast* is filed and the Court directs instalments to be paid under it and recovers instalments, it cannot be that while the instalments are being recovered any further proceedings are necessary: *Bapuchand* v. *Mugutrao* (2). Assuming that the third *darkhast* presented on the 9th of August 1915 would have been held to be barred by limitation if the point had been taken, the point was not taken, and proceedings continued under that *darkhast* until it was disposed of on the 10th of November 1915. Then, the next *darkhast* which was presented in the Belgaum Court and continued until it was disposed of on the 12th of May 1917 was within time. In *Desaiappa Khalilappa Desai* v. *Dundappa Malkappa* (3) the same question came up before Mr. Justice Heaton and myself, and, following the decision of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (4), we decided that if an application be admitted and proceedings taken thereunder, although as a matter of fact they would be barred by limitation if an application were made for the disposal of the application on that ground, they provide a new starting point for limitation. Following that decision, it is clear that this *darkhast* was within three years from the previous *darkhast*. Therefore, on that ground the appeal fails.

It may be noted that this question was never raised in the lower Court. The only question argued was whether the Sangli and Shahapur Courts were proper Courts.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

(2) 22 B. 340; 11 Ind Dec (N. S.) 800.
(3) 55 Ind. Cas. 329; 22 Bom L. R. 76; 44 B. 227.
(4) 8 I. A. 123; 8 C. 51 (P. C.); 11 C. L. R. 113; 4 Sar P. C. J. 249; 4 Ind. Dec. (N. S.) 22.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 92 AND 93 OF 1919.

May 21, 1920.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

IN No. 92 OF 1919.

NANDA KUMAR MAJUMDAR—DEFENDANT—APPELLANT

versus

DINABANDHU NANDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN No. 93 OF 1919.

NANDA KUMAR MAJUMDAR—FIRST PARTY—DEFENDANT—APPELLANT

versus

UMED RAJA BHUIA AND ANOTHER—PLAINTIFFS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), s. 85, clause (2)—Landlord and tenant—Sub-lease exceeding nine years, whether admissible in evidence to prove tenancy—Sub-lessee having subsisting tenancy, effect of.

A sub-lease granted by a *raiyat* after the passing of the Bengal Tenancy Act for a term exceeding nine years and registered in contravention of the terms of section 85, clause (2) of the Act is inadmissible in evidence to prove the tenancy of an under-*raiyat*. Where, however, the sub-lessee has a subsisting tenancy he can defend his possession, or recover possession on being dispossessed on the strength of such subsisting tenancy even though the lease cannot be produced to prove the tenancy. [p. 750, col. 2.]

Letters Patent appeal against the following judgment of Mr. Justice Newbould, dated the 26th of March 1917, in Appeals from Appellate Decrees Nos. 1616 and 2575 of 1917.

NEWBOULD, J.—These two appeals arise out of suits for ejectment with regard to two plots of land. The principal defendants in both suits were the mortgagees, of the tenants under the plaintiffs and they purchased in execution of the decree on their mortgage the interest of the mortgagors. The plaintiffs in the suit which leads to the Second Appeal No. 2575 are the transferees of the interest of the plaintiffs in the suit corresponding to Second Appeal No. 1616. The plaintiffs in that suit granted a lease to Kali Charan De who is the mortgagor of the contesting defendants. By that lease three plots of land were let out. With the first plot we are not concerned. As regards the second plot the lessor's interest is described as *raiyati* and the lessee's as under-*raiyati* interest. This is the plot in suit in Appeal No. 1616. In

the third plot the lessor's interest is described as a *kaimi miras raiyati* as well as *raiyati*, and the lessee's interest is described as *kaimi raiyati*. The lease purports to grant a permanent lease of all the three plots at a fixed rent. The first Court decreed the suit holding that this lease was void under the provisions of section 85 of the Bengal Tenancy Act and that, therefore, the contesting defendant obtained no right either by his mortgage or by his purchase at the sale in execution of their mortgage-decree. On appeal by these defendants the lower Appellate Court held that the plaintiffs were estopped by the terms of the lease from denying that their lessees had a permanent interest which was consequently a transferable interest.

There can be no doubt that the lease in question is contrary to the provisions of section 85 of the Bengal Tenancy Act. As regards one plot it distinctly purports to create a permanent under-*raiyati* lease at a fixed rent, and as regards the second of the two plots with which we are now concerned the lessor's interest is described as partly *raiyati*, and it would appear also that the description of *kaimi mirasi raiyati* is not equivalent to asserting a right which would give the lessor power to create a permanent subordinate interest. In the case of *Meher Ali* v. *Kolai Khalashi* (1) it was held that the use of the word *kaimi* by the grantor of a lease did not impart fixity of rent but only permanence of occupation of the land.

As regards what is the effect of the lease granted in contravention of the provision of section 85, it is sufficient to refer to what I believe to be the latest reported case on the subject *Chandi Charan Nath* v. *Somla Bibi* (2). In that case, sitting alone, I held that the doctrine of estoppal could not be invoked or applied so as to defeat the provisions of the Statute, and on Letters Patent Appeal the decisions of this Court were reviewed by Beachcroft, J., who summed up his conclusion at page 188 as follows :—'The authorities, therefore, point to this that the validity of the lease can be questioned by the grantors.' It is clear, therefore, that the plaintiffs were not estopped from questioning the validity of the lease granted by them in the present case.

It is contended that there was an estoppal because the defendants were not advanced money on the representation that the lease was a permanent heritable one. The lease, on the face of it, could not be valid in respect of the plot in which the lessee's interest is described as an under *raiyati* interest, and it was obviously the duty of the defendants, before lending money on the mortgage of the interest created by this lease to ascertain whether the plaintiffs had such rights that they could grant a valid lease in respect of the other plots. Further, even as regards the second plot, as I have pointed out, there is no allegation in the lease that the right of the lessors was either that of a tenure holder or a *raiyati* at fixed rate, in which case alone could they have created a permanent interest subordinate to their own. The learned Additional District Judge is clearly wrong in holding that the plaintiffs were estopped, and no attempt has been made before me to support the decree on any other ground except that of estoppel.

The result, therefore, is that these appeals must be decreed and the decrees of the lower Appellate Court set aside and the decrees of the Munsif restored.

The appellants will get their costs of this Court and of the lower Appellate Court.

Dr. *Sarat Chandra Basak* (with him Babu *Bepin Chandra Bose*), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for ejectment. The first Court decreed the suit. The lower Appellate Court dismissed the suit. On appeal to this Court Newbould, J., restored the decree of the first Court. On appeal under section 15 of the Letters Patent the case was remanded for determination of certain issues relating to the nature of the landlord's interest at the time of the lease. The plaintiffs, Nundies, granted a permanent lease to one Kali Charan Dey who mortgaged the properties to defendant and in execution of the mortgage-decree he purchased Kali Charan's interest. Thereafter the present suit was instituted on the allegation that

(1) 29 Ind. Cas. 461; 19 C. W. N. 1129; 27 C. L. J. 579.

(2) 44 Ind. Cas. 254; 22 C. W. N. 179; 28 C. L. J. 91.

*Page of 22 C. W. N.—[*Ed.*]

Kali Charan was a *raiyat* and, therefore, my clients were liable to ejectment as the lease was invalid. The question for determination is, whether a tenant who has granted a permanent lease can subsequently be permitted to question the validity of his grant. I am the party in possession and I am defending my right as under-*raiyat*. There are many conflicting rulings on the point. Refers to *Rashed Kazi* v. *Pachoo Sardar* (3). Further, there have been served no notice to determine the subsisting tenancy in the land. As regards estoppel, one-third was acquired before the grant. As regards the other two-thirds, the doctrine would apply. Supposing that the grantor had no right when he made a permanent grant but subsequently acquired the right, that would I submit surely feed the estoppel. Refers to section 43 of the Transfer of Property Act; *Chandi Charan Nath* v. *Somla Bibi* (2). In view of the conflicting decisions, I would ask your Lordships to refer the case to the Full Bench. Refers to *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (4).

Babu *Jotindra Mohan Ghose*, for the Respondents.—The present appellant is a mortgagee in possession. The mortgagor having walked out, the mortgagee is a mere trespasser. That is my case throughout. The defendant purchased the property on 2nd Asar 1320 in execution of the mortgage-decree. Section 43 of the Transfer of Property Act is wholly inapplicable in view of section 3, Transfer of Property Act. Refers to *Radha Bai* v. *Kamod Singh* (5). Neither can the doctrine of estoppel apply. The main reason being the transfer is void *ab initio*. Section 85 of the Bengal Tenancy Act is clear on the point. Refers to *Chandi Charan Nath* v. *Somla Bibi* (2), *Jarip Khan* v. *Durfa Bewa* (6). There is no conflict of decisions. The tenancy is not subsisting. That differentiates the present case from other cases.

Dr. *Basak*, in reply.

JUDGMENT.

In No. 92 of 1919.

This case and Appeal No. 93 were remanded for findings on certain points. They relate to the nature of the landlord's interest at the time of the lease to Kali Charan Dey.

It has been found in the other case (Second Appeal No. 2575 of 1917) that the landlord had the right of a permanent tenure holder in one-third of the property, and subsequently acquired a permanent right to two thirds share. In the present case (Second Appeal No. 1616 of 1917) the landlord had only the interest of a *ryot*. A sub-lease was granted by the landlord and as he had only a *ryot's* interest, the interest created in favour of the lessee was that of an under *ryot*. The lease purported to grant a permanent transferable interest. A sub-lease granted by a *ryot* after the passing of the Bengal Tenancy Act for a term exceeding nine years and registered in contravention of the terms of section 85, clause (2) is inadmissible in evidence to prove the tenancy of an under-*ryot* [*Jarip Khan* v. *Durfa Bewa* (6)].

When, however, the sub-lessee has a subsisting tenancy, it has been held that he can defend his possession, or recover possession on being dispossessed, on the strength of such subsisting tenancy even though the lease cannot be produced to prove the tenancy.

In the present case, it was alleged that a notice was served upon the original tenant, Kali Charan, and that a suit based upon that notice resulted in a decree for ejectment under section 49 of the Bengal Tenancy Act. It was found at some stage of the litigation that that decree was a collusive one. The finding as to the notice having been served, however, is not clear, but the question is not material in the present case because the person in possession of the property is not the original tenant, or his heirs who might have been entitled to a notice to quit, had they been in possession under a subsisting tenancy. The person in possession, the defendant, in execution of a mortgage decree against the original tenant purchased the property. The under-*ryoti* interest is not transferable apart from the lease and the lease being inadmissible in evidence, the defendant cannot, we think, rely upon the invalid lease.

(3) 42 Ind. Cas. 534.
(4) 35 Ind. Cas. 754; 24 C. L. J. 541; 20 C. W. N. 1340; 44 C. 771.
(5) 30 A. 38; 4 A. L. J. 696; A. W. N. (1907) 276.
(6) 15 Ind. Cas. 476; 16 C. L. J. 144; 17 C. W. N. 59.

MANEKL'L v. BAI AMAA.

We have been asked by the learned Pleader for the appellant to refer the case to a Full Bench, having regard to the difference of judicial opinion upon the question whether the grant of a sub lease in contravention of the provisions of section 85 (2) of the Bengal Tenancy Act is binding as between the lessor and the lessee.

In a recent case of *Rashed Kazi* v. *Pachoo Sardar* (3) Fletcher and Newbould, JJ., in declining to refer the case to a Full Bench, observed as follows:—"We have been asked to refer the case to a Full Bench. But the decision in *Jarip Khan* v. *Durfa Bewa* (6) has been followed on more than one occasion and the learned Judges who decided the subsequent cases did not consider that the point required the decision of a Full Bench. The learned Judges, I suppose, who decided these cases came to the conclusion that this point was a new point that had not been before the Court in the earlier cases and that, if it had been, the Court would have arrived at a different conclusion. However, as the other Benches consisting of other learned Judges saw no difficulty in following the case of *Jarip Khan* v. *Durfa Bewa* (6) in other cases, I do not think we ought to refer the matter to a Full Bench."

We have been referred to the decision in the case of *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (4). But that case may be distinguished on two grounds. The *first* is, that there was a distinct representation on the part of the lessor that he was a tenure-holder and had, therefore, a right to grant the *ryoti* lease; and, *secondly*, that there was a subsisting tenancy under which the sub-lessee was entitled to succeed.

The latest case on the point that has been brought to our notice is that of *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (4) cited above, and the learned Judges in that case declined to refer the case to a Full Bench. We also do not think it necessary, for the reasons stated in the judgment in that case, to refer this case to the Full Bench.

In the circumstances, we think the Letters Patent Appeal No. 92 in Second Appeal No. 1616 of 1917 must fail and is dismissed with costs.

IN No. 93 OF 1919.

In this case, as stated above, the landlord had the right of a permanent tenure-holder to one-third share of the property at the time when he granted the lease, and it has been found that, subsequent to the grant of the lease, he acquired a permanent right to the rest of the land. The lease was not described as an under-*ryoti* lease. In these circumstances, the lease was not invalid and is binding upon the landlord.

This appeal is allowed and the suit dismissed with costs.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 437 OF 1919.

July 19, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

MANEKLAL VAMANRAO AND OTHERS —PLAINTIFF—APPELLANT

versus

BAI AMBA—DEFENDANT—RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), s. 83—Landlord and tenant—Ejectment—Permanent tenancy—Burden of proof.

The presumption is that a tenant is an annual tenant and the onus lies on him to prove that he is something more. If he wishes to prove that he is a permanent tenant he must prove, first of all, if he has not got a document of permanent tenancy, the antiquity of his tenure. If he succeeds in establishing this, then the second paragraph of section 83 of the Bombay Land Revenue Code comes into operation. The landlord has to prove that there is evidence of the intended duration of the tenancy either by agreement or by usage. If he cannot do that, then it is presumed that the tenancy is co-extensive with the duration of the tenure of the andlord. [p. 752, col. 1.]

Second appeal from the decision of the Assistant Judge, Surat, in Appeal No. 68 of 1918, reversing the decree passed by the Second Class Subordinate Judge at Olpad, in Civil Suit No. 19 of 1917.

KIRAN CHANDRA v. BONO BEHARI DATTA.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *J. G. Rele*, for Mr. *R. W. Desai*, for the Respondent.

JUDGMENT.—The plaintiffs filed this suit in ejectment. The defendant pleaded that she was a permanent tenant. The Trial Court gave the plaintiffs a decree which was reversed in appeal. It is curious that a Judge of the experience of Mr. Bhatt should have considered that the onus lay on the plaintiffs in an ejectment suit to prove that the tenancy was an annual one. The presumption is that the tenant is an annual tenant and the onus lies upon him to prove he is something more. But it is perfectly clear that that initial error of the learned Judge had no effect on the final decision. If we strike out the whole of that paragraph where he considers the case from the point of view of the plaintiffs, and begin with the paragraph where he deals with the defendant's evidence, the decision still remains correct. A defendant who wishes to prove he is a permanent tenant must prove, first of all, if he has not got a document of permanent tenancy, the antiquity of his tenure. The Judge on the evidence of the witnesses came to the conclusion that the antiquity of the tenancy at a uniform rent could not be doubted. Then the second paragraph of section 83 of the Bombay Land Revenue Code comes into operation. The landlord has to prove that there is evidence of the intended duration of the tenancy either by agreement or by usage. If he cannot do that, then it is presumed that the tenancy is co-extensive with the duration of the tenure of the landlord. So we think the decision of the lower Court is right.

The appeal must be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 658, 671, 1113 AND 1114 OF 1918.

April 29, 1920.

Present:—Mr. Justice Newbould.

IN NO. 658 OF 1918

Rai KIRAN CHANDRA RAI BAHADUR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BONO BEHARI DATTA AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

IN NO. 671 OF 1918

BANA BEHARI DUTT AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Rai KIRAN CHANDRA RAI BAHADUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN NOS. 1113 AND 1114 OF 1918

BANA BEHARI DUTT AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NARENDRA BHUSAN RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Res judicata—*Rent, rate of, decision as to, in suit for enhancement—Subsequent suit for rent—Previous decision, effect of—Fraud—Pleader, failure of, in duty, whether fraud on part of principal.*

In a suit for enhancement of rent the question of the rate of rent is an issue which must necessarily be decided by the Court, and the Court's decision on that point would operate as *res judicata* in a subsequent suit for rent in which the same question is in issue. [p. 754, col. 1.]

The failure by a Pleader to allow essential points to be overlooked does not amount to fraud on the part of his principal. [p. 754, col. 2.]

Appeals against the decrees of the Subordinate Judge, First Court, Jessore, dated the 20th of December 1917, affirming that of the Munsif, First Court at Jhinidah, dated the 26th of January 1917.

FACTS appear from the judgment.

Dr. *Jadunath Kanji Lal* (with him Babus *Pareshnath Mukherjee, Kanaidhon Dutt, Harinath Banerjee*, and *P. N. Mukherjee*), for the Appellants in Nos. 671, 1113 and 1114 of 1918.—These appeals arise out of three rent suits and the question in controversy is the rate of rent payable. The plaintiffs have obtained decrees on the basis of a previous *ex parte* decree for rent. The defendants are the appellants before your Lordships.

My contentions are three in number,—(1) Having regard to the Full Bench deci-

sion in *Modhusudun Shaha* v. *Srae* (1), a previous decree for rent cannot operate as *res judicata* as to the rate of rent. Refers also to *Maharaja Jotindra Mohun Tagore* v. *Shumbhu Chunder Bhuttacharjee* (2), *Maharani Beni Pershad Koeri* v. *Raj Kumar Chowbey* (3), *Kali Roy* v. *Pratap Narain* (4) and *Kailash Mondul* v. *Baroda Sundari Dasi* (5).

Secondly, the Courts below ought to have held that the *ex parte* decrees were vitiated by fraud and were, therefore, not binding upon the defendants. See section 44 of the Evidence Act. The question of fraud is one of mixed law and fact and I am entitled in second appeal to question the conclusion of the Courts below as to whether the *ex parte* decrees were vitiated by fraud. It was the duty of the Pleader who appeared for the plaintiffs in these *ex parte* cases to draw the attention of the Court to the actual quantity of land in respect of which the rent was going to be fixed. His failure to do so amounted in law to a fraud on the part of the plaintiffs and had the effect of vitiating the decrees by fraud.

Finally, your Lordship will be pleased to see that in a subsequent suit it was agreed between the parties that the question as to the rate of rent should be left open. The decree in this subsequent suit re opened the whole matter and, therefore, the previous *ex parte* decrees no longer operated as *res judicata* as to the rate of rent.

Babu *Provash Chandra Mitter* (with him Babus *Surendra Chandra Sen*, *Mon Mohan Bose* and *Surendranath Bose*), for the Respondents in Nos. 671, 1113 and 1114 of 1918. —The *ex parte* decrees which operate as *res judicata* were obtained in suits for enhancement of rent. On this ground the authorities cited by my learned friend are distinguishable. There is no authority or principle in the argument advanced by my learned friend that the decision in a suit for enhancement of rent does not operate as *res judicata* as to the rate of rent.

The question of fraud is concluded by the findings of fact which cannot be questioned in second appeal. I do not dispute the general proposition enunciated by my learned friend that it is the duty of a Pleader to put all the facts of a case before the Court, but my submission is that such failure to discharge his duty on the part of a Pleader cannot amount to fraud on the part of the client. If a Pleader fails in his duty in a matter like this, the client ought not to suffer.

Then, as regards the effect of the decrees in suits subsequent to these *ex parte* decrees, I would draw your Lordship's attention to the arrangement between the parties by which it was agreed that the plaintiffs would not lose any right which they might have acquired under the previous *ex parte* decrees. The operation of the *ex parte* decrees, therefore, remained unaffected by express agreement.

Babu *Pareshnath Mukherjee* replied.

IN No. 658 OF 1915.

Babus *Surendra Chandra Sen* and *Surendranath Bose*, for the Appellant.

Dr. *Jadunath Kanji Lal* and Babu *Biraj Mohan Mazumdar*, for the Respondent.

JUDGMENT.

IN No. 658 OF 1918.

Four suits were instituted and disposed of in one judgment both by the first Court and by the lower Appellate Court. Three were decreed in full and one was decreed in part and the decrees of the first Court were upheld by the lower Appellate Court. In this second appeal the plaintiff is the appellant and his contention is that he should have obtained a decree for the full amount of his claim. In these four suits there are two sets of plaintiffs, one set are the owners of 13 annas, 4 pies interest and the other set of 2 annas, 8 pies interest. The appellants in this appeal are the owners of the 13 annas, 4 pies interest. They claim rent on the basis of an *ex parte* decree passed in 1906 in a suit brought by the 16 annas cosharers. Though the lower Court has held that this decree acted as *res judicata* at a fixed rate of rent, it has given a decree at the lower rate in this case on the finding that, after that decree, the plaintiff accepted rent from the defendants at the lower rate of Rs. 4 instead of the rate claimed, *i. e.*, Rs. 12-8-0. Though the first Court's judgment gives good reasons for this decision the learned Subordinate Judge in upholding this decision has fallen into an error in stating the materials on which his decision

(1) 16 C. 300; 8 Ind. Dec. (N. s.) 197.
(2) 4 C. W. N. 43
(3) 6 C. W. N. 589.
(4) 5 C. L. J. 92.
(5) 24 C. 711; 1 C. W. N. 565; 12 Ind. Dec. (N. s.) 1143.

is based. One of the grounds of his decision is that the plaintiff sued the defendants for rent at the lower rate. It is conceded on the part of the respondents that there was never any suit for rent at the lower rate subsequent to the suit of 1906. The mistaken idea that there had been such a suit must have strongly influenced the learned Subordinate Judge in coming to his decision. It is necessary, therefore that he should re-hear the case and consider whether, on the evidence, it is established that the plaintiff by his conduct subsequent to the decree of 1906 is barred from successfully claiming rent at the rate then decreed. The result is that this appeal is decreed, the judgment and decree of the lower Appellate Court are set aside and the appeal remanded to the lower Appellate Court for re-hearing and decision on the evidence on the record. Costs will abide the result.

IN Nos. 671, 1113 AND 1114 OF 1918.

These three appeals arise out of three rent suits and the question to be decided is the rate of rent payable by the defendants. The plaintiffs have obtained decrees on the basis of former *ex parte* decrees for rent and the contention of the appellants is that these *ex parte* decrees are not binding and do not operate as *res judicata*.

The first contention is based on the Full Bench ruling in *Modhusudun Shaha* v. *Brae* (1) in which it has been held that a previous decree for rent does not necessarily operate as *res judicate* as to the rate of rent. Several other rulings were cited but none of them, in my opinion, carries the appellant's case any further than the authority of the Full Bench ruling; these cases now under consideration are distinguishable on the ground that the decrees which were obtained were decrees in suits for enhancement of rent. In such a suit the question of the rate of rent was an issue which must necessarily be decided by the Court and the Court's decision on that point would operate as *res judicata*. In a suit for enhancement of rent the declaration of the rate of rent is part of the substantive relief claimed, and that is sufficient to make the Full Bench ruling inapplicable to the present case.

The next point taken is that these *ex parte* decrees were vitiated by fraud. Both the lower Courts have held that there was no fraud. It is contended that the existence of fraud is a question of mixed law and fact and that, on the facts found, it should be held that one of these decrees, that of 1906, was obtained by what in law amounted to fraud. It appears that in this suit the defendants filed a written statement and issues were framed. Then, before the case came on for hearing, it was adjourned more than once because there was a talk of compromise. The compromise fell through and finally the suit was decreed *ex parte* in the absence of the defendants. Previous to this, a local enquiry had been held by the trying Munsif and he had come to the conclusion that the area of the land which was under claim was not $2\frac{1}{2}$ *cottas* as alleged by the plaintiffs but 2 *cottas*. It is found that when the Munsif gave judgment he overlooked the actual quantity of the land, and it is suggested that it was the duty of the Pleader who appeared for the plaintiffs in that case to draw the attention of the Munsif to his previous finding and that his failure to do so in law amounted to a fraud on the part of the plaintiffs. The learned Pleader for the respondents in these appeals does not dispute the general proposition that it is the duty of a Pleader to put all the facts of the case before the Court and not to allow essential facts to be overlooked. But I think I must accept his contention that, even if a Pleader fails in his duty, though he may be liable to reprimand or possibly punishment under the Legal Practitioners Act, it cannot be said that such conduct amounts to fraud on the part of his principal his client. So far as any other fraud is alleged, the findings of fact of the lower Appellate Court are conclusive in the plaintiff's favour and I cannot hold there was in these cases such a fraud as would justify me in holding, under section 44 of the Evidence Act, that the previous decree did not operate as *res judicata*.

The last contention is that the effect of these decrees was nullified by subsequent decrees in suits brought in 1912 in which it was agreed between the parties that the question of the rate of rent should be left open. It is contended that these decrees re-opened the whole matter and the previous decrees no longer operate as *res judicata* in fixing the rate of rent. But it appears that, in

coming to this arrangement, the parties also agreed that "the plaintiffs would not lose any right which they might have acquired in the previous suits between the parties and their position would remain unaffected by the result of these suits;" that is to say, it was expressly agreed that if these decrees of 1906 and 1908 had in law the effect of settling the rent payable by the defendants that right of the plaintiffs would not be lost by the decrees in the suits of 1912. For the above reasons, I hold that the lower Appellate Court was right and that the previous decrees operated as *res judicata* on the question of the rate of rent payable.

The appeals are accordingly dismissed with costs.

Appeals dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 427 OF 1919.

July 13, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

RAJMAL GIRDHARLAL MARWADI —PLAINTIFF—APPELLANT

versus

MARUTI SHIVRAM AND OTHERS— DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Sch. II, paras. 20, 21—Arbitration—Award—Order refusing to file award, whether res judicata *—Suit to enforce award, whether barred—Limitation for suit—Limitation Act (IX of 1908), Sch. I, Art. 120.*

Although an application under paragraph 20 of Schedule II to the Civil Procedure Code to file an award is numbered and registered as a suit, proceedings under paragraphs 20 and 21 of the Schedule are not proceedings in a suit. [p. 755, col. 2.]

Where an application to file an award is rejected, a suit to enforce the award is not barred by the rule of *res judicata*. [p. 756, col. 1.]

A suit to enforce an award is not provided for by any other Article of the Limitation Act: such a suit is, therefore, governed by Article 120 of Schedule I to the Act. [p. 756, col. 1.]

Appeal from the decision of the District Judge, Ahmednagar, in Appeal No. 20 of 1918, confirming that of the Subordinate Judge at Parner, in Civil Suit No. 349 of 1916.

Mr. *A. G. Desai*, for the Appellant.

Mr. *I. N. Mehta* (with him Mr. *M. B. Dave*), for Respondents Nos. 1 and 2.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to enforce an award against the defendants. Various issues were raised in the Trial Court. The 4th issues was—Is the suit barred by limitation? The Trial Court held that the suit was barred. It proceeded to find on the remaining issues. The result was that the suit was dismissed.

In appeal the learned Appellate Judge held that the suit itself was not barred by limitation, but that it was barred by the rule of *res judicata*. It appears that the award was made on the 28th November 1910. The plaintiff then applied to file the award under paragraph 20 of the Second Schedule to the Civil Procedure Code. That application was rejected on the 12th January 1914. The plaintiff could appeal against that order under section 104 of the Civil Procedure Code. The plaintiff did appeal to the District Court, and also applied to the High Court in revision, but in both Courts the lower Court's decision was upheld.

It has now been argued that the question whether the plaintiff is entitled to get a decree on the award is *res judicata* and this suit was, therefore, barred. It can only be *res judicata* if the application to file the award can be considered as a suit. No doubt the application under paragraph 20 of the Second Schedule to the Civil Procedure Code is numbered and registered as a suit. But it does now follow that it thereby becomes a suit within the meaning of the word 'suit' in the Code. The procedure followed is not that of a suit, but the procedure regulated by paragraph 21. The Court can only consider whether any ground such as is mentioned or referred to in paragraph 14 or 15 is proved and the Court has power either to order the award to be filed or to refuse to file the award. If it orders the award to be filed, then it must pronounce judgment according to the award, and upon the judgment so pronounced the decree shall follow. Under section 11 of the Civil Procedure Code no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. It cannot be said that the proceedings under paragraphs 20 and 21 of the Second Schedule were proceedings in a suit, though for the purposes of convenience they may be numbered and registered as a suit. Order IV refers to

the institution of suits. Rule 1 says that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. Then the following Orders refer to the issue and service of summons and the proceedings that must follow when a regular suit has been instituted. This question was decided in *Kunji Lal* v. *Durga Prasad* (1) in which the Court felt itself bound to follow the series of decisions of its own Court, although the learned Judges seemed to think that there were some expressions in the case of *Ghulam Khan* v. *Muhammad Hasan* (2) from which it might be considered that their Lordships of the Privy Council were of opinion that an order made under old section 525 was a decree. No doubt, a decree can be made when the Court pronounces judgment on the award, and there being no appeal against that, the question whether a suit could be filed to enforce the award would never arise. An order refusing to file an award is a different matter. It cannot be considered as a decree. In my opinion, therefore, this suit is not barred by *res judicata*. It is not barred by limitation, because it seems to be settled now that a suit to enforce an award is a suit not provided for by any other Article of the Limitation Act. Then the time is six years under Article 120. The appeal, therefore, must be allowed and the case remanded to the lower Appellate Court for decision on the remaining issues. The appellant must get his costs of the appeal.

FAWCETT, J.—I agree that the word 'suit' in section 11 of the Civil Procedure Code cannot properly be extended to cover an application under paragraph 20 of the Second Schedule of the Code even though such application is to be registered as a suit. In *Gokul Mandar* v. *Padmanund Singh* (3) their Lordships of the Privy Council, with reference to section 13 of the then Civil Procedure Code, corresponding to the present section 11, made the well known remark that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the law and the enactment according to its true construction. Also in *Ram Kirpal* v. *Rup Kuari* (4) their Lordships held that judgment in execution proceedings would have a binding force not under this particular section but upon general principles of law. It is upon such general principles that the learned District Judge has apparently gone in holding that the present suit is barred. But the adjudication on an application to file an award under paragraph 20 is restricted, under paragraph 21, to a particular class of questions, and I do not think, in those circumstances, that the general principles of *res judicata* should be held to be applicable so as to bar the right of suit to a person who has succeeded in obtaining the award. The only authority on the question that has been cited to us is also against any such doctrine.

As regards the question of limitation, it has already been held in this Court in *Firdunji* v. *Jamsedji* (5) that a suit on an award to recover a certain sum of money allowed by the arbitrator is not a suit for specific performance, and, therefore, this Court should agree with the decisions which hold that such a suit as the present does not fall under Article 113 of the Indian Limitation Act.

Since the oral delivery of the above judgment, my attention has been drawn to the observations of the Judicial Committee in *Muhammad Nawaz Khan* v. *Alam Khan* (6) which [according to the view taken in *Ponnusami Mudali* v. *Mandi Sundara Mudali* (7)] clearly imply that any matter which is directly and substantially in issue and is determined in a proceeding under section 525 (corresponding to paragraph 20 of Schedule II of the present Code) would be *res judicata* in any subsequent litigation between the same parties. With due respect, it seems to me that their Lordships left entirely open the question whether an applica-

(1) 6 Ind. Cas 127; 32 A 484; 7 A. L. J. 425.

(2) 29 C. 167 (P. C.); 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902.

(3) 29 C. 707 at p. 718 (P. C.); 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323.

(4) 6 A. 269 (P. C.); 11 I. A. 37; 4 Sar. P. C. J. 459; 3 Ind. Dec. (N. S.) 718.

(5) 5 Bom. L. R. 705; 28 B. 1.

(6) 18 C. 414 (P. C.); 18 I. A. 73; 15 Ind. Jur. 284; 6 Sar. P. C. J. 26; 70 P. R. 1891; 9 Ind. Dec. (N. S.) 276.

(7) 27 M. 255 (F. B.); 14 M. L. J. 356.

tion under section 525 is a suit such as is contemplated in section 13 (see at p. 419). But, even assuming it was such a suit, they held that the mere refusal to file an award would not constitute a binding judgment against the validity of the award, unless the particular ground on which its validity is assailed was definitely raised and put in issue and made the subject of a trial. In the present case the question of the validity of the award does not appear to have been so tried in the proceedings on the application to file the award; for the application was summarily rejected on the ground that, treated as a suit, it was time-barred.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 191 OF 1919.

July 17, 1920.

Present:—Mr. Hallifax, A. J. C.

ADKIA—DEFENDANT—APPLICANT

versus

SHANKAR RAO AND OTHERS—PLAINTIFFS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 3—Execution of decree—Judgment-debtor, death of—Legal representative minor—Application to bring legal representative on record—Guardian, appointment of—Procedure.

Where the legal representatives of a deceased judgment-debtor are minors and an application is made to bring their names on to the record under the guardianship of their mother, it is incumbent on the Court, under Order XXXII, rule 3, Civil Procedure Code, before making any order adverse to them, to call upon each minor to show cause against the appointment of his mother as his guardian and to call on the mother to show cause against her appointment, and in the event of her expressing willingness and her being found fit to record an order appointing her guardian and to afford her an opportunity to show cause why the decree should not be executed against the minors [p 7 8, cols 1 & 2.]

Civil revision against the order of the Small Causa Court, Nagpur, in Civil Suit No. 52 of 1919 decided on the 7th May 1919.

Messrs. *A. V. Zinjardey* and *A. P. Sathaye*, for the Applicant,

Mr. *G. V. Deshmukh*, for the Non-Applicants.

JUDGMENT.—The non-applicants in this case obtained a decree for Rs. 240 and Rs. 20 as costs against one Polji Gond on 5th February 1914. On 20th April 1916 the decree holders applied for execution, but on 30th June 1916 they appeared and stated that the judgment-debtor, Polji, was dead and asked to have the names of his three sons and his widow substituted for him in the decree praying that the two younger sons, who were minors, should be impleaded under the guardianship of their mother, *Musammat* Hasa. An order was passed that notices should issue "to the legal representatives under Order XXI, rule 22, Civil Procedure Code, for 23rd August 1916"; that is to say, with no advertence whatever to the fact that the two of the legal representatives were minors. Notices were issued to Paikia, Ghulia and Adku, the three sons named. Paikia's notice calls on him to show cause why the decree should not be executed against him. The notices addressed to the minors Ghulia and Adku described them as under the guardianship of their mother, Hasa, and called on them to appear for the purpose of having a guardian appointed. Nothing is said about showing cause against the execution of the decree nor about the proposal to appoint *Musammat* Hasa as guardian. These two notices were served on *Musammat* Hasa to whom personally no notice appears to have been sent at all. It is possible that a notice of some sort did issue to her at this hearing but it is not now to be found on the record. The order of 23rd August 1916 says it was served. That of 1st November 1916 says it was "misplaced in some other record" and orders fresh notice to issue, and in the margin I find in pencil the three words "notice found out" though it is not now on the record. As the original application did not ask for a notice to go to *Musammat* Hasa herself it may fairly be assumed, in these circumstances, that none was sent.

The order passed on 23rd August 1916 was as follows:—"Decree holder by agent Sadasheo. Deceased judgment debtor Polji's heirs are his sons Paikia, Ghulia and Adku. The last two are minors. Their guardian *Musammat* Hasa is served. Paikia is not

properly served. Fresh notice to issue to Paikia". At the next hearing Paikia was absent. He was held to be duly served and a fresh notice was ordered to issue to *Musammat* Hasa as already mentioned. This called on her personally to show cause against the execution of the decree against herself. It contains no mention of the minors. On 2nd December 1916 the following order was passed : "Appellant (D. H.) by agent Sadasheo. Non applicant Paikia absent though served before. Hasa M. G. of the other two non-applicants is absent though served. She refused to take and sign the summons. D. H's affidavit proves that the three non-applicants are the sons and heirs of the deceased J. D. Polji. Let their names be substituted as the legal representatives of the deceased J. D. Costs on non-applicants Rs. 3".

A more complete disregard of the provisions of Order XXXII, rule 3, it would be hard to find. What was required in this case under Order XXXII, and Order XXI in regard to each minor was,—

(1) Service of notice on the minor asking him to show cause against the appointment of *Musammat* Hasa as his guardian.

(2) Service of notice on *Musammat* Hasa, the actual and natural and also the proposed guardian, asking her to show cause against her own appointment.

(3) The passing of an order appointing her guardian after she had expressed her willingness and the Court had found her fit.

(4) The granting of an opportunity to *Musammat* Hasa as guardian to show cause why the decree should not be executed against the minors.

Not a single one of these essentials was complied with. No notice was sent to anybody to show cause against the appointment of *Musammat* Hasa as guardian. She never agreed to act as such and, indeed, she gave some indication of unwillingness to do so by refusing to accept service of the summons for appearance on 2nd February 1916. She never appeared and the Court never ever began to consider her fitness for the guardianship of the minors and never by the remotest implication appointed her. Finally, the minors have never in any way, either through their mother or directly, been called upon to show cause why the decree should not be executed against them.

After the substitution of names ordered on 2nd December 1916 the decree was transferred to another Court for execution. The attachment of tenancy land was made and on that the minor Adku applied, through his sister's husband Ganpati Gond, as his next friend, to have his name removed from the list of legal representatives of his deceased natural father Polji on the ground that he had been adopted by his father's brother Lakhwa. He was called on to prove this and, after recording evidence, the learned Judge held that he was bound by the previous order of his predecessor in the matter and could not set aside or alter it.

I do not think it necessary to discuss the rights or wrongs of this order, which is the order I am asked to set aside in revision. The proceedings, as far as the two minors are concerned, are hopelessly bad and illegal from the very first mention of their names and even in the interests of the decree-holders themselves these proceedings must be set aside. I, therefore set aside every proceeding or order in this case of the 18th October 1917 or any later date so far as it affects either of the minors Ghulia and Adku. Their names should be entirely removed from the record. All the proceedings affecting their elder brother Paikia and their mother *Musammat* Hasa personally will, of course, stand. The non applicants will pay all the costs incurred by or on behalf of both the minors in the execution proceedings and those incurred by Adku in these proceedings. The Pleader's fee in this Court will be Rs. 15.

Application allowed.

BAPU TATYA *v.* BALA RAOJEE DESAI.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 649 OF 1919.

July 16, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

BAPU TATYA DESAI—PLAINTIFF—APPELLANT

versus

BALA RAOJEE DESAI—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 7, Sch. I, Art. 44—Hindu Law—Joint family—Sale by mother as guardian—Suit by sons to recover property more than three years after eldest has attained majority, whether barred.

Where property belonging to minor Hindu brothers who constitute a joint family is alienated by their mother as their natural guardian a suit by the brothers to recover the property after setting aside the alienation brought more than three years after the eldest of them has attained majority is barred by time. [p. 759, col. 2.]

Second appeal from the decision of the Assistant Judge, A. P., at Satara, in Appeal No. 391 of 1918, reversing the decree passed by the Joint Subordinate Judge at Tasgaon, in Civil Suit No. 113 of 1915.

Mr. *K. H. Kelkar*, for the Appellant.

Mr. *K. N. Koyajee*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued to recover possession of a moiety of the plaint lands after setting aside the sale-deed passed on 28th July 1905 by their mother during their minority. The three plaintiffs are brothers, members of a joint family, and it is admitted that the third plaintiff was more than 21 years when he filed the suit. Therefore, under Article 44 of the Indian Limitation Act, the suit as against him was clearly barred. The question arises whether section 7 of the Indian Limitation Act is applicable and whether the bar also applies to the first and second plaintiffs who are still minors. They will be barred if the third plaintiff could have given a discharge and acquittance of all claims against the defendants without the concurrence of the first and second plaintiffs as manager of the joint Hindu family. Now, the cause of action which the plaintiffs had owing to the sale-deed executed by their mother being, as they alleged, contrary to their interest, was a joint cause of action, and time would run against them all when one of them became entitled to give a discharge without the concurrence of the others: see *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (1). I agree with the reasoning of the learned Appellate Judge at page 2 of the print, where he says :

"It is not denied that the plaintiff No. 3 is the managing member of the family; hence he had a right, as soon as he attained majority and became such managing member, to bring a suit *as such manager* for recovery of not only his share of the alienated property, but of the whole of the alienated property, including his minor brothers' shares, *treating the whole as family property* improperly alienated during the minority of himself and his younger brothers. If he fails to do so within the period allowed by Article 44 of the Limitation Act, the minor brothers cannot be allowed to contend that they had separate causes of action to recover their shares alone, apart from the cause of action of the adult managing member to recover *the whole*. I, therefore, hold that the whole suit is time-barred."

The test seems to be this: supposing the third plaintiff had brought a suit within three years of attaining majority to set aside the alienation made by his mother, and that suit had been dismissed, would the next brother be allowed to file a suit and also any other brothers there might be, who were minors at the time, as soon as they came of age? It appears to me that the cause of action would be joint amongst them all, the issue being whether the alienation made by their guardian mother was a proper one, and when once that point has been decided in a suit filed by one of the sons who is entitled to be considered as a manager of the joint family, then that decision would be binding on them all. In my opinion, the decision of the learned Appellate Judge was correct and the appeal should be dismissed with costs.

FAWCETT, J.—I agree that the appeal should be dismissed with costs. The main question is, whether the plaintiff No. 3 could have given a discharge as manager

(1) 21 Ind. Cas. 350; 15 Bom. L. R. 882; 38 B. 94.

of the joint Hindu family consisting of himself and his minor brothers without the concurrence of the latter. On this point it has been laid down by the Privy Council in *Kishen Prishad* v. *Har Narain Singh* (2) that the manager of a joint family business has a power of making contracts, giving receipts, and compromising or discharging the claims ordinarily incidental to the business; and, having regard to the extensive powers of a manager of a joint Hindu family, which includes a power to contract debts for the family, it seems clear that he has power to give a discharge without the concurrence of the minor members of the joint family. It was argued for the appellants that he can only do so for the benefit of the family, but this seems to me to be immaterial. Under section 7 of the Indian Limitation Act, we have only to consider whether the manager can give a discharge without the concurrence of the minor members of the family, and the answer clearly is that he can—although, no doubt, if he does not do it for proper purposes, that discharge might be invalid so far as the interests of the minor members of the family are concerned. The ruling in *Doraisami Sirumadan* v. *Nondisami Saluvan* (3) is an authority that the suit is barred in such a case as the present, and it seems to me that the reasoning on which that case proceeds is sound. In *Ganga Dayal* v. *Mani Ram* (4), no doubt, the contrary view was taken but, with due respect to the learned Judges who decided that case, it seems to me that their conclusions are based on irrelevant considerations. The fact that the manager could not have sued alone but must have joined his minor brother as a co-plaintiff is not one which affects the provisions of section 7 of the Indian Limitation Act, so far as I can see. Then, it is said, in that there was nothing to show that plaintiff No. 3 ever acted as a manager, and that, as a matter of fact, he simply remained quite inactive. That, again, seems to me irrelevant. The only question is, whether he could give a discharge without the concurrence of the minors. The authority of this case is also weakened by *Rati Ram* v. *Nadir* (5) where it is said that all cases anterior in date to the passing of Act No. IX of 1908 require to be reconsidered in the light of the words then inserted in section 7 of the said Act. It seems to me that the main object of the Legislature in section 7 is to limit the indulgence which is otherwise given to minors, so that, if there are several minors who can claim the benefit of section 6, that concession does not extend to cover the whole period of time up to the youngest of the minors becoming a major, but can only be availed of by the eldest of them.

Appeal dismissed.

(2) 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 344; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45 (P. C.).

(3) 21 Ind. Cas. 410; 38 M. 118; 25 M. L. J. 405; 14 M. L. T. 401.

(4) 1 Ind. Cas. 824; 31 A. 156; 6 A. L. J. 62.

(5) 49 Ind. Cas. 990; 41 A. 435; 17 A. L. J. 649.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2585 OF 1917.

May 14, 1920.

Present:—Sir Asutosh Mookerjee, Kt., Acting Chief Justice, and Justice Sir Ernest Fletcher, Kt.

Srimati ABEDA KHATUN AND OTHERS—DEFENDANTS Nos. 2, 3, 5, 8, 10 and 15—APPELLANTS

versus

MAJUBALI CHOWDHURY AND OTHERS—PLAINTIFFS AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 105, 109—Application under s. 105, nature of—Dismissal for default, effect of—Jurisdiction of Civil Court to entertain claim made subsequent to application.

An application for enhancement of rent made under section 105 of the Bengal Tenancy Act, which is withdrawn, or is dismissed for non-prosecution, is an application made within the meaning of section 109 of the Act, and once such an application is made, a Civil Court has no jurisdiction to entertain a claim in respect of a matter which formed the subject of that application. [p. 762, col. 1.]

ABEDA KHATUN v. MAJUBALI CHOWDHURY.

Appeal against the decree of the Subordinate Judge, Second Court, Backergunj, dated the 17th of September 1917, modifying the decree of the Munsif, First Court, at Barisal, dated the 12th of July 1916.

FACTS appear from the judgment

Babu *Suresh Chandra Talukdar*, for the Appellants.—The defendant is the appellant. The appeal arises out of a suit for enhancement of rent and for recovery of rent at the enhanced rate. The former rent was Rs. 106-0 0. The plaintiff's allegations are that the area has increased, the rent payable is below the prevailing rate of rent, the fertility of the soil has increased and that the tenants are making considerable profit out of the property.

The defence was that, as a matter of fact, the present suit is barred, the plaintiff having failed in an application under section 105 of the Bengal Tenancy Act. *Secondly*, there was uniform payment of rent for twenty years. *Thirdly*, there was a *kabuliyat*. The first Court dismissed the suit for enhancement of rent. On appeal, the suit was decreed at the enhanced rate.

I submit that, under the provisions of the Bengal Tenancy Act, I am liable to pay the original rent. The present suit is not maintainable under section 109 of the Bengal Tenancy Act. The plea of the increase in area was taken in section 105 case. So, under section 109 of the Bengal Tenancy Act, the present suit does not lie. No leave of the Court was taken to bring a suit under clause (*b*) of section 39 of the Bengal Tenancy Act. See *Chiodith* v. *Tulsi Singh* (1). Leave of the Court to withdraw from the application should have been taken in order to bring a fresh suit. See *Kamini Sundari Chowdhurani* v. *Abdul Halim Moulvi* (2). Having made an application under section 105 of the Bengal Tenancy Act and failed in that, the plaintiff cannot bring a suit. There was no withdrawal from the application under section 105 of the Bengal Tenancy Act. The subject matter of the present suit was the subject matter of the application under section 105 of the Bengal Tenancy Act.

Mr. *N. Ahmed* and Moulvi *A. S. M. Akram*, for the Respondent.—The application under section 105 of the Bengal Tenancy Act was not proceeded with. This case cannot be on principle distinguished from other cases. See *Rajah Pudmanunda Singh* v. *Ghanoshyam Misser* (3). The case in *Rajah Pudmanunda Singh* v. *Ghanshyam Misser* (3) was before the amendment. Instead of withdrawing from the case, the plaintiff did not prosecute the case. Besides, the point was never raised before the lower Courts.

No reply was called upon.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the tenants defendants in a suit for enhancement of rent of a tenure and for recovery of rent at the enhanced rate.

The Court of first instance refused the claim for enhancement and made a decree for arrears at the existing rate.

Upon appeal the Subordinate Judge has granted an enhancement and made a decree for arrears at the enhanced rate.

In support of the present appeal, it has been contended that the claim for enhancement was not maintainable, in view of the provisions of section 109 of the Bengal Tenancy Act. In our opinion, this contention is well founded.

Section 109 provides as follows, "subject to the provisions of section 109A. (which relates to appeals from decisions of Revenue Officers), a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 (both inclusive)." It appears that on the 14th May 1907 the plaintiffs made an application under section 105 for enhancement of the rent of the tenure, on the grounds that the rent payable was lower than the prevailing rate of rent; that the defendants had made considerable profit out of the property; that the fertility of the soil had considerably increased; that the price of the staple food-crops had advanced, and that there was an increase of area. On the 9th June 1909, the agent for the plaintiffs appeared and stated that the plaintiffs did not wish to prosecute the proceeding under section 105. Thereupon, the proceeding was dismissed for non-prosecution. The tenants-appellants contend

(1) 18 Ind. Cas. 130; 40 C. 428; 17 C. W. N. 167.
(2) 47 Ind. Cas. 420; 28 C. L. J. 254.
(3) 1 C. L. J. 134; 32 C. 336; 9 C. W. N. 610.

that the plaintiffs cannot now in view, of the provisions of section 109, put forward a claim for enhancement on the ground of increase of area, which is one of the grounds mentioned in the proceeding under section 105. In our opinion, there is no answer to this contention.

On behalf of the respondents reliance, however, has been placed upon the decisions of this Court, in *Chiodith* v. *Tulsi Singh* (1), and *Kamini Sundari Chowdhurani* v. *Abdul Halim Moulvi* (2). In those cases, applications had been made under section 105 of the Bengal Tenancy Act and subsequently withdrawn without liberty reserved to make fresh applications. This Court held that an application made under section 105 of the Bengal Tenancy Act but withdrawn was to be treated as one never made. In our opinion, those cases are clearly distinguishable, even if we assume that they were correctly decided. An application which has been made, whether it is withdrawn or whether it is dismissed for non-prosecution, is nevertheless an application made within the meaning of the provisions of section 109. We are clearly of opinion that the provisions of that section should be strictly enforced and not whittled down, as appears to be the effect of the two decisions mentioned. In any event, so far as the present case is concerned, there can be no doubt that the Civil Court has been invited to entertain a suit concerning a matter, namely, a claim for enhancement of rent on the ground of an increase in area, which was the subject of an application previously made under section 105 of the Bengal Tenancy Act. Consequently, section 109 is an effective bar to the claim.

The result is, that this appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored with costs both here and before the Subordinate Judge.

FLETCHER, J.—I agree.

Appeal allowed.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 45 OF 1918.

July 30, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

LALCHAND SAKHARAM MARWADI—DEFENDANT—APPELLANT

versus

KHANDU KEDU UGHADE—PLAINTIFF—RESPONDENT.*

Mortgage—Redemption—Transfer of equity of redemption in favour of mortgagee by one of several co-mortgagors, effect of.

The mere fact that one of several co-mortgagors is the registered occupant of the mortgaged land does not entitle him to transfer the portions of the equity of redemption belonging to his co-mortgagors. Any such transfer in favour of the mortgagee does not operate to extinguish the right of the co-mortgagors to redeem their shares in the mortgaged land. [p. 763, cols. 1 & 2.]

Appeal from an order passed by the First Class Subordinate Judge, A. P., at Nasik, in Appeal No. 75 of 1917, reversing the decree passed by, and remanding the suit to, the Subordinate Judge at Yeola, in Civil Suit No. 225 of 1915.

Mr. *Nadkarni* (with him Mr. *A. G. Desai*), for the Appellant.

Mr. *W. B. Pradhan*, for Respondents Nos. 1 to 8 and 10 to 14.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued for accounts under the Dekkhan Agriculturists' Relief Act and for redemption of a mortgage. The first nine plaintiffs were the descendants of four brothers who passed the original mortgage in 1869. I do not know why the other plaintiffs were made parties, for the descendants of four other brothers by the same father have no interest whatever in the mortgaged property. In 1879 Mahadu, one of the first set of four brothers, executed a *rajinama* in his capacity of registered occupant of the mortgaged property in favour of Government, and the mortgagee executed a corresponding *kabuliayat*. Since then the mortgagee has been in occupation of the mortgaged land. The mortgage-bond was restored to Mahadu with an endorsement that it had been satisfied. The question is, whether the equity of redemption which existed in favour of the remaining three brothers continued and whether it still continues in favour of their descendants. The really important issue is Issue No. 3

in the first appeal: had the mortgagors other than Mahadu consented to and authorized the latter's *rajinama*? That was found in the negative. The corresponding issue in the Trial Court was, whether the *rajinama* and *kabuliayat* were competent to extinguish the right of redemption of the mortgagors and pass title to the defendants. That was found in the affirmative. Accordingly, the Trial Judge dismissed the plaintiff's suit. The argument seemed to be that, because Mahadu, the registered occupant, executed the *rajinama*, the interest not only of Mahadu but also of his brothers in the land passed. But I think that the learned Appellate Judge looked at the case from the right point of view when he considered whether the interest of the other brothers was conveyed or transferred when Mahadu executed the *rajinama*, unless it could be shown by positive evidence that they had consented to give up their rights to redeem the mortgage. The learned Judge says: "there is nothing in these documents, that is to say, the *rajinama* and *kabuliayat*, to show that the three mortgagors had given up their rights to the land in dispute. There is nothing to show that they had authorised Mahadu to extinguish their rights or that they had consented to his doing so, Exhibit 60 who proved the documents nowhere said anything about the other brothers authorizing Mahadu to do so or consenting to his doing so." In *Pandu Lakshman Masu-ekar* v. *Anpurna* (1) it was held that, "in the absence of any act showing that the mortgagee is asserting himself against the owner of the equity of redemption, his possession is not adverse against the latter as regards limitation. The mere assertion of his claim by the mortgagee would not affect the right of the real owner of the equity of redemption where a person having no right in the property pretends to sell the equity of redemption to the mortgagee." Here, no doubt, Mahadu was a co mortgagee with his brothers, but he had no right to sell their interest in the equity of redemption, so far as they were concerned he was in the same position as an outsider. The general rule is that, a mortgagee cannot set up title by adverse possession against the owner so as to defeat his right to redeem. That was decided in *Bhagvant Govind* v. *Kondi* (2). We have been referred to the case of *Puttappa* v. *Timmaji* (3), where there was a sale of the equity of redemption to an outsider, but though the purchaser from a mortgagee can set up a title by adverse possession to the original mortgagor, that does not affect the principle that the mortgagee himself cannot set up a title against the mortgagor. Since then the mortgagee in 1879 did not take the most ordinary precaution to see that the right to redeem which lay in the parties to the mortgage-deed was extinguished, it follows that he is now in a difficult position when the descendants of those parties assert their right to redeem. The mortgagee cannot prove that their ancestors consented to the right of redemption being extinguished. There is no hardship really in the case, because there has been an inquiry of what is due to the mortgagees for principal and interest and also an account of the improvements made to the property.

The decree, therefore, of the learned Appellate Judge must be confirmed.

The plaintiffs cross-objected on the ground that they ought to have been entitled to redeem the whole. But when Mahadu purported to convey to the mortgagee the right to redeem, as there is no doubt about his having a share in the equity of redemption, that brought about a merger of the mortgage to that extent, and consequently the present plaintiffs can only be allowed to redeem the three-fourths of the land in dispute.

Therefore, the cross-objections are dismissed with costs and the appeal is dismissed with costs.

FAWCETT, J.—I agree. The appellants clearly cannot rely on adverse possession against the right to redeem asserted in this suit, not only because of the rule which bars a mortgagee setting up adverse possession against his mortgagor, but also because, in any case, the period of adverse possession that would suffice to bar the right of suit to redeem under Article 148 of the Indian Limitation Act, *viz.*, 60 years, has not expired. Therefore, under section 28 of the Indian

(1) 21 B. 793; 11 Ind. Dec. (N. S.) 534.

(2) 14 B. 279; 7 Ind. Dec. (N. S.) 645.
(3) 14 B. 176; 7 Ind. Dec. (N. S.) 576.

Limitation Act, the equity of redemption, which is now asserted, would not have been extinguished. It seems to me that the dispute really rests upon the decision on the third issue in the lower Court, *viz*, had the mortgagors other than Mahadu consented to and authorized the latter's *rajinama*? This issue has been found by the lower Appellate Court in the negative. And, although there are considerations which may be said to favour the view taken by the Trial Court that there was such consent and authorisation, yet there are other considerations which go the other way. Certainly, to my mind, there is no clear proof of such consent and, in any case, it is purely a question of fact which in second appeal we cannot decide for ourselves. Any presumption that there may be in the appellant's favour under section 135-J of the Bombay Land Revenue Code is, in the circumstances, rebutted. Accordingly, I can see no sufficient reason for interfering with the lower Court's decree.

Appeal dismissed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 1748 OF 1916.
December 17, 1920
Present :—Mr. Justice LeRossignol and Mr. Justice Wilberforce.
SURAPU, MINOR SON AND REPRESENTATIVE OF RAM RAKHA, DECEASED, THROUGH HIS MOTHER, *Musammat* LACHHMI —PLAINTIFF—APPELLANT
versus
DIWAN CHAND—DEFENDANT—RESPONDENT.

Mortgage—Redemption—Clog on equity of redemption—Improvements—Condition meant to improve mortgagor out of property, validity of.

Plaintiff's mother acting as his guardian mortgaged a house belonging to the plaintiff to defendant. Under the mortgage agreement the plaintiff made himself liable for the cost of reasonable improvements, also for interest on the sum expended on improvements and for repairs :

Held, (1) that the condition relating to the cost of improvements did not justify the demolition and re-building of the house at a cost equivalent to several times the mortgage-debt ;

(2) that the condition relating to the payment of interest by the plaintiff was most inequitable and unconscionable, inasmuch as it amounted to an agreement by the plaintiff to pay interest to defendant on money spent by defendant on making himself comfortable.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 8th May 1916, varying that of the Senior Subordinate Judge, Gurdaspur, dated the 24th February 1916, decreeing the claim

Lala *Mehar Chand Mahajan*, for Bakhshi *Tek Chand*, for the Appellant.

Lala *Moti Sagar*, R. S, for the Respondent.

JUDGMENT.—The plaintiff's mother acting as his guardian mortgaged a house to defendant in 1894 for Rs. 350. Plaintiff, now of age, sued to redeem, and the defendant called upon him to pay no less than Rs. 10,282-8 of which Rs. 3,200 were said to be the cost of re building the house, Rs. 500 cost of annual repairs and Rs. 5,760 the interest on the item of Rs. 3,200.

The first Court found the defendant's accounts of expenditure fictitious, his claim prepostrous, and the terms of the mortgage inequitable and not binding on the *quondam* minor and decreed for plaintiff on payment of Rs. 624 less the costs of the case.

The District Judge rejected defendant's accounts also, but gave him a decree enhancing the sum payble by the plaintiff to Rs. 2 000 on no very clear grounds ; but mainly on conjecture.

Plaintiff has preferred this second appeal and urges that the first Court's decree should be restored and we think that equity points directly to this issue.

From documentary evidence it is quite clear that, as soon as he secured the mortgage, the defendant started demolition and re-building of the house in spite of the protests of plaintiff's mother and he has now led evidence to show that the house was ruinous when he took the mortgage, although the document in no way gives support to that contention.

Under the mortgage agreement, plaintiff was responsible for reasonable improvements (*tarraqi munasib*), also for interest on the sum expended on improvements, and for repairs.

The first condition did not justify a demolition and re building of the house at a cost equivalent to nine times the mortgage-debt, and the second is clearly inequitable

for it amounts to an agreement by the plaintiff to pay interest to defendant on money spent by defendant on making himself comfortable.

Bearing in mind the fact that the plaintiff's mother was a widow and plaintiff an infant, we hold this condition was most inequitable and unconscionable and defendant's action a clear attempt to improve the plaintiff out of his property.

We accordingly accept the appeal and restore the first Court's decree, plaintiff shall have the house on payment into Court of Rs. 624 less his costs in this and the Court below. In the first Court parties shall bear their own costs.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 127 OF 1920.

July 30, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

MANIKCHAND MAGANCHAND GUJAR—PLAINTIFF—APPELLANT

versus

RANGAPPA KONDAPPA KORPE—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss 58, 67, 68—Mortgage, usufructuary—Possession not delivered to mortgagee—Interest, whether can be recovered.

Where under a usufructuary mortgage the mortgaged property is made security only for the amount borrowed and not for interest, and the mortgagee is to have possession and enjoyment of the profits of the mortgaged property in lieu of interest, which is not made payable otherwise, and the mortgagee does not take any steps to obtain possession of the mortgaged property, he loses his right to interest.

Second appeal from the decision of the Assistant Judge, A. P., at Poona, in Appeal No. 117 of 1919, varying the decree passed by the Second Class Subordinate Judge at Khed, in Civil Suit No. 55 of 1918.

Mr. *S. Y. Abhyankar*, for the Appellant.

Mr. *D. O. Virkar* for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover on a mortgage-bond, dated the 6th of August 1910, Rs. 99-15-0 principal and interest at 12 per cent. from the date of the mortgage to the date of suit. The mortgage is as follows :—

"I took from you to day Rs. 99-15 0 to pay Muleband Jetbabhai. This is without interest. In consideration of this the property of my ownership situated at Wafagaon is mortgaged. The property thus described is mortgaged to you and delivered into your possession. According to the terms I shall pay the amount without interest within one year and shall take back the mortgaged property—my lands—into my possession. The profits of the said land should be enjoyed in lieu of interest. If the amount is not re-paid within the stipulated time, the profits should be enjoyed in lieu of interest according to the aforesaid agreement. If the money be demanded after the expiry of the stipulated period and if I be unable to pay the same the rupees without interest should be realized by the sale of the mortgaged property. If the amount realized is not sufficient, I shall be personally liable for the balance."

The plaintiff never got possession of the property under the terms of the mortgage. The property was sold by the first defendant on the 13th of April 1915 to the 2nd defendant. The Trial Court passed a decree for the sum claimed with further interest at 12 per cent. per annum from date of suit to date of decree on the principal sum, with costs of suit against the 2nd defendant. It was also decreed that, if the defendant No. 2 did not pay the amount decreed into Court within six months, the property should be sold. On the question of interest the learned Judge said: "It is not shown, nor is it defendant No. 2's case, that the plaintiff, the mortgagee, had ever been in the enjoyment of the mortgaged land though the mortgage-deed is possessory in form. As the mortgagor has been in actual possession and the mortgage is merely possessory in form only, plaintiff is entitled to charge interest on the principal sum at a reasonable rate, and the rate of 12 per cent. per annum claimed by him is fair." In appeal this decree was altered substituting the amount of Rs. 99-15-0 for Rs. 188 15 0, by deleting the direction to pay future interest

at 12 per cent. per annum from date of suit to date of decree, by deleting the direction to pay furture interest on the principal from date of decree to date of payment and by directing that the costs in the lower Court should be borne in proportion to the success and failure as between respondent and appellant. The learned Judge said that the case appeared to be on all fours with *Mahadaji* v. *Joti* (1) and it was the fault of the mortgagee himself if he took no steps to recover possession of the mortgaged property. The terms clearly showed that the mortgaged property was a security only for the amount borrowed and not for interest; that the mortgagee was to have possession and enjoyment of the profits of the mortgaged property, in lieu of interest which was not made payable otherwise; that the amount advanced was recoverable after one year by sale of the property.

It appears to me that it is very difficult to distinguish this case from the case of *Mahadaji* v. *Joti* (1). The only difference which can be seen in that case is this, that the mortgage did not contain a power of sale in default of the payment of principal. But it was held that the mortgage was a simple usufructuary mortgage carrying the right to have the property sold in default of payment of the principal sum of Rs. 500. On the question of interest Mr. Justice Candy said: "The claim for interest is bad, for the plaintiff was entitled to possession in lieu of interest, and, if he never took the trouble to obtain possession, he lost his right to interest. The land was security for the principal". That is exactly what has happened in this case. Plaintiff has lost his claim to interest as he never took the trouble to obtain possession. The mortgage-bond is positive on that point. There is a personal covenant to pay back the mortgage amount within one year. There is also a power of sale if the mortgagor does not pay back the rupees without interest. It has been contended that the Transfer of Property Act, which was not in force when the decision of *Mahadaji* v. *Joti* (1) was given, made an alteration in law giving a usufructuary mortgagee who does not take possession the right to charge interest. I can see nothing in sections 58, 67 and 68, to which we have been referred, which can enable a mortgagee to make a claim to interest—which is not given to him by the mortgage bond. In my opinion, therefore, the decree of the lower Court as against the second defendant is perfectly correct.

The only difficulty I have in my mind is whether the plaintiff can claim against first defendant, who has not appeared, damages for breach of what may be called a covenant to give possession. That would be a claim entirely of a different nature, it has not been made out in the plaint, and it would require entirely different considerations before it could be determined. No case has been cited to us in which such a claim has ever been put forward. In the case of a usufructuary mortgage, it is the business of the mortgagee to get into possession before he advances the money, and if he does not get into possession, then he is entitled to take steps to get into possession. And, for myself, I should like to say that it would be a very bad precedent if we hold that a usufructuary mortgagee could lie by and not take the trouble to get into possession relying upon his being able afterwards to make a claim before the Court for damages for not having been given possession.

The appeal must be dismissed with costs.

FAWCETT, J.—I agree that the appeal fails. It was argued that the plaintiff-appellant was entitled to recover interest by virtue of the provisions of section 68 of the Transfer of Property Act. But that section can scarcely be applied in the present case, inasmuch as the suit is one for sale of the mortgaged property, falling under section 67. As has been ruled in many cases, sections 67 and 68 provide entirely distinct remedies by a mortgagee, and, though it might be possible to combine them in one suit, yet in the present case clearly no attempt has been made to do so. All that the plaintiff asks for in regard to a personal remedy was, to recover any dificit in the sale proceeds from the defendant. But, quite apart from that, it also seems to me clear that interest could not in this particular case be considered to be a part of the mortgage-money, within the meaning of that expression as defined in section 58. It is there said that the principal money and interest

(1) 17 B. 425; 9 Ind. Dec. (N. S.) 2

of which payment is secured for the time being are called the mortgage money, that is to say, interest to be part of mortgage-money must be actually secured for the time being under the mortgage in question, and in the present case it is beyond all possible doubt that the interest is not secured by the terms of the mortgege. The only possible basis on which the plaintiff could claim interest is that of damages for breach of the covenant to deliver possession and, in regard to such a claim, I entirely concur with the learned Cheif Justice.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 7, 1920.

Present:—Viscount Cave, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins.

Sri Rajah MALRAJU LAKSHMI VENKAYYAMMA ROW BAHADUR ZEMINDARINI GARU—APPELLANT

versus

Sri Rajah VENKATADRI APPA ROW BAHADUR ZEMINDAR GARU AND OTHERS—RESPONDENTS.

Pleadings and practice—Court, duty of—Inferences of fact at variance with case pleaded, whether permissible.

It is absolutely necessary that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. [p 769, col. 1.]

Parties cannot be concluded by inferences of fact which are not only not consistent with the pleadings but actually contradictory of the case therein made. [p. 769, col. 1.]

Eshenchunder Singh v. *Shamachurn Singh Bhutto*, 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3, approved.

Appeal from a decree of the Madras High Court, dated 7th September 1914, affirming, with certain variations, a decree of the Subordinate Judge, Kistna.

FACTS are sufficiently stated in their Lordships' judgment. The other litigation therein referred to is reported in *Lakshmi Venkayyamma* v. *Venkatanarasimha* (1).

(1) 34 Ind. Cas. 921; 43 I. A. 138; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 59; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 39 M. 509; 24 C. L. J. 279 (P. C.).

In the present case the High Court modified the Sub Judge's decree by awarding to the plaintiff-appellant the value of certain jewels inherited from her mother, but without interest, and also the amount of certain rents, with interest at 4 per cent. from date of suit. Appellant contended she was entitled to interest at 6 per cent. on the jewels from the Rani's death and on the rents from the dates when they were received by the Rani.

Sir *Erle Richards*, *K. C.*, and Mr. *Kenworthy Brown*, for the Appellant.

Messrs *DeGruyther*, *K. C.*, *Dube* and *Polut*, for Respondents Nos. 1 to 3.

Mr. *Parikh*, for Respondent No. 4 (the Receiver).

Sir *Erle Richards*, *K. C.*, for the Appellant, submitted that the gift of the jewels to appellant by the Rani was proved. When the parties are living together manual delivery is not necessary to complete a verbal gift, a declaration that the declarer will hold and is holding the property for the other will suffice.

[VISCOUNT CAVE:—There are concurrent findings that no legal gift was proved].

Yes, but there is the authority of this Board in the previous case that the proof is sufficient. The High Court admit that the Rani probably made a distinct promise to appellant to give him these jewels. The Rani's letters evidence a contract to that effect. The appellant relied on her expressions of intention and continued to live with her; she acted on the Rani's promise; and just as in the case of Repudi village, this constituted a contract which could be enforced in appellant's favour. I sumbit that the promise itself is quite clear and is legally binding. In one of her letters the Rani tells appellant the jewels "are all yours". It is a declaration that she holds them for appellant.

Kenworthy Brown, followed.

Mr. *DeGruyther*, *K. C.*, for the Respondents Nos. 1 to 3. There are concurrent findings of fact in our favour, that no gift took place. The argument that there was a contract was obviously suggested by this Board's previous decision. Appellant now wants to alter her whole case and set up an inconsistent one which cannot arise on the pleadings and requires fresh evidence. Neither appellant herself nor any of the leading witnesses have deposed to any

contract. The suit, as framed, is one for specific property ; this Board is now asked to let them set up a new story and to decide upon it without taking evidence.

Mr. *Dube* followed, and submitted that the circumstances as to the jewels were different from those in the case of Repudi village.

Sir *Erle Richards*, *K. C.*, replied.

JUDGMENT.—This is an appeal from a judgment and decree, dated the 7th September 1914, of the High Court at Madras, by which the previous decree of the Subordinate Judge of Kistna at Ellore, of the 29th September 1909, was affirmed with certain variations.

The appellant is the plaintiff, Sri Rajah Malraju Lakshmi Venkayyamma Row Bahadur Zamindarini Garu, and she instituted this suit as far back as the 5th December 1902. By her plaint she prayed that she might be declared entitled to recover "the jewels, vessels, etc, mentioned in the schedule, or their value," and that the defendants should deliver to the plaintiff these jewels, vessels, etc., or pay their value, Rs. 1,65,156-1-3. Relief was also sought as to the income of certain villages with interest.

The jewels were in the possession of Rani Papamma Row at her death. The original defendants Nos. 1 to 3, now represented by the present respondents, were alleged in the plaint to be the heirs to all properties that belonged to Rani Papamma absolutely as *stridhanam*. They also were the reversionary heirs expectant on the death of Rani Papamma to the estates of her deceased husband, Naraya Appa Row.

The fourth defendant was the Receiver of those estates, appointed in Suit No. 44 of 1899.

The main question for determination in this appeal is, whether the plaintiff has proved her right to the jewels she claims, and in view of the concurrent findings of the Courts, the contest is now limited to the jewels included in the large presents of valuable jewels alleged in the plaint to have been made to her by Rani Papamma, from time to time (paragraph 11).

So far as that claim rests on actual gifts made by Rani Papamma it must fail, for it is negatived by concurrent findings of both the lower Courts, and those findings are, in the circumstances of this case, findings of fact.

In the argument this has been recognised, and an endeavour has been made to escape from this difficulty by basing the claim on an assumed contract by Rani Papamma to give the plaintiff the jewels. To appreciate the origin of this change of front, a brief explanation is necessary.

It is beyond controversy that Rani Papamma was very attached to the plaintiff. She was her great aunt, she had brought her up from infancy, she had borne the expenses of her marriage, she had throughout treated her as her own daughter.

The plaintiff was married to a man of some means and position, but Rani Papamma was anxious that, notwithstanding the marriage, the plaintiff and her husband should continue to reside with her; and it is the plaintiff's case that, as an inducement to this, the Rani agreed that in consideration of their so doing, she "would meet all the private and special expenses of the plaintiff, treat her in every way as her daughter, give her jewels, and make adequate provision for her."

The marriage was in 1886, and the plaintiff and her husband, in compliance with her wishes, resided with the Rani till 1893. Though it has always been the plaintiff's case that large presents of jewels had actually been made to her as a result of this arrangement, she and her husband felt that as the jewels still remained in the Rani's possession, some written record was necessary as evidence of their ownership. And so there was negotiation and correspondence which ultimately led to a letter, Exhibit 'H," written by Rani Papamma to the plaintiff in 1893.

The effect of that Exhibit was considered by this Board in a suit brought by the present plaintiff to establish her claim to a village called Repudi, and it was there held, in view of this Exhibit, the conduct of the parties and the other circumstances of the case disclosed in the evidence that there was a contract as to the village which could be enforced in the plaintiff's favour.

It has been argued on this appeal that this decision is conclusive in the plaintiff's favour as to the jewels. But this argument cannot be sustained.

KRISHNAJI GOVIND v. SITARAM HANMANT.

No doubt Exhibit "H" is a single document, but its treatment of the jewels and Repudi is not the same. It deals with each separately in language not identical in its terms or, necessarily, in its legal consequences. There is, too, a diversity of circumstances. The effect, however, of these dissimilarities need not be discussed, for, apart from this, there has been a difference between the conduct of the earlier suit and the present which is fatal to the plaintiff's present proposal to abandon gift and rely on contract as the foundation of her claim to the jewels.

In the earlier suit the plaintiff's claim to Repudi was rested on contract at the earliest stage of the litigation; contract was alleged in the plaint and was a matter of dispute, discussion and decision in both the Indian Courts.

In the present suit it is not until this appeal that contract has been suggested as a possible cause of action. There is no trace of it in the pleadings, the issues, the evidence, or the judgments, for in India the issue was gift, not contract. Ownership of the jewels was the case made in the plaint; the cause of action was alleged to have arisen when the Receiver took possession of them; and the decree sought was delivery of the jewels or payment of their value conformably to section 20*d* of Code of the Civil Procedure, which deals with a suit for delivery of specific moveables on the ground of property (*sic*).

The argument now advanced is contradictory of the case thus made, and involves a line of attack that the defendants had no opportunity to meet while the litigation was in the lower Courts, where appropriate evidence could have been adduced. In effect, it invites their Lordships to do that which was censured in *Eshenchunder Singh* v. *Shamachurn Bhutto* (2) where Lord Westbury, delivering the judgment of the Board, said:—

"It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the defendant has to meet, but which are in reality contradictory of the case made by the plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove."

This is essentially a case where this ruling should be strictly applied in view of the long duration of the suit and the lack of finality in any decree that would at this stage be possible. This change of front, therefore, cannot be permitted, and the plaintiff's contention must fail.

The only other objection taken to the decree was as to the rate and period of interest directed by the High Court. This admits of a short and conclusive answer. There was nothing contrary to law in this direction and what was ordered was within the scope of the Court's discretion. With this exercise of discretion their Lordships decline to interfere.

The result, then, is that this appeal wholly fails, and their Lordships will accordingly humbly advise His Majesty that it should be dismissed with costs to the first three respondents.

Appeal dismissed.

Solicitor for the Appellant Mr. *Douglas Grant.*

Solicitors for Respondents Nos. 1 to 3: Messrs. *T. L. Wilson and Co.*

Solicitor for Respondent No. 4: Mr. *E. Dalgado.*

(2) 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 82 OF 1920.

July 30, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

KRISHNAJI GOVIND JOSHI AND OTHERS —DEFENDANTS—APPELLANTS

versus

SITARAM HANMANT RAMDASHI— PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 114—Lease —Forfeiture, relief against, rule as to.

RAM CHAND *v.* JANA.

No hard and fast rule can be laid down as to relief against a forfeiture clause in a lease, but the general principle of equity is, that the court will relieve against forfeiture unless the tenant has done something to forefeit his right to bring himself within the principles of equity.

Second appeal from the decision of the Assistant Judge, A. P., at Satara, in Appeal No. 136 of 1919, varying the decree passed by the Joint Subordinate Judge at Karad, in Civil Suit No. 416 of 1918.

Mr. *J. R. Gharpure*, for the Appellants.
Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.—In this case the plaintiff sued to recover possession of the suit property together with Rs. 55-8 0 as arrears of rent. Admittedly, there had been a default. The learned Judge in the Trial Court said that it would be a hardship if the land which the defendants had been cultivating for so many years should be taken from them for two defaults in payment. He, therefore, passed an order relieving them against forfeiture under section 114 of the Transfer of Property Act provided they paid the arrears of rent with interest and costs within fifteen days. That was a perfectly correct order to make and an order within the powers of the Judge to make. But in appeal the learned Appellate Judge, relying on the decision in *Naraina Naika* v. *Vasudeva Bhatta* (1), appeared to think that the forfeiture could not be relieved against. The learned Judge said that "the exercise of the discretion of the Court to relieve against forfeiture might depend upon the circumstance whether the lease allowed a period of grace or not and whether the period of grace was a reasonable period having regard to the nature and terms of the lease." Each case must depend upon its own facts. It may be that if a period of grace is allowed and yet the tenant does not pay rent within that period, the Court will not relieve against forfeiture. There can be no hard and fast rule, and the general principle of equity is, that the Court will relieve against forfeiture unless the tenant has done something to forfeit his right to bring himself within the principles of equity. We do not think this is such a case.

(1) 28 M. 389; 15 M. L. J. 208.

The decree of the Trial Court must be restored.

Appellants will get their costs in this Court and in the Court below.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2628 OF 1919.

December 9, 1920.

Present :—Mr. Justice Martineau.

RAM CHAND—PLAINTIFF—APPELLANT

versus

JANA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 35 36—Decree for possession—Possession not obtained—Subsequent suit for possession, whether maintainable.

Plaintiff purchased *J.*'s share in a well, and obtained a decree for possession of that share as against *J.* and his co-sharers. They took out execution against *J.* alone and filed a *dakhalnama*. Subsequently, they brought a suit for possession against *J.*'s co-sharers. It was found that they had not obtained possession according to law in execution of their previous decree:

Held, that it was necessary for the plaintiffs to obtain symbolical possession according to law in execution of the previous decree and having failed to do that they could not maintain the present suit, their title having merged in the previous decree. [p. 771, col. 1.]

Second appeal from the order of the District Judge, Mianwali, dated the 8th August 1919, affirming that of the Munsif, Second Class, Bhakkar, District Mianwali, dated the 24th June 1919.

Lala *Jagan Nath*, for the Appellant.

Lala *Har Gopal*, for the Respondents.

JUDGMENT.—In 1894 Jumma sold his 1/6th share in a certain well to Thanu Ram and Khan Chand. In 1896 the vendees sued Jumma and his co sharers in the well for possession. The claim was not disputed by Jumma, but was resisted by his co-sharers. The vendees obtained a decree. They took out execution against Jumma only. On the 15th August 1899 they filed a *dakhlnama*, and the proceedings ended.

In the present case the plaintiff, who is the representative-in-title of the vendees sue for possession of the land alleging that his predecessors got possession in 1899, and that

he was dispossessed four years ago by defendants Nos. 1 to 6, who are co sharers in the well.

The Courts below have concurred in dismissing the suit finding that the plaintiff's predecessors never obtained possession according to law in the execution proceedings in 1899, and that the plaintiff and his predecessors have not been in possession within the period of 12 years prior to the suit.

The plaintiff has filed a second appeal in this Court.

The findings that the plaintiff or his predecessors never got possession are findings of fact which cannot be attacked in second appeal.

It is contended that there was no necessity for the decree holders to obtain symbolical possession in 1899, because in the Code of Civil Procedure then in force there was no provision corresponding to Order XXI, rule 35 (2) in the new Code. Order XXI, rule 35 (2), however, applies only to the case of a decree for joint possession, which was not the decree that the plaintiff's predecessors obtained. Their decree was an ordinary decree for possession of the share which they had bought, and such a decree would be executed in the manner provided in section 264 of the old Code, corresponding to Order XXI, rule 36 of the present Code. It was clearly necessary for the decree-holders to obtain symbolical possession as laid down in section 264 and the finding is that they did not obtain it.

It is argued for the appellant that, even if he did not get possession, he is entitled to succeed on the strength of his being a co-sharer in the well by virtue of the purchase by his predecessors from Jumma, as the possession of the co-sharers must be deemed to be the plaintiff's possession. This argument cannot be accepted for two reasons. In the first place, it sets up an entirely new case for the plaintiff, as the case with which he came into Court was that he got possession and that about four years before suit he was dispossessed. In the second place, the rights created by his predecessor's purchase in 1894 merge in the decree obtained thereon in 1896. As observed by the Courts below, *Khub Ram* v. *Surat* (1) is applicable to the present case. The plaintiffs in that case had obtained a decree as mortgagees for possession of the mortgaged land. They brought a suit later on alleging that they had been given possession and had afterwards been dispossessed but they failed to prove their allegations. It was held that they could not then plead that they could sue a second time for possession on the terms of the mortgage, and that, even if that new plea could be entertained, it would be of no avail as the mortgage must be held to have merged in the decree.

The suit has, therefore, been rightly dismissed. Possession not having been obtained under the decree of 1896 the plaintiff loses his remedy [*Hafiz Baha-ud-din* v. *Musammat Fateh Bibi* (2)].

The appeal is dismissed with costs.

Appeal dismissed.

(1) 39 Ind. Cas. 753; 20 P. R. 1917; 26 P. L. R. 1917; 22 P. W. R. 1917.

(2) 16 P. R. 1893.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No 893 OF 1918.
July 21, 1920.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

BALKRISHNA BHIMAJI MOKASHI AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RAMKRISHNA GANGADHAR DIXIT INAMDAR—PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara—Succession—Male bandhus, *whether preferred to female* bandhus.

Under the Hindu Law female *bandhus* are excluded by the nine classes of *bandhus* mentioned in the Mitakshara. [p. 772, col. 1.]

Second appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 253 of 1916, varying the decree passed by the Assistant Judge at Belgaum, in Appeal No. 145 of 1915.

Mr. *Nadkarni* (with him Mr. *A. G. Desai*), for the Appellants.

Mr. *Bahadurji* (with him Mr. *S. R. Bakhale*), for the Respondent.

MOTO DASI v. BEHARI LAL.

JUDGMENT.—The plaintiff sued to recover possession of the plaint property and his claim was resisted by the defendants Nos. 3 and 4 who denied that the plaintiff was the owner. In the Trial Court the plaintiff's suit was dismissed. In appeal the plaintiff's claim was allowed and he was held entitled to recover possession of the plaint property with the exception of what was mortgaged to the defendants Nos. 3 and 4. The learned Judge decided in the plaintiff's favour on the ground that defendant No. 1, through whom the plaintiff claims, was a nearer heir to Raghu than the vendors of defendants Nos. 3 and 4, who were the sons of Raghu's mother's sister. The learned Judge says: "It is now settled law that the suggestion in West and Buhler, page 491, as to the postponement of all other *bandhus* to the nine specially mentioned in the Mitakshara is not correct, and that the only principle governing the order of succession among *bandhus* is that of propinquity." Unfortunately, the learned Judge has not cited any authority for that opinion which, if correct, would mean this, that the female *bandhus* are placed in a position of equality with male *bandhus*. Now the nine *bandhus* specially mentioned in the Mitakshara are male *bandhus*, and, although other male *bandhus* have been held by various decisions entitled to rank with those *bandhus*, there is not a word said in any of those decisions about female *bandhus* being placed in equality with the male *bandhus*. On the other hand, there is a direct decision of the Madras High Court—*Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur* (1)—that under the Mitakshara a male *bandhu* is entitled to preference over a female *bandhu* even though the latter is nearer in degree. In the absence of any authority to the contrary of the opinion expressed by West and Buhler we are of opinion that female *bandhus* are excluded by the nine classes of *bandhus* mentioned in the Mitakshara. Mr. Mulla also, in his Work on Hindu Law, cannot point to any authority to support the learned Judge's conclusion. We may take it then as settled law, as far as the present case is concerned, that female *bandhus* are still excluded from being treated on an equality with male *bandhus*.

The result is that the appeal is allowed and the plaintiff can only be entitled to the half share of Appa in the plaint property subject to the mortgage of the defendants Nos. 3 and 4.

It is true that he sues for possession, although the properties are in the possession of the mortgagees until the mortgages are paid off. But it is just as well that, in order that there should be no dispute in the future, we should hold him entitled to that half share of Appa subject to his having to pay off the mortgages together with the costs and further charges, if any before he gets possession.

Plaintiff to pay costs throughout.

The cross-objections are dismissed with costs.

Appeal allowed.

(1) 31 M. 321; 4 M. L. T. 5; 18 M. L. J. 409.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1900 OF 1918.

May 20, 1920.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

Srimati MOTO (MOTOMOYI IN *Vakalatnama*) DASI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BEHARI LAL CHONGDOR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11A, applicability of—Suit for possession brought more than one year after dismissal of application under O. XXI, r. 100, Civil Procedure Code, whether barred.

P. purchased *N's* share of family property. *D*, on the other hand, purchased the entire property of the family of which *N.* was a member and dispossessed *P.*, who thereupon applied under Order XXI, r 100, Civil Procedure Code, for possession. The application was disallowed on 28th August 1914, and *P.* brought the present suit for possession on 30th November 1916:

Held, that the suit was barred by limitation, not having been brought within one year, as required by Article 11A, Schedule I to the Limitation Act, from the date of the order disallowing the application under Order XXI, r. 100, Civil Procedure Code. [p. 774, col. 1.]

MOTO DASI v. BEHARI LAL.

Appeal against the decree of the Additional District Judge, Hooghly, dated the 19th of July 1918, reversing that of the Munsif, second Court at Amta, dated the 19th of December 1917.

FACTS appear from the judgment.

Babu *Brojolal Chakravarty* (with him Babus *Monmothanath Ganguli* and *Gour Mohan Dutt*), for the Appellants.—This appeal arises out of a suit for establishment of title and recovery of possession. The defendants are appellants in this appeal. Plaintiff purchased one third share of the property from a Hindu widow who became unchaste when succession opened after the death of her son. Defendant purchased the entire property of the family to which the said widow belonged and the plaintiff was dispossessed since then. The plaintiff made an application under Order XXI, rule 100, Civil Procedure Code, to recover possession, but it was disallowed on 26th August 1914. The present suit was instituted on 30th November 1916.

My first submission is that, when succession opened after the death of her son, the widow was unchaste and she could not inherit the property and her transfer was invalid.

Secondly, the suit, having been brought after one year from the date of the last application under Order XXI, rule 100, is barred by limitation under Article 11 A.

Thirdly, the lower Court erred in law in shifting the onus to prove unchastity upon the plaintiff. The purchaser of the land from this lady has got to prove that she was chaste and not upon us to prove that.

Babu *Lalit Mohan Banerjee*, for the Respondents.—So far as the question of chastity is concerned, it is concluded by the finding of fact and my learned friend cannot raise this question in second appeal.

The question of limitation has been raised here for the first time and that point cannot be raised now.

Babu *Brojolal Chakrabuty* in reply.—It is clear from the plaint that the suit was instituted after the expiration of time. The suit is clearly barred by limitation.

JUDGMENT.—Two questions have been raised on behalf of the defendants, who are appellants in this case. The first relates to the question of onus of proof with respect to the alleged unchastity of Nithar, a Hindu widow, from whom the plaintiff purchased a one-third share of the property which is the subject-matter of dispute in the present case. But we need not go into that question, because the learned District Judge has, upon a consideration of the evidence of both sides, come to a finding that she is not unchaste.

The appeal, however, must succeed on the second contention, namely, that the suit is barred by limitation, having regard to the provisions of Article 11A of Schedule I to the Limitation Act. The plaintiff, as stated above, purchased a one-third share of the property which belonged to Nithar. The defendant No. 1, on the other hand, purchased the entire property belonging to the family of which Nithar was a member and dispossessed the plaintiff from the one-third share purchased by him. The plaintiff thereupon made an application for possession under Order XXI, rule 100. That application was fully gone into and was disallowed on the 26th August 1914. The present suit was instituted on the 30th November 1916.

Now, Article 11A of Schedule I to the Limitation Act lays down that in a suit "by a person against whom an order has been made under the Code of Civil Procedure, 1908..... upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order," the period is one year from the date of the order.

The order, as stated above, was passed on the 26th August 1914 more than a year before the institution of the suit. It is true that the question was not raised in either of the Courts below, and we would not have allowed this question to be raised here in second appeal, were it not for the fact that the plaintiff himself in his plaint states these facts. In the fifth paragraph he says: "That the plaintiff having purchased the one-third share of the *jote*, he was obliged to object to the aforesaid granting of possession in execution case No. 47 of 1914,

but his objection was rejected in the month of Bhadra 1321. Since then the principal defendant has dispossessed the plaintiff from the said one-third share, which he had purchased from Nitharmoyee Dassi, and the said defendant is holding the same". The order in that case is on the record and shows that the share purchased by the plaintiff was the subject-matter of dispute in that case which is the same as in the present case. The matter was fully gone into in that case and the application of the plaintiff was rejected. The suit, not having been brought within one year from the date of the order, is barred by limitation even upon the facts stated by plaintiff in his plaint.

In these circumstances, the appeal must be allowed and the suit accordingly dismissed. But, as the question was not raised in the Courts below, we direct that each party do bear his own costs in all Courts.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 678 OF 1919.

August 2, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

MANILAL GIRDHAR PATEL—DEFENDANT—APPELLANT

versus

NATHALAL MAHASUKHRAM VYAS—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 13—Civil Procedure Code (Act V of 1908), O. XXI, r. 61—Execution of decree—Attachment—Claim of third party dismissed—Attachment withdrawn, effect of—Suit by third party to recover property—Limitation.

Where property is attached in execution of a decree and a claim preferred to it by an alleged purchaser from the judgment-debtor is dismissed on the ground that the alleged purchase was fraudulent, but the attachment is subsequently withdrawn, the unsuccessful claimant is not bound to bring a suit to contest the order within the special period of limitation provided by Article 13 of Schedule I to the Limitatson Act. A subsequent suit by the purchaser to recover the property from the judgment-debtor will not be barred merely because he failed to bring a suit to contest the order made in claim proceedings. [p. 775, cols. 1 & 2.]

Second appeal from the decision of the District Judge Ahmedabad, in Appeal No. 70 of 1918, reversing the decree passed by the Joint Subordinate Judge at Ahmedabad, in Civil Suit No. 342 of 1917.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover possession of the plaint house and Rs 125 rent due under a registered lease dated the 18th of May 1915. The defendant filed a written statement contending that the sale deed was effected through fraud in order to defraud the creditors, that the lease was inoperative, and that the sale was declared to be ineffective in a miscellaneous application filed by the plaintiff.

It appears that, after the sale-deed had been executed by the defendant in favour of the plaintiff, the property was attached by a creditor of the defendant. The plaintiff took proceedings under Order XXI for removing the attachment. But in summary proceedings the Court came to the conclusion that the sale-deed was inoperative as it was effected to defraud the creditors. Plaintiff then filed Suit No. 86 of 1916 to set aside this order. That suit was withdrawn on the 15th of August 1916, because defendant settled with the judgment creditor and the attachment was withdrawn. This suit was filed on the 25th of May 1917.

The Trial Court dismissed the suit, relying on the decision in the attachment proceedings against the plaintiff. In first appeal the learned District Judge remanded the case for the trial of the issue whether the transfer by sale on the 10th of April conveyed any interest to the plaintiff, and whether the effect of the lease of 18th May 1915 created the relation of landlord and tenant between the parties. He disagreed with the finding of the lower Court that the order in Miscellaneous Proceedings No. 68 of 1915 was conclusive as against the plaintiff in favour of the present defendant, who was not a party to those proceedings. The lower Court found on those issues in the affirmative. Thereupon the District Judge reversed the decree of the lower Court and decreed the plaintiff's suit.

It has been argued in this Court that the plaintiff, not having sued within a year of the order passed in the attachment proceedings, could not now file this suit against the present defendant. But it appears to me that the decision in *Gopal Purshotam* v. *Bai Divali* (1) decides the question. It is true, in that case the defendant, who had made an unsuccessful attempt to remove the attachment on the property which she claimed as her own, was in possession. When the plaintiff, who had privately purchased the land which had been attached and consequently withdrew his application for execution, endeavoured to get possession, it was contended by him that, because the defendant had not brought a suit within one year to set aside the order of the Subordinate Judge, he was barred from setting up a claim to the land. That contention was disallowed and Sargent C. J., said: "We agree with the lower Appeal Court that, when the plaintiff withdrew his attachment, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was, as contemplated by section 278, Civil Procedure Code, to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act on the 20th of November 1882, there is no longer an attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant. Therefore, there was no interest to bring a suit to set aside the order." Applying the reasoning of that case to this case, as soon as the attachment was withdrawn, there was no longer any attachment or any proceedings in execution in which the order against the plaintiff would operate to his prejudice. The defendant, his vendor, was not a party to the claimant's proceedings, and, once the attachment proceedings were withdrawn, the plaintiff purchaser and the defendant vendor were restored to the position which they occupied before the property was attached. No doubt, if the attachment had continued when the property was sold in execution before the claimant filed the suit, then different considerations would apply, and certainly the order would be conclusive against him in favour of the purchaser if the suit was not filed within a year of the date of the order. But if the defendant's argument were to succeed, this result follows that a party entitled to bring an action within a period fixed by the Indian Limitation Act for that particular action would be barred from bringing a suit within a very much lesser period merely because it happened by accident that attachment proceedings had been instituted at the instance of a third party. In my opinion, therefore, the learned District Judge was perfectly correct in disregarding the order in Miscellaneous Proceedings No. 68 of 1915.

Then, it is contended that only Rs. 1,500 consideration has been proved out of Rs. 2,500. Therefore, the defendant has a lien for the remaining Rs. 1,000. The lower Court came to the conclusion that Rs. 2,500 had been paid and, clearly, the defendant had admitted that at a time when it suited him to do so. But the learned District Judge seemed to think that the onus lay on the plaintiff to prove that he had paid the whole of the consideration, and, dealing with the evidence from that point of view, considered that he could not hold it proved that the other thousand rupees had been paid. I think that the onus clearly lay on the defendant, after he had admitted that the whole consideration had been paid, to show that that was incorrect and that he still had a lien on the property for some of the purchase-money. However, that finding made no difference in the decree passed by the learned District Judge. Apparently, no suggestion was made on the part of the defendant that there was a lien for a thousand rupees. I think the probable explanation of that was, that the question, how much of the consideration-money was actually paid, was not properly dealt with in the case. No specific issue was raised. What the defendant contended was that the whole sale was inoperative and was a fraud against creditors. The Court very certainly was satisfied that Rs. 1,500 out of the Rs. 2,500 went to pay the claim of one of the defendant's creditors, and if once that was proved, it is perfectly clear that it could not be held that the sale was inoperative and it was not necessary to consider whether the plaintiff had received the balance of Rs. 1,000 or not.

(1) 18 B. 241; 9 Ind. Dec. (N. S.) 669.

In my opinion, therefore, the appeal fails and the decree of the learned District Judge must be confirmed with costs.

FAWCETT, J.—I agree. On the first point I may also refer to the case of *Krishna Prosad Roy* v. *Bipin Behary Roy* (2). It was there held, in a case like the present where the attachment was withdrawn, that the plaintiff is not required to institute a suit under section 283 of the previous Code to establish his right to the property in dispute.

Appeal dismissed.

(2) 31 C. 228.

LAHORE HIGH COURT.
FIRST CIVIL APPEAL No. 1479 OF 1915.
December 2, 1920.
Present:—Mr. Justice LeRossignol and Mr. Justice Abdul Raoof.

PUNJAB SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
ARJAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Suit to contest alienation—Fictitious item entered in sale-deed, effect of—Court, duty of

Fictitious items are very often introduced into conveyances, but it does not follow that they are always introduced for fraudulent purposes. They often are introduced for the purpose of frightening would-be pre-emptors but they might also be introduced by the purchaser in order to enhance the importance of his bargain and, consequently, his status in the eyes of his neighbours. Even if the object of introducing such fictitious items is to scare away pre-emptors, reversioners can derive no advantage from that circumstance. [p. 778, col. 2.]

In such a case the real issue is, what is the contract between the vendor and the vendee? And if it is found that by consent of the vendor and the vendee a fictitious amount was included in the ostensible sale-price the only matter which remains for consideration is whether the real contract is one which should be binding on the collaterals [p. 777, col. 1.]

First appeal from the decree of the District Judge, Hoshiarpur, dated the 13th June 1914.

Dr. *Muhammad Iqbal*, for the Appellants.

Mr. *Badar ud-Din Qureshi*, for the Respondents.

JUDGMENT.—Prem Singh and Hem Singh, two brothers, in June 1908 sold 18 *kanals*, 3 *marlas* of ancestral land, and the present appeal arises out of a suit which has been brought by their nephews for possession of their share of the land sold on the ground that the sale was without consideration and necessity. The learned District Judge has found that out of the Rs. 1,500, which purports to be consideration for the sale, Rs. 288 are not proved to have been paid, and he is of opinion that that sum was purely fictitious and was included in the ostensible consideration for the sale probably with the intention of scaring away pre-emptors. He has accordingly given the plaintiffs a decree for possession of one-fourth share in the land sold, to which they are entitled, on the condition that they first pay to the vendee one-fourth of Rs. 1,212, the amount found to be a valid charge.

In appeal before us it has been contended that there is evidence on the record that the item of Rs. 288 rejected by the Court below was paid by the vendee to the vendors; but having heard that evidence, we are unable to differ from the Court below in its conclusion that this sum is not proved to have been paid. The next argument addressed to us on behalf of the appellants is that even if it be held that the item of Rs. 288 is not proved to have been paid, it does not follow that it was included in the sale-price in order to evade suits of pre-emption, and that as the item is only a fraction of the whole sale price, the vendee's failure to prove it should not involve the rescission of the sale.

It is, however, borne in upon us by a long experience that such fictitious items are very often introduced into conveyances, but it does not follow that they are always introduced for fraudulent purposes. They often are introduced for the purpose of frightening would-be pre-emptors, but they might also be introduced by the purchaser in order to enhance the importance of his bargain and, consequently, his status in the eyes of his neighbours. Even, however, if the object of introducing such fictitious items is to scare away pre-emptors, we do not think that reversioners should derive advantage from that circumstance. It is true that in *Kesar* v. *Sundar Singh* (1) a somewhat strict view

(1) 1 Ind. Cas. 888; 27 P. R. 1909; 46 P. L. R. 1909; 38 P. W. R. 1909.

is taken, and it was held that the fact that a portion of the alleged consideration was fictitiously entered with the consent of both parties was no satisfactory ground for relieving the vendee of proving that the whole consideration-money passed for necessity. A contrary view, however, was expressed in another Division Bench ruling of this Court in Civil Appeal No. 210 of 1905, and in that case it was held that the contract in such cases between the parties was that the balance after the exclusion of the fictitious amount formed the real consideration for the sale.

In this case we consider that the real issue is, what was the contract between the vendors and the vendee? And if it is found that by consent of the vendors and the vendee a fictitious amount was included in the ostensible sale-price, the only matter which remains for consideration is, whether the real contract is one which should be binding on the collaterals. On the finding of the Court below, which has not been challenged in appeal by the respondent-plaintiffs, 18 *kanals* of land paying a revenue of Rs 5 passed from the vendors to the vendee for Rs. 1,212. Rs. 1,212 is a sum equal to 240 times the land revenue payable on the land sold and is itself probably a very inflated price. The other facts found in the case are, that the vendors were very poor men; that they had no sons to help them but that one of them had three daughters of a marriageable age at the time of the sale; that their holding was originally a very small one and at the time of the sale was mortgaged with possession to mortgagees in its entirety. It is quite obvious that these men must have been in a necessitous condition and indeed it was asserted in the Court below—and the assertion was not challenged by the other side—that before selling the land to the defendant-appellants the vendors applied to the Deputy Commissioner for permission to sell their land to a member of a non-agricultural tribe. For six years the plaintiffs took no action and that confirms our impression that the sale was for necessity and for the full market value of the land at the time.

In these circumstances, we do not think that the sale should now be interferred with. We accept the appeal and dismiss the plaintiffs' suit with costs.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No 972 OF 1919.

August 4, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

GOVINDA KRISHNA SATHE—PLAINTIFF—APPELLANT

versus

HANMAYA LINGAYA FULMALI AND OTHERS—DEFENDANTS—RESPONDENTS

Court Fees Act (VII of 1870), s. 7 (iv) d —Suits Valuation Act (VII of 1887), s. 8—Injunction, suit for —Valuation for purposes of Court-fee and jurisdiction.

A suit for an injunction comes within section 7 (*iv*) (*d*) of the Court Fees Act and the Court-fee has to be computed according to the amount at which the relief sought is valued in the plaint, which value the plaintiff is entitled to fix himself. In such a case it is wholly unnecessary for the plaintiff to fix any value for the purposes of jurisdiction as, by section 8 of the Suits Valuation Act, the value for the purposes of Court-fee is also the value for the purposes of jurisdiction. [p. 777, col. 2; p. 778, col. 1.]

Appeal from the decision of the District Judge, Sholapur, in Appeal No. 96 of 1919, dismissing an appeal from the decree passed by the Joint Subordinate Judge at Sholapur, in Civil Suit No. 450 of 1918.

Mr. *S. R. Gokhale*, for the Appellant.

Mr. *P. V. Kane*, for Respondents Nos. 1 and 2.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued for an injunction. Such a suit comes within section 7, paragraph (*iv*), of the Court Fees Act and the Court-fee had to be computed according to the amount at which the relief sought was valued in the plaint, which valuation the plaintiff was etitled to fix himself.

He valued the claim at Rs. 10 but also added another valuation of Rs. 500 for purposes of jurisdiction. The memorandum of appeal was valued in the same way. The District Judge, holding that under section 8 of the Suits Valuation Act there could not be two valuations in a suit of this nature, one for Court-fees and another for jurisdiction, ordered the plaintiff to pay the balance of Court-fees as if the claim had been valued at Rs. 500. On the plaintiff failing to comply with this order, the appeal was rejected.

As the plaintiff was entitled, under section 7 of the Court Fees Act, to value his claim at Rs. 10 it was wholly unnecessary for the plaintiff to fix any value for the purposes of jurisdiction, as, by section 8

of the Suits Valuation Act, the value determinable for the computation of Court-fees and the value for the purposes of jurisdiction shall be the same: *Bai Hiragavri* v. *Gulabdas Jamnadas* (1). This principle was approved of by the Privy Council in *Sunderbai* v. *Collector of Belgaum* (2).

In *Raj Krishna Dey* v. *Bepin Behary Dey* (3) the Court considered that the Legislature never intended that the plaintiff should be at liberty to assign any arbitrary value to the relief claimed and thus be free to choose capriciously the forum of trial or appeal. Whatever the Legislature may have intended, that is the meaning which has been given to section 7 of the Court Fees Act by the Privy Council.

The appeal must be allowed and the District Judge must be directed to take Appeal No. 96 of 1919 in his Court on to his file and dispose of it according to law. The costs of this appeal will be costs in the appeal to the lower Court.

Appeal allowed.

(1) 22 Ind. Cas. 71; 15 Bom. L. R 1123.

(2) 52 Ind. Cas. 897 at p. 898; 21 Bom. L. R. 1148; (1919) M. W. N. 254; 43 B. 376; 23 C. W. N. 753; 46 I. A. 15 (P. C.)

(3) 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N. 591.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 378 OF 1919.
RULE No. 136 OF 1920.
June 21, 1920.

Present:—Mr. Justice Teunon
and Mr. Justice Newbould.

SURENDRA NATH GHOSH AND ANOTHER —JUDGMENT-DEBTORS—APPELLANTS

versus

KESHAB LAL GHOSH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Execution of decree—Surety for judgment-debtor—Security, forfeiture of—Sum paid by surety, appropriation of.

In execution of a decree a judgment-debtor was arrested and imprisoned, but was released on furnishing security in the sum of Rs. 500, the surety undertaking to produce him in Court in the event of his not applying to be adjudicated insolvent within a month. He did not so apply and the surety failed to produce him and paid the Rs. 500; the question was how this sum was to be appropriated:

Held, that the sum was to be applied in satisfaction of the decree. [p. 779, col. 2.]

Appeal against the order of the Officiating Additional District Judge, Khulna, dated the 10th of September 1919, reversing that of the Additional Subordinate Judge of that District, dated the 21st of December 1918.

FACTS appear from the judgment.

Babu *Kshitish Chandra Chakraburty* (with him Babu *Panchanan Ghosal*), for the Appellants:—The judgment-debtors are the appellants. The facts of the case are briefly these: The decree-holders obtained a decree against the judgment debtors for Rs. 2,000. In execution of that decree the decree-holder got my client arrested and imprisoned. We then applied to the Court for release on the ground that my client would apply for being declared an insolvent. On this the Court ordered my release on a security of Rs. 500. The surety failed to produce the judgment-debtor in Court as he was directed. As a result of his default, he paid in Rs. 500 for which he stood security. The question for your decision is, whether the amount is to be credited against the judgment debtor. Three points, therefore, would arise for consideration by your Lordships. The first point is that, under section 145 of the Civil Procedure Code, the decree-holder can execute the decree against the surety to the extent to which he has rendered himself personally liable. Therefore, the money realised from the surety should be deducted from the decretal amount.

[TEUNON, J.—Section 145 does not say whether the money realised from the surety should be deducted from the decretal amount?]

My second point is that, upon a proper construction of the surety-bond, the decree-holder is not entitled to get from the surety any amount over and above the decretal amount. The bond merely says that on the surety failing to produce the judgment-debtor under the order of the Court he would be liable to pay a sum of Rs. 500 in accordance with the orders of the Court. My last point is that, in equity the decree-holder is not entitled to get the money from the surety in excess of his decretal dues. The cases in *Basanti Lal* v. *Obed'lu Singh* (1) and *Shyam*

(1) 16 Ind. Cas. 118; 39 C. 1013; 16 C. W. N. 664.

Sundar Lal v. *Bajpai Jainarayan* (2) relied upon by the lower Courts did not deal with the point now under consideration

Babu *Troilakhyanath Ghosh* (with him Babu *Manmathi Nath Roy*), for the Respondents.—The money realised from the surety upon the surety-bond is a penalty. Penalty is a punishment for the breach of law, rule or contract. The case in *Basanti Lal* v. *Oheddu Singh* (1) is in my favour.

[TEUNON, J.—The only point decided in that case is whether the money would go to the Government or to the decree-holder].

There are other cases also. Refers to *Krishnaaiyar* v. *Krishnasamy Ayyar* (3), *Imbichunni Nayar* v. *Lalji Ram Doss Soit* (4) and *Koylash Chandra Shaha* v. *Christophoridi* (5).

Babu *Kshitish Chandra Chakraburty* replied briefly.

JUDGMENT.—This appeal is directed against an order of the Additional District Judge of Khulna, dated 10th September 1919. In this case it appears that in execution of a decree aggregating, with interest and costs, a sum of about Rs. 2,000 the judgment-debtor was arrested and imprisoned. He was thereafter released on furnishing security for a sum of Rs. 500; the surety undertaking to produce the judgment debtor in Court in the event of his not applying to be adjudicated an insolvent within a month. The judgment debtor, in fact, did not apply for adjudication as an insolvent and the surety further failed to produce him. It is not disputed on these facts that the conditions of the surety-bond have not been fulfilled and that the sum of Rs. 500 has become payable by the surety. That sum has, in fact, been paid by the surety. The question before us is, whether the Rs. 500 should be appropriated or credited against the decretal amount or should be taken by the decree-holder as a solatium for the delay brought about in the execution of his decree.

The surety-bond runs thus:—"If the aforesaid judgment debtor does not apply to be declared an insolvent within a month from this date, I undertake to produce him under the orders of the Court. If I fail to do so, then I will be liable to pay a sum of Rs. 500 in accordance with the order of the Court." The terms of the bond do not in themselves make it clear whether the payment made by the surety was to be credited against the decree or was to be made available to the decree-holder over and above his decretal amount. But we are of opinion that the intention of the parties and of the Judge who took this bond was that the sum would be credited against the decree. The Subordinate Judge who took the bond has shown by his order, which has been reversed by the learned Additional District Judge, that this was the view he took of the transaction. Possibly, from the language of the bond and more particularly the words "in accordance with the order of the Court," it might be argued that it was for the Judge who took the bond to decide how the sum that ultimately became payable should be appropriated. On the question in controversy we have been referred more particularly to two reported cases, namely, the case reported in *Basanti Lal* v. *Oheddu Singh* (1) and the case reported in *Koylash Chandra Shaha* v. *Christophoridi* (5). In the first of these cases it was held that in a case such as this the money should not be declared a forfeiture in favour of Government, but must be appropriated for the benefit of the decree-holder whose rights were interfered with. But there, apparently, the question did not arise whether the money should be appropriated towards the satisfaction of the decree or should be given to the decree-holder as a solatium or further benefit over and above the decretal amount. In the second case, the terms of the bond make it clear that any sum paid by the surety, should he fail to comply with the conditions of the bond, was to be applied in satisfaction of the decree, and that, we think, represents the usual course of proceedings in cases of this kind.

For these reasons, we set aside the order of the Additional District Judge and restore the order of the Subordinate Judge with costs in all Courts. We assess the hearing fee in the Court of first instance at rupees ten, in the Court of first appeal rupees sixteen and in this Court at one gold *mohur*.

(2) 30 C. 1060; 7 C. W. N. 914.
(3) 26 M. 366.
(4) 24 M. 560.
(5) 15 C. 171; 7 Ind. Dec. (N. S.) 693.

The connected Rule (No. 136 of 1920) is discharged. We make no order as to costs in the Rule.

Appeal allowed.
Rule discharged.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No 645 OF 1919.
July 29 1920.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.
NURDIN NAJBUDIN—DEFENDANT—APPELLANT
versus
UMRAV BU—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 123, 141—Suit to recover share in property left by Muhammadan—Limitation applicable.

Where the members of a Muhammadan family continue to live as tenants-in-common without dividing the estate of a deceased ancestor, limitation for a suit by one of his heirs to recover his share in the estate of the deceased will not run from the time of the latter's death, but from the date when the defendant begins to hold adversely to the plaintiff.

Second appeal from the decision of the Assistant Judge, Ahmedabad, in Appeal No. 78 of 1918, reversing the decree passed by the Subordinate Judge at Borsad, in Civil Suit No. 97 of 1916.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *N. K. Mehta*, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover her share in the property of her grandmother, Gulbai, who died in 1892. It is admitted that she would have been entitled to half her mother's share, and she has been held entitled to one-twelfth of the estate of Gulbai.

It is contended that the suit is barred by limitation and that Article 123 applied. But we decided in *Kallangouda* v. *Bibishaya Shah Mahomed Khan* (1) that where the members of a Muhammadan family continued to live as tenants-in common without dividing the estate of a deceased ancestor, limitation will not run from the time of his death. Here, on the findings of fact by the Appellate Court, we cannot say that facts were proved to establish adverse possession against the plaintiff. Therefore, we see no reason to differ from the finding of the learned Judge.

The appeal must be dismissed with costs.

FAWCETT, J.—I agree. The learned Pleader for the appellants has relied upon the Privy Council case of *Maung Tun Thi* v. *Ma Thit* (2), where their Lordships refer to Article 123 of the Indian Limitation Act as prescribing the period within which a claim must be made for a share of property on the death of an intestate. It is to be noted with regard to that case that it was one from Burma and, as the report at page 381* shows, there was already a decision of the Chief Court that the period of limitation for the recovery of a share by an eldest son is twelve years from the date of his parent's death under Article 123. The appellant's Counsel also referred to that Article as being the one applicable in such a case. Their Lordships' attention does not appear to have been drawn to the Indian rulings regarding the scope of this particular Article, and it was not a point in issue in the case. The reference to this Article is merely incidental, and there may be special reasons for its applicability to the case of Buddhist Law there under consideration. I do not, therefore, consider that it is a pronouncement of the Privy Council which should necessarily be held to conclude the question, especially as a contrary opinion appears to me to have been expressed by their Lordships of the Privy Council in the case of *Mahomed Riasat Ali* v. *Hasin Banu* (3). No doubt it is arguable that Article 123 could not apply on the particular facts of that case. But the view there taken seems to be based on proper force being given to the word 'distributive' in this Article 123. We are practically asked by the appellants' Pleader to construe Article 123 as if that word had no force and the Article was meant to cover the case of any claim for a share of the property of an intestate.

(1) 58 Ind. Cas. 42; 22 Bom. L. R. 936 44 B. 943.

(2) 38 Ind. Cas. 809; 44 C. 379; 19 Bom. L. R. 294; 15 A. L. J. 96; 32 M. L. J. 71; 21 M. L. T. 97; 21 C. W. N. 527; 26 C. L. J. 169; 9 L. B. R. 56; 10 Bur. L. T. 138; 44 I. A. 42 (P. C.).

(3) 21 C. 15[illegible] at p. 163 (P. C.); 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique & Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737

*Page of 44 C.—[Ed.].

BIS RAM v. KEWAL RAM.

This word 'distributive' has always been in this Article, since its enactment in Act IX of 1871, where the Article further inserted the word 'moveable' before the word 'property'. I think the latter fact explains how the word 'distributive' came to be in this particular Article. The word 'distribution' has, under English law, a very particular meaning. In the case of real or immoveable property the term 'descent' was applied to the division of the property among those legally entitled to it, whereas the term 'distribution' was applied to the division of the personal estate of an intestate. And it is also part of the English law that, whereas the title to real estate vests at once in the heirs of the deceased owner, the legal title to his personal property vests in the executor or administrator and is transferred to the persons beneficially interested by the distribution. It has, therefore, a peculiar meaning of distribution of an estate which has vested in an executor or administrator and in several cases the Article has been so construed as limited to such a case. There are strong reasons for that view, and I do not think the Privy Council judgment relied upon gives any sufficient basis for our differing from it.

Appeal dismissed.

LAHORE HIGH COURT.
CIVIL REVISION PETITION No. 312 OF 1920.
December 2, 1920.
Present :—Mr. Justice Wilberforce.
BIS RAM—DEFENDANT—PETITIONER
versus
KEWAL RAM AND ANOTHER—PLAINTIFFS
RESPONDENTS.

Contract Act (IX of 1872), s. 19—Acknowledgment, suit on—Signature of executant obtained by intimidation, effect of.

A person acknowledging his liability to pay a certain sum cannot be held bound by the acknowledgment, where it is found that his signature was obtained by intimidation and that the amount acknowledged has been paid.

Petition under section 25 of Act IX of 1887, for revision of the decree of the Judge, Cantonment Small Cause Court, Kasauli, dated the 20th February 1920.

Lala *Amar Nath Bhatia*, for the Petitioner.

Mr. *Des Raj Sawhney*, for the Respondent.

JUDGMENT.—In this case the plaintiff sued for recovery of money due on a balance. The Judge of the Small Cause Court held that the defendant had signed the balance sued upon. He further held that the whole account with the plaintiff had been settled by a payment made by the defendant's brother. The Judge stated : "I believe this and it was more than a full settlement too, but unfortunately the law does not make any allowance for fools who sign documents they don't understand, and since defendant on 29th December 1913 signed that he separately owed this money-lender Rs. 316, I am forced to give plaintiff a decree. Plaintiff, in my opinion, has behaved disgracefully by intimidation forcing defendants to sign documents." In spite of this finding, the Judge gave the plaintiff a decree. The defendant has put in an application for revision against this decree.

It is clear that the Judge of the Small Cause Court was labouring under a misapprehension as to the legal effect of the mere signing of documents. Such signatures can be in no way binding when it is found that they were caused by the intimidation of the plaintiff and that the amount acknowledged had been paid off.

I, therefore, accept this petition for revision and dismiss the plaintiff's suit with costs in all the Courts.

Petition accepted.

MAHARAJ BAHADUR SINGH *v.* FORBES.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

November 15, 1920.

Present :—Viscount Cave, Lord Sumner and Sir John Edge.

MAHARAJ BAHADUR SINGH —APPELLANT

versus

A. H. FORBES—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 90, 93—Sale in execution of decree—Payment to decree-holder—Security-bond—Sale set aside and refund ordered—Interest, whether should be allowed.

Where part of the purchase-money upon a sale in execution has been paid out to the decree-holder under a security bond, and the sale is subsequently set aside, the Court has power, under Order XXI, rule 93 of the Civil Procedure Code, to order that interest be paid for the period during which the decree-holder has had the use of the money, even though the security bond does not provide for interest. [p. 783, col. 1.]

Appeal from a decree of the Patna High Court, dated the 4th January 1917, affirming an order of the District Judge, Purnea.

FACTS.—The only question in this appeal was, whether the respondent was entitled to interest and if so against whom?

A Zemindar, who had already sold his Zemindari, obtained a decree against a *patnidar* for arrears of rent accrued before the sale. Thereafter, he conveyed his whole estate to trustees, and later died, leaving him surviving a son and widow, the appellants.

The trustees applied to sell the *patni* tenure and respondent, who was a *dar-patnidar*, sued for a declaration that the decree was not a rent decree within the Bengal Tenancy Act and the *patni*, therefore, not liable to sale.

In 1908 the Calcutta High Court in appeal dismissed this suit and held that the *patni* could be sold. It was then sold on the application of the trustees and bought by respondent for Rs. 61,200 which was paid into Court.

On July 4th, 1909 the trustees and the appellants entered into a security bond in the sum of Rs. 40,708 (the amount due under the decree) to be paid in case an appeal then pending in the Privy Council was successful. The bond did not provide for interest. The Rs. 40,708 was thereafter paid out to the first appellant's Pleader.

In 1914 the Privy Council reversed the decree of the Calcutta High Court—*vide Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1).

Meanwhile, in 1908, applications were made by respondent to set aside the sale under sections 311 and 313 of the Civil Procedure Code, 1882; the sale was set aside by the District Judge on February 19th, 1911, and his decision was affirmed by the Calcutta High Court in 1914.

On May 27th, 1915, respondent applied for the refund of his money with interest: the appellants and trustees denied their liability to pay interest, but the District Judge allowed it, and an appeal to the Patna High Court was dismissed, the learned Judges (Chapman and Roe, JJ.) holding that the Court had a discretion to allow interest under section 144, even though the bond did not provide for it.

Hence this appeal.

Messrs. *Dunne, K. C.* and *E. B Raikes*, for the Appellants.—The order for payment of interest was erroneous. The bond does not provide for it, and there is no statutory authority, contract or equity under which it could be given. Section 144 of the new Code does not apply: there was here no question of a decree being varied or reversed: the only question was whether the sale should stand. The High Court did not rely on Order XXI, rule 93: if they had, a point of limitation would have arisen: the sale was set aside in 1911, but the application for restitution was not made till 1915, and any application under Order XXI, rule 93 was then barred by Article 181 of Schedule I of the Indian Limitation Act, 1908. The appeal to the High Court did not suspend the Statute. *Hukum Chand Boid Juscurn Boid* v. *Pirthichand Lal* (2).

Messrs. *De Gruyther, K. C.* and *O'Gorman* for the Respondent.—The Court had the power to allow interest under section 144, which corresponds to section 583 of the Code of 1882. These sections merely give effect to the general power of the Court to allow

(1) 23 Ind. Cas. 632; 41 I. A. 91; 18 C. W. N. 747; (1914) M. W. N. 397; 15 M. L. T. 380; 12 A. L. J. 653; 27 M. L. J. 4; 41 C. 926; 1 L. W. 1059; 25 C. L. J. 434 (P. C.).

(2) 50 Ind. Cas. 444; 46 I. A. 52 at p. 56; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 46 C. 670; 26 M. L. T. 131; 10 L. W. 416 (P. C.).

interest when making restitution, laid down in *Rodger* v. *Comptoir d' Escompte de Paris* (3).

Although the High Court mention section 144 of the Civil Procedure Code, there was also power to make the order allowing interest under Order XXI, rule 93. The question of limitation was not raised in the lower Courts: it is too late to raise it now.

[VISCOUNT CAVE.—The trustees had the use of the money, but if the whole estate goes to the original decree-holder's creditors what benefit do the appellants get? Why should they be made to pay interest?]

The decree appealed from imposes liability on them merely as representing the estates. We do not suggest we are entitled to interest from them personally.

Mr. *Dunne*, *K. C.*, replied.

JUDGMENT.

VISCOUNT CAVE.—In their Lordships' opinion there is no ground for this appeal. Proceedings to set aside the sale were taken both under section 311 of the Civil Procedure Code of 1882, corresponding with Order XXI, rule 90, of the rules scheduled to the Civil Procedure Code of 1908, and under section 313 of the Code of 1882, corresponding with rule 91 of the same Order. The sale was duly set aside; and accordingly Order XXI, rule 93 applied and the Court had power to order interest to be paid on the sum of Rs. 40,708 paid to the trustees. This being so, it is unnecessary to consider whether, as the High Court appears to have held, section 144 of the Code of 1908 also applied. It is true that the bond did not reserve interest, but the effect of this omission was, not that the Court was deprived of its power to order interest to be paid, but only that the security did not extend to interest. It is common ground that the order, so far as it directs the payment of interest, is not intended to be enforced against the appellant personally, but only binds the estate in the hands of the trustees in which the appellant is interested.

An attempt was made to raise a question of limitation, but this question was not raised in the Courts below or in the appellant's case on this appeal, nor are the facts upon which it depends fully before the Board. This plea, therefore, cannot be raised at this stage.

(3) (1871) 7 Moo. P. C. (N. S.) 314; 40 L. J. P. C. 1; 8 P. C. 465; 24 L. T. 111; 19 W. R. 449; 17 E. R. 120.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant:—Mr. *G. C. Fan.*

Solicitors for the Respondents:—Messrs. *Pugh & Sons.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 34 OF 1920.

July 27, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice and Mr. Justice Fawcett.

PANDU KRISHNA JADHAV—

PLAINTIFF—APPELLANT

versus

DHONDI KRISHNA PATIL—

DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Adoption by widow of co-parcener, validity of—Consent of co-parceners, whether necessary—Effect of adoption.

The widow of a co-parcener cannot adopt unless she has either the express authority of her husband or the consent of her husband's co-parceners. [p. 784, col. 1.]

An adoption cannot be partly valid and partly invalid, so that the person adopted, although excluded from becoming a member of the joint family, may still be entitled to inherit the self-acquired property of his adoptive father. [p. 784, col. 1.]

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Satara, in Appeal No. 363 of 1918, reversing the decree passed by the Second Class Subordinate Judge at Islampur, in Civil Suit No. 120 of 1918.

Mr *Nilkant Atmaram*, for the Appellant.

Mr. *J. R. Gharpure*, for the Respondent.

JUDGMENT.—The plaintiff filed this suit to recover possession of the suit property, alleging that it originally belonged to his father, Krishna, who had secured it under a gift-deed from his maternal grandfather, Rama. Krishna died in 1907 leaving a widow, Chandra, who disposed of the property in question to the first defendant at the time when she was a minor. The second defendant is the father of Krishna who is joined as a co-defendant for some reason which is not very apparent. He claimed that Krishna died joint with him

and, therefore, the adoption by Chandra was not valid. The first Court found that Krishna died separate from his father, the second defendant, but on grounds which do not appeal to us as being correct. The presumption is that Krishna was joint with his father. There is nothing to show that he ever became separate. Admittedly, there was some property belonging to the second defendant though its value may have been very small. The Trial Judge came to the conclusion that, because Krishna lived at Khed where his grandfather lived and not where his own father lived, he had relinquished his right to any share of his father's property. However that may be, that would not amount in law to a separation. I think the learned Appellate Judge was right in holding that Krishna and his father died joint, although no doubt the property which was gifted to Krishna was his self acquired property. Then, the ordinary rule of Hindu Law must apply, that the widow of a co parcener cannot adopt unless she has either the express authority of her husband or the consent of her husband's co-coreeners. An adoption cannot be partly valid and partly invalid, so that the person adopted, although excluded from becoming a member of the joint family, may still be entitled to inherit the self-acquired property of his adoptive father. In this case it seems obvious that the widow adopted the plaintiff in 1915 in order that he might make a claim to the property which had been alienated by her at the time she was a minor. She took, when her husband died, a life-interest in her husband's self-acquired property. No doubt, to that extent her alienation will be good, unless she is able to upset it on the ground that she was not competent to alienate at the time. But it is quite clear that the plaintiff cannot set aside the alienation on the ground that he is an adopted son. The judgment of the lower Court, therefore, must be upheld and the appeal dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 67 OF 1920.

October 27, 1920.

Present: Mr. Justice Piggott and Mr. Justice Walsh.

MESSRS. STRAUSS AND Co. LD.—DEFENDANT—OPPOSITE-PARTY—APPELLANT *versus* RAGHUBAR DAYAL AND OTHER—PLAINTIFFS—APPLICANTS—RESPONDENTS.

Arbitration—Award—Decree in terms of award—Order staying suit—Final decree, whether necessary.

An order staying a suit is permanent unless the order itself provides otherwise by imposing a terminus. [p. 785, col. .]

Where during the pendency of a suit the subject-matter of the dispute is referred to arbitration and the suit is stayed, the order staying the suit is sufficient finally to dispose of the suit. [p. 785, col. 1.]

Appeal from the order of the District Judge, Cawnpore, dated the 21st of February 1920.

Messrs. *B. E. O'Conor*, and *Durga Prasad*, for the Appellant

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This appeal and the connected Revision No. 49 of 1920 are brought against an order of the District Judge of Cawnpore, dated the 21st of February 1920.

On the 27th of August 1919 he had stayed a suit upon the ground that the parties had submitted the matter to arbitration in accordance with the terms of the contract between them. In the meanwhile, an arbitrator had been appointed, an award had been made, and a decree passed in pursuance of the award. For some reason or another the present respondents made an application on the 21st of February to remove the stay of the 27th August. The learned Judge obviously felt great difficulty about it and, with considerable reluctance, finally made an order removing the stay which he himself had granted, the effect of which was to revive the suit, although the matter had been disposed of according to law by arbitration. The defendant appeals from that order. In support of the learned Judge's order it is suggested that, in any event, even in a case where the matter in dispute has been referred to arbitration, if a suit has been instituted, it is necessary that there should be a final decree dismissing the suit. If that were the correct view, clearly, the stay would have to be removed before any final decree could be passed. We have come to the conclusion

that no final decree is necessary. Without saying that there are no cases in which a stay could possibly be removed, for example, the parties by consent might decide to drop the arbitration and relegate their dispute to the Courts of law; in such a case by the consent of parties, no doubt a stay could be removed, but it is clear that, where the circumstances are the same, as they were in this case, as at the time when the stay was originally imposed, the Judge is *functus officio*, and cannot reverse his own order.

If the order of the 21st of February had not been made, or if it were now reversed, the original stay order of the 27th of August would remain in force. Ordinarily, a stay is permanent unless the order directing it provides otherwise by imposing some terminus. In the case of *Shebabu* v. *Udit Narain* (1), to which we were referred in the course of argument, it was suggested that my brother Piggott had said that the suit in such a case would have to be formally dismissed upon a finding that the matter had been otherwise disposed of. While agreeing with everything which was said in that case, we do not think that it was intended to lay down any definite practice on this particular matter which was not necessary for the decision. We have consulted the learned Judge of the English department, and we have come to the conclusion that a stay order under section 19 of the Arbitration Act, when arbitration has in fact taken place, is sufficient finally to dispose of the suit. The intention of the Legislature was to oust the jurisdiction of the ordinary Courts, and any procedure other than that provided by the Arbitration Act in matters which are referred to arbitration would only create difficulty and confusion. There ought to be no difficulty, so far as the file and records in the lower Court are concerned, in disposing of the suit which has been stayed. We would only further observe that it is satisfactory to note that the dispute arising out of this contract was disposed of by a decree within less than six months from the institution of the suit. The appeal and revision of the defendant against the order of the 21st of February must be allowed with costs and the learned Judge's order set aside. Costs to include fees on the higher scale.

Appeal allowed.

(1) 24 Ind. Cas. 403; 12 A. L. J. 757.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 17 OF 1919.

July 28, 1920.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

GOPAL DINKAR NAGARKAR—PLAINTIFF—APPELLANT

versus

GANESH NARAYA NAGARKAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 12 (b), (c)—Arbitration—Award-Court, power of, to correct arithmetical error in award.

The only power a Court has under paragraph 12 (*b*) and (*c*) of the Second Schedule to the Civil Procedure Code is either to amend an obvious error in the award which can be amended without affecting the decision, or to rectify a clerical mistake or an error arising from an accidental slip or omission. It has no power to correct an error of calculation or arithmetic and award a sum different from that awarded by the arbitrator. [p 786, col. 2.]

Appeal from an order passed by the First Class Subordinate Judge at Ahmednagar, in Suit No. 824 of 1912.

Mr. *S. R Bakhale*, for the Appellant.

Mr. *G. S. Mulgaokar*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The matters in dispute in this suit were referred to arbitrators at the request of the parties who agreed to abide by the decision of the arbitrators, who were two in number, on the points on which they agreed, and by the decision of the umpire on point or points on which they differed. The arbitrators agreed on certain points and they filed their award on the 19th of February 1915, and on the points on which they differed the umpire gave his decision on the 9th of August 1918. Both parties filed objections to the arbitrators' award. The Court passed an order on an application made by the parties to amend the award on the ground that there were certain clerical errors made by the arbitrators. The order was: "Notice to arbitrators to rectify the award under rule 12 of the Second Schedule of the Civil Procedure Code, and notice to the plaintiff to show cause why the award should not be amended as proposed by the defendants." On the 28th of July the plaintiffs made an application to the Court pointing out certain clerical errors made by the arbitrators and the Court passed an order forwarding the application to the arbitrators for consideration. The

arbitrators considered the objections of the parties, and submitted their opinion regarding the alleged errors on the 31st of August 1915. Notice was then issued to the parties, and an order was passed, after hearing them, appointing two Commissioners to examine the accounts made by the arbitrators with a view to ascertain whether they really involved any arithmetical or clerical error. The Commissioners were directed to examine the accounts and also the parties, if necessary. Thereupon, the Commissioners asked the opinion of the Court on certain points, on which the Court passed the following order: "The Commissioner should confine himself to three items (double entries as stated in the Purshis Exhibit 120 by Mr. Patwardhan). Even if the parties may ask to re-open the whole account, he should not be guided by their views, for the arbitrators' award cannot be challenged except for clerical errors. Mr. Patwardhan has pointed out only three errors and plaintiff has pointed out none." The Commissioner made his report which supported the opinion of the arbitrators. The Court then considered any objections taken by the parties with regard to the three disputed items, apparently the same as those which were referred to the Commissioner by the previous order, and the Court reversed the report of the Commissioner on these three items and directed that the Commissioner already appointed should make calculations in the light of the judgment and find out what amount was really due and by whom to whom. The Commissioner then reported, and eventually a decree was passed in favour of the defendants for Rs. 2,027 10-0.

It appears to us that an absolutely wrong procedure has been followed by the Court from the commencement of these proceedings. The Court professed to act under paragraph 12 of the Second Schedule. All questions of misconduct against the arbitrators had been dropped, and the only suggestions that could be made against the award should have been made under sub-paragraphs (*b*) and (*c*) of paragraph 12. But the Court in effect directed the Commissioner to sit in appeal on the award of the arbitrators with regard to the three disputed items, and when the Commissioner supported the decision of the arbitrators, the Court itself sat in appeal on the decision of the Commissioner. But the only powers the Court had under paragraph 12 (*b*) and (*c*) were either to amend an obvious error which could be amended without affecting the decision, or to rectify a clerical mistake or an error arising from an accidental slip or omission. It cannot be said that the Court has amended an obvious error which could be amended without affecting such decision, because the decree of the Court was entirely different from the award of the arbitrators. Nor can it be said that the Court has rectified a clerical mistake or an error arising from an accidental slip or omission. The Court went into the merits of the dispute as regards those three items and came to a conclusion of its own, with the result that a very distinct alteration was made in the award. When the parties agreed to have their disputes decided by their arbitrators, they agreed to accept the decision of the arbitrators whether it might be right or wrong, and the Court can only alter the award within the limits laid down by the Second Schedule. There is a recent decision—*Shyam Lal* v. *Parshottam Dass* (1)—where it was decided that, "it is not a ground for remitting an award on matter referred to arbitration or for setting aside an award that the arbitrator has made a mistake in arithmetic, and apparently unintentionally has awarded a larger sum of money to be paid by one party to the other than he would have awarded if his attention had been directed to the mistake." This is a stronger case, because the arbitrators' attention was directly drawn to the objections made to their award and they finally decided what their award should be after hearing those objections. In my opinion, therefore the procedure followed by the Trial Court was wrong.

The decree must be set aside and a decree must be passed in terms of the award.

The appellants must have their costs of this appeal.

FAWCETT, J.—I entirely concur. The procedure adopted by the Subordinate Judge in this case is clearly unwarranted by the provisions of the Second Schedule of the

(1) 58 Ind. Cas. 585; 42 A. 277; 18 A. L. J. 241; 2 U. P. L. R. (A.) 104.

SHAHZADI BEGAM v. MUHAMMAD IBRAHIM.

Code of Civil Procedure and he has practically arrogated to himself appellate or revisional jurisdiction which is not conferred upon him. Even if the Subordinate Judge considered he had an inherent power to alter the award for the ends of justice under section 151 of the Civil Procedure Code, this action is against the ruling of this Court in *Jethabhai* v. *Chapsey* (2). In that case it was held that where, according to well-established principles, certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction on the plea that the Court has inherent power to do what justice requires for the parties before it.

There is only one other thing I would add. The Subordinate Judge, in paragraph 40 of his judgment, describes these errors as "errors of calculation or omission to take into consideration in calculation or of kindred nature and nothing more"; that is to say, they were arithmetical mistakes. But it is to be noted that under clause (*c*) of paragraph 12 of the Second Schedule the Court can only correct an award where it contains a clerical mistake, whereas in section 152 of the Code clerical or arithmetical mistakes are mentioned as apparently two separate classes of mistakes. It would be difficult, therefore, to say that the word 'clerical' in clause (*c*) covers the word 'arithmetical.'

Decree set aside.

(2) 4 Ind. Cas. 108; 34 B. 467 at p. 431; 11 Bom. L. R. 1014.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 423 OF 1917.
October 25, 1920.
Present :—Justice Sir P. C. Banerji, Kt., and Mr. Justice Gokul Prasad.
Musammat SHAHZADI BEGAM—PLAINTIFF—APPELLANT
versus
Sheikh MUHAMMAD IBRAHIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Compromise—Parties agreeing to abide by decision of Court—Decision, whether can be questioned as incorrect—Appeal, whether lies.

Where parties to a suit effect a compromise in respect of some of the suit property, and as regards the rest agree to be bound by the decision of the Court to be arrived at after considering certain documentary evidence to be placed before it, it is not open to either of the parties to question the correctness of the Court's decision by appeal. [p. 788, col. 1.]

First appeal against the decree of the Subordinate Judge, Cawnpore, dated the 14th September 1917.

Dr. *S. M. Sulaiman*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by *Musammat* Shahzadi Begam for recovery of her legal share in the estate of her deceased father, Baqar Ali. The defendants to the suit were her brother, Muhammad Ibrahim, and her sisters, or legal representatives. The suit was mainly defended by the brother who alleged that part of the property claimed was *wakf* property; that part was property which exclusively belonged to him, and that the plaintiff was not entitled to obtain any share in the *wakf* property. A document was produced alleged to have been executed by one Wilayat Ali, who was the ancestor of Baqar Ali, and under which certain property was declared to be *wakf*. In the course of the trial the parties came to terms and a compromise was filed on the 13th of September 1917. This compromise is printed at page 27 of the paper book. The compromise dealt with all the property in dispute which consisted of house property, shops, some Government securities and money deposited in a Bank and other property of a similar description. As to part of the property which was claimed to be *wakf* the compromise provided as follows:—"With regard to the remaining properties which defendant No. 1 says in his written statement to be *wakf* properties, the Court may find with reference to the documentary evidence produced by the parties in this case whether they are *wakf* properties or not *and the parties will be bound* by such a finding." The Court, in accordance with the terms of this compromise, came to a finding as to whether some of the property was *wakf* property or not and accordingly directed a preliminary decree for partition to be prepared. It is against the finding of the Court below as regards some properties claimed by one

party to be part of the estate of Baqar Ali and by the other as *wakf* property that the present appeal has been preferred. A preliminary objection has been taken to the hearing of the appeal on the ground that, under the terms of the compromise as quoted above, the parties undertook to be bound by the finding of the Court and that, consequently, it is not open to the appellant to question the correctness of that finding. In our opinion the objection is well founded. As we have stated above, the parties under the compromise came to an understanding as to all various items of property claimed in the suit. They made arrangements in regard to all the property with the exception of certain properties referred to in the passage which we have quoted above and they agreed that, on the basis of the documentary evidence alone, the Courts should come to a finding and such finding would be binding on the parties. The words which we have italicised above would be meaningless unless we hold that by those words the parties agreed to accept the finding as a correct finding and not to appeal against it. There was a clear implication in the agreement not to appeal against the finding but to be bound by it whatever it might be. As all the terms of the compromise were agreed upon in view of this condition also, the plaintiff, in our opinion, is estopped from disputing the correctness of the finding. We think that this case is similar to the case of *Bahir Das Chakravarti* v. *Nobin Chunder Pal* (1). In our opinion, it is not open to the plaintiff to dispute the correctness of the Court's finding and this appeal must fail. We accordingly dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

(1) 29 C. 306 at p. 310; 6 C. W. N. 121.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 492 OF 1918.

May 14, 1920.

Present :—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

Srimati SARI *alias* SARADAMAYI DEBI, WIDOW OF LATE NARAIN CHANDRA SINGH—DEFENDANT—APPELLANT

versus

Srimati SAILABALA DASI, WIFE OF BROJA GOPAL ROY—PLAINTIFF—RESPONDENT.

Landlord and tenant—Tenancy created by registered instrument—Surrender, oral, validity of—Yearly payment of rent, whether conclusive evidence of annual tenancy—Transfer of Property Act (IV of 1882), s. 107.

An oral surrender of a tenancy created by a registered lease is not invalid if it is accepted and acted upon by the landlord. [p. 789, col. 2.]

The fact of an annual rent being reserved, though it may raise a presumption, is not conclusive to show that the tenancy is a yearly one [p. 789, col 2.]

After the passing of the Transfer of Property Act, there cannot be a tenancy reserving a yearly rent without a registered instrument in accordance with the provisions of section 107 of the Act. [p. 790, col. 1]

Appeal against the decree of the Subordinate Judge, 3rd Court, Hoogbly, dated the 25th of June 1917, affirming that of the Munsif, Amta, dated the 22nd of March 1915.

FACTS appear from the judgment.

Babu *Jatindranath Sen*, for the Appellant :—The defendant is the appellant. The appeal arises out of a suit for ejectment. Both Courts have decreed the suit. The point of law is that, as between the plaintiff and the defendant, there is an outstanding lease and so long as it lasts there can be no ejectment. The lower Appellate Court found that there was a surrender but that I submit would be of no effect as it was not registered. The land is a homstead land. There was no issue raised as to my status. The whole suit was tried on the basis that the case was governed by the Transfer of Property Act. The land in dispute which was held by *lakheraj* right was mortgaged in 1292 B. S. to one Kedar Roy, who is plaintiffs' vendor. On 1st *Asar* 1295 Kedar in execution of the decree purchased the property. On the 16th *Asar* my client's husband took lease for 1306-12 from Kedar. On 6th *Kartic* 1312

Kedar mortgaged the property to Prafulla and others. On the 24th *Kartic* 1312 Kedar granted lease to mortgagees from 1312 20 for Rs. 300. Sometime after Kedar by paying off his share obtained release of his share of the mortgage. In 1319 Kedar sold the same. In 1319 Prafulla executed an *istafa* in plaintiff's favour. As Prafulla and others were holding under the registered lease it cannot be surrendered by an unregistered instrument under the law. Refers to *Sarat Chandra Sinha* v. *Nritya Gopal* (1). Secondly, the notice to quit was bad in law, the tenancy being one from year to year. Thirdly, the forfeiture has been waived by the notice to quit. The tenancy, I submit, should have been held to be governed by the provisions of the Bengal Tenancy Act. The surrender of a registered lease is to be made by registered instrument. Refers to *Abdullah Khan* v. *Basharat Hussain* (2); section 92 of the Indian Evidence Act. There must be some act of giving up possession. The defendant was all along in possession and paid rents to the intermediate holder who verbally professed to give up possession by surrender. He was not in possession. Refers to *Sarat Chandra Sinha* v. *Nritya Gopal* (1). The cases in *Bengal Coal Company Limited* v. *Monoranjan Bagchi* (3) and *Abiul Majid* v. *Hari Charan Haldar* (4) are very different from the present case There the question was whether a valid surrender under the Transfer of Property Act required a written instrument. The question in issue here is very different from that. The person surrendering was not in possession and I was on the land by virtue of the subsisting lease. I was not an attorned tenant of Prafulla. The tenancy cannot be determined by a 15 days' notice even though I hold over under the terms of the previous lease. Refers to *Baijnath Prosad* v. *Raghunath Rai* (5). The case in *Troilokya Nath Roy* v. *Sarat Chandra Banerjee* (6) is distinguishable. Refers to *Durgi Nikarini* v. *Goberdhan Bose* (7) and *Lalit Mohan Ghose* v. *Gopal Chauk Coal Company Limited* (8).

Dr. *Dwarkanath Mitter* (with him Babu *Satindranath Mukerjee*), for the Respondent:—It is not necessary that in all cases where the lease is by a registered instrument the surrender must be by a registered instrument also. The case is governed by section 111 (*f*) of the Transfer of Property Act. The Act contemplates the acts and conduct of the parties. It nowhere suggests that surrender cannot but be by a deed. Reads section 92, Indian Evidence Act. Refers to *Subramanian Chettiar* v. *Arunachalam Chettiar* (9), *Imambandi Begam* v. *Ramleswari Pershad* (10), *Ram Awatar* v. *Tulsi Prosad Singh* (11). The finding of the first Court is clear and it was found that the intention to surrender was actually carried into effect. Refers to *Troilokya Nath Roy* v. *Sarat Chandra Banerjee* (6), *Sarat Chundra Dutta* v. *Jadab Chundra Goswami* (12). There is also the clear finding of forfeiture. Notice is, therefore, not necessary. Refers to *Megh Lal Pandey* v. *Raj Kumar Thakur* (13). The mere fact that a notice was given does not constitute waiver. Farther, this question was not raised below.

Babu *Jatindranath Sen*, replied in brief.

JUDGMENT.—The first contention raised in this appeal is that the oral surrender is invalid because the original tenancy was created by a registered lease. But it is found that the tenant gave up his lease-hold right and that it was accepted and acted upon by the landlord. The tenant has raised no objection. In the circumstances, we do not think that the surrender was invalid.

The next contention is that the tenancy was a yearly tenancy because a yearly rent was paid and that, therefore, the defendant was entitled to six months' notice to quit.

But the fact of an annual rent being reserved, though it may raise a presumption, is not conclusive to show that it was

(1) 8 Ind. Cas. 47; 13 C. L. J. 284

(2) 17 Ind. Cas. 747; 17 C. W. N. 233; 40 I. A. 31; 18 M. L. T. 182; (1913) M. W. N. 131; 35 A. 48; 17 C. L. J. 312; 15 Bom L. R. 432; 25 M. L. J. 91 (P. C.).

(3) 44 Ind. Cas. 297; 22 C. W. N. 441.

(4) 53 Ind. Cas. 17; 23 C. W. N. CLXVII (167) notes.

(5) 14 Ind. Cas. 817; 16 C. W. N. 496.

(6) 32 C. 123; 8 C. W. N. 901.

(7) 24 Ind. Cas. 183; 19 C. W. N. 525; 20 C. L. J. 448.

(8) 12 Ind Cas. 723; 16 C. W. N. 55; 14 C. L. J. 411; 39 C. 284.

(9) 25 M. 603 at p 611 (P. C.); 29 I. A. 138; 12 M. L J. 479; 6 C. W. N. 865; 4 Bom. L R. 839; 8 Sar. P. C. J. 316.

(10) 14 C. 109 P. C.); 13 I A. 160; 10 Ind. Jur. 468; 4 Sar. P. C J. 732; 7 Ind. Dec (N. S.) 72.

(11) 11 Ind. Cas. 743; 16 C. W. N. 137; 14 C. L. J. 507.

(12) 37 Ind. Cas. 956; 44 C. 214; 21 C. W. N. 206; 27 C. L. J. 198.

(13) 34 C. 358; 11 C. W. N. 527; 5 C. L. J. 208.

a yearly tenancy and, secondly, the lease having come into existence after the Transfer of Property Act, there could not be a tenancy reserving a yearly rent having regard to the provisions of section 107, without a registered instrument. The lease was not for agricultural or manufacturing purposes. It must, therefore, be deemed to be a tenancy from month to month. Notice to quit given in the case, therefore, was sufficient.

The appeal must accordingly be dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO. 8 OF 1918.
July 28, 1920.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.
GOPALDAS GANPATDAS AND OTHERS —PLAINTIFFS—APPELLANTS
versus
TRIBHOVAN JETHIRAM AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48, applicability of, to mortage decrees, passed before passing of Code.

Section 48 of the Civil Procedure Code of 1908 governs an application for the execution of a mortgage-decree even though obtained before that Code came into force. [p. 794, col 1.]

Second appeal from the decision of the District Judge, Poona, in Appeal No. 247 of 1915, confirming that of the Subordinate Judge at Haveli, in Darkhast No. 249 of 1914.

Mr. *S. Y. Abhyankar*, for the Appellant.

Mr. *S. R. Bakhale*, for Respondents Nos. 1, 2, 4 and 5.

JUDGMENT.

FAWCETT, J.—The plaintiffs-appellants obtained an award decree on the 5th September 1895 against defendants-respondents. By the terms of that decree, the defendants had to pay off the decretal sum by instalments of Rs. 400. It further provided that, should any one of the instalments remain unpaid, then the whole amount should be payable at once together with interest, and that if this was not paid the plaintiff was to recover the amount by sale of the whole of the immoveable and moveable estate mentioned in the plaint. The defendants were meanwhile debarred from alienating in any way the estate given in mortgage. This decree, as has been held by both the lower Courts, was made absolute in 1898. In 1914, the plaintiffs made an application for its execution. The defendants took the objection that the application was time-barred under section 48 of the Civil Procedure Code, by reason of its having been presented more than twelve years after 1898 when the decree was made absolute. This contention has been upheld by the two lower Courts. In this appeal the learned Pleader for the appellants has not contested the view that the decree was made absolute in 1898, but contends that the lower Courts erred in holding the application to be time-barred under section 48, Civil Procedure Code. This contention is based on the argument that the repeal of the former Civil Procedure Code (Act XIV of 1882) did not affect the right of the plaintiffs to execute their decree in accordance with the law contained in section 230 of that Code, *i. e.*, without the restriction of twelve years' limitation from the date of decree which applies to it under section 48 of the Code of 1908. In support of this, reliance is placed on the decision of the Allahabad High Court in *Konsilla* v. *Ishri Singh* (1). In that case it was held that the right to enforce execution of decree being a substantive right and not a mere matter of procedure, section 48 of the Code of Civil Procedure, 1908, will not have the effect of barring execution of decrees which were passed prior to the enactment of that Code and were, having regard to the Code of Civil Procedure of 1882 and to the Indian Limitation Act, 1877, alive at the time of its coming into force. The judgment refers to the terms of section 6 of the General Clauses Act, X of 1897, which enacts, *inter alia*, that unless a different intention appears in the repealing Act, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment repealed, or affect any remedy in respect of any such right. In the case of a mortgage-decree passed before Act V of 1908 came into

(1) 6 Ind. Cas. 188; 32 A. 499; 7 A. L. J. 420.

force, this decree-holder had a substantive right to enforce it till the end of time if he prosecuted his right with legal diligence, and section 48 of the new Code should not be construed to have a retrospective operation affecting that right, unless such a construction appears very clearly in the terms of the Code or arises by necessary and distinct implication. On the other hand, the respondents' Pleader cites *Bisseshur Sanamot* v. *Jasoda Lal Chowdhry* (2), where *Konsilla* v. *Ishri Singh* (1) was dissented from, and section 48 of the new Code of 1908 was held to govern an application for the execution of a mortgage-decree, even though obtained before that Code came into force. Jenkins, C. J., in the judgment in that case refers to section 154 of the new Code as clearly contemplating a retrospective effect of the Code and an interference with rights acquired under the old Code. He also refers to section 1, clause (2), of the new Code as affording ample opportunity to all persons having rights under the old Code to enforce them before the new Code came into operation. It was accordingly held that, 'a different intention", within the meaning of section 6 of Act X of 1897, did appear in the Code and that an application for execution coming under the Code of 1908 could not be made in disregard of the express conditions of that Code contained in section 48. We have, therefore, to decide which of these two opposing views we should follow.

Now, the provision in section 48, Civil Procedure Code, which is under consideration, is one of limitation. It might, for instance, have been inserted in Article 179 of the Indian Limitation Act, XV of 1877, corresponding to Article 182 of the present Limitation Act except that in form it is a limitation not of an application, but of the right to get a decree executed. Should, then, the general rule that no one has any vested interest in the course of procedure and that a legislative enactment presumably has a retrospective effect when it merely regulates practice and procedure, be applied in such a case? In *Reg.* v. *Dorabji Balabhai* (3) it was laid down that, "an Act of Limitation' being a law of procedure, governs all proceedings to which its terms are applicable from the moment of its enactment, except so far as its operation is expressly excluded or postponed". But in *Khusalbhai* v. *Kabhai* (4) it was said (page 29) that the proposition was somewhat too broadly stated in that case, and that, "this general rule must admit of the qualification that, when the retrospective application of a Statute of Limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the Statute is not, any more than any other law, to be construed retrospectively". In support of that view a reference was made to *Delhi and London Bank, Limited* v. *Orchard* (5), in which the Privy Council decided against the literal construction of section 21 of Act XIV of 1859 as giving the Act an operation which would retrospectively deprive the creditor of a right that he had under the previous law, and being contrary to the intention of the Legislature. Similarly, in *Gajanan Vinayak* v. *Waman Shamrao* (6), Beaman, J. expresses a doubt "whether it is strictly accurate to say that the law of limitation is always a law of procedure, that is to say, a purely adjective law, for, amongst its other consequences, it certainly has the creation of rights by prescription and if those rights have vested in individuals under one law of limitation" it cannot be "seriously argued that they can be divested by the introduction of a new law of limitation." On the other hand, in *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (7) it was held that the law of limitation applicable to proceedings in execution is not the law under which the suit was instituted, but the law in force at the date of the application for execution in the absence of a legislative provision to the contrary. West, J., in the judgment of the court, says: "Acts of limitation, like other laws relating to procedure, apply immediately to all steps taken after they have come into

(2) 19 Ind. Cas. 391; 40 C. 704; 17 C. W. N. 622.
(3) 11 B. H. C. R. 117 at p. 119.

(4) 6 B. 26; 3 Ind. Dec. (N. S.) 474.
(5) 3 C. 47 (P. C.); 4 I. A. 127; 3 Sar. P. C. J. 721; 3 Suth. P. C. J. 423; 7 P. R. 1878; 1 Ind. Jur. 457; 1 Ind. Dec. (N. S.) 622.
(6) 8 Ind. Cas. 389; 12 Bom. L. R. 881.
(7) 7 B. 459 at p. 462; 4 Ind. Dec. (N. S.) 309.

force, except when some provision is made to the contrary. The reason of this is that every one seeking the aid of a Court seeks it on the terms from time to time imposed by the Legislature. He has not the privilege of making any application he likes in any way and at any time he likes. Other interests than his are at stake, and the Courts are not to exercise their coercive power at his request over another person, except under such regulations as shall make their action compatible with the general welfare. They, accordingly, are commanded to act only in defined ways on applications which satisfy specified conditions". This decision was followed in *Shib Shankar Lal* v. *Soni Ram* (8) where it was said (at page 43*) : "The law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary". And this statement of the law was approved by the Privy Council on appeal in *Soni Ram* v. *Kanhaiya Lal* (9). The question whether this decision of the Privy Council affected the ruling of the Calcutta High Court, in *Manjuri Bibi* v. *Akel Mahmud* (10) was considered in *Gopeshwar Pal* v. *Jiban Chandra* (11). The decision of the Full Bench in the latter case was that a special rule of limitation extended to under-*raiyats* by an amendment in 1908 of the 3rd Article of Schedule III of the Bengal Tenancy Act did not apply where the dispossession was in 1898 and the suit for recovery of possession was instituted on the 25th August 1908. Prior to that amendment, the Article in question applied only to occupancy *raiyats*. The Full Bench held that the Privy Council judgment in *Soni Ram's case* (9) did not affect the decision in *Manjuri Bibi* v. *Akkel Mahmud* (10) in regard to cases where the application of the amended law makes it impossible to exercise a vested right of suit. In the judgment the Court says that they could only construe the amendment as not applying to cases where its provisions could not be obeyed and that, "there are thus two positions, where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application". If this test of possibility of compliance be applied to the present case, then, I think, section 48 must be held to have a retrospective effect upon the plaintiffs' decree. For, the twelve years laid down by section 48 did not expire till 1910, and the plaintiffs had, therefore, about two years from the passing of the new Code for taking steps to get their decree executed by sale of the immoveable property. And even if the twelve years had expired prior to the 1st January 1909 when the Code came into force, they had the opportunity of taking steps to get the decree executed under the old law, between the date of the passing of the Code—21st March 1908—and its coming into force.

Apart from the above considerations, there are, in my opinion, strong reasons for holding that section 48 was intended to have immediate retrospective effect. In all the three prior Codes, the provisions governing the execution of decree and fixing time limits to applications for execution contained a special provision under which, notwithstanding anything contained in them, an application for execution could be made in accordance with the law previously in force for a period of three years from the passing of the Code. Thus, section 21 of Act XIV of 1859 provided that, "nothing in the preceding section (which lays down what may be called the three years rule as to an application for execution being made within three years of a prior application) shall apply to any judgment, decree or order in force at the time of passing of this Act, but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire." It was this section which was construed in *Delhi and London Bank, Limited* v. *Orchard* (5) as meaning that, notwithstanding anything

(8) 3 Ind. Cas. 725; 32 A. 33; 6 A. L. J. 931; 6 M. L. T. 348.

(9) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.).

(10) 19 Ind. Cas. 793; 17 C. W. N. 889; 17 C. L. J. 316.

(11) 24 Ind. Cas. 37; 41 C. 1125; 18 C. W. N. 804; 19 C. L. J. 549.

*Page of 32 A.—[*Ed.*]

in section 20, process of execution might issue either within the time allowed by the law in force when the Act was passed, or within three years next after the passing of the Act, whichever should first expire. When the Code of 1877 was enacted, the three years rule already mentioned was relegated to Article 179 of the Indian Limitation Act (XV of 1877), which came into force on the same date as the Procedure Code (Act X of 1877), and in section 230 of the Code what may be called the twelve years' rule now contained in section 48 was enacted. The last paragraph of section 230 provides: "Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years". This gave a suspensory period of three years within which a decree, which would otherwise be dead under the twelve years' rule might be executed. In section 230 of the Code of 1882 the twelve years' rule was re-enacted, and the last paragraph of this section contains a provision in precisely the same words as that contained in the last paragraph of section 230 of the previous Code. But section 48 of the present Code contains no corresponding provision, although the provision contained in the previous Codes saving the case of the judgment-debtor by fraud or force preventing the execution of the decree within the period of twelve years, is re-produced with a slight change of language. This, to my mind, clearly shows that the Legislature did intend this section to have a restrospective effect in regard to decrees passed prior to the coming into force of the new Code. It is a case where the intention of the Legislature in this respect may legitimately be gathered from the history of the legislation on the subject: *cf. Behari Lal* v. *Muhammad Muttaki* (12) and *Administrator-General of Bengal* v. *Prem Lall Mullick* (13). It is not a case where this aid to construction is illegitimate under the observations of Lord Herschell in *Bank of England* v. *Vagliano* (14), which were repeated with the approval of their Lordships of the Privy Council in *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (15), for we are concerned with the history of the enactment, not for the purpose of departing from its ordinary meaning but for deciding the question whether the Legislature intended the enactment to have retrospective effect. Again, as pointed out in *Bisseshur Sanamat* v. *Jasoda Lal Chowdhry* (2) section 154 provides an indication that the new Code contemplated a retrospective effect and interference with rights acquired under the old Code. Sub-section (2), section 89, may also be referred to as a similar indication.

Furthermore, it is, in my opinion, open to considerable question whether the plaintiffs can be said to have had a vested right to get the mortgage-decree executed without the restrictive twelve years' rule contained in section 230 of the Code of 1882. That section, like the corresponding section of the Code of 1877, applies the twelve years' rule to a decree "for the payment of money or delivery of other property". It was held by the Allahabad and Calcutta High Courts that a mortgage-decree did not come under this category: *Ram Charan Bhagat* v. *Sheobaratrai* (16) and *Fazil Howladar* v. *Krishna Bundhoo Roy* (17). But a different view was taken by the Madras High Court: *Abdulla Sahib* v. *Doctor Oosman Sahib* (18). I have not been able to find any reported rulings of the Bombay High Court upon this question, and though, to the best of my belief, the Calcutta view was the one generally adopted, the question was apparently an undecided one. If so, the plaintiffs can scarcely be said to have had a vested right of the kind alleged. In any case, the Legislature in section 48 of the new Code has plainly given effect to the view that a mortgage decree is a decree for the payment of money and has included such decrees in the terms of that section. The amendment of the law is thus little more than

(12) 20 A. 482 (F. B.); A. W. N. (1898) 123; 9 Ind. Dec. (N. S.) 669.

(13) 21 C. 782 at p. 770; 10 Ind. Dec. (N. S.) 1118.

(14) (1891) A. C. 107 at p. 144; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

(15) 23 C. 563 (P. C.); 23 I. A. 18; 6 Sar. P. C. J. 667; 6 M. L. J. 71, 12 Ind. Dec. (N. S.) 874.

(16) 16 A. 418; A. W. N. (1894) 142; 8 Ind. Dec. (N. S.) 272.

(17) 25 C. 580; 2 C. W. N. 118; 13 Ind. Dec. (N. S.) 383.

(18) 28 M. 224.

declaratory. As stated in Hardcastle on Statutory Law, 3rd Edition, page 363: "Where an Act is in its nature declaratory, the presumption against construing it retrospectively is inapplicable. Acts of this kind, like judgments, decide like cases pending when the judgments are given, but do not re open decided cases". See also Maxwell on the Interpretation of Statutes, 3rd Edition, page 309. This, in my opinion, affords another reason for holding that section 48 in this respect has a retrospective effect. I think, therefore, we should follow the Calcutta ruling in preference to the Allahabad one. I am of opinion, that the appellants' contention fails and would dismiss the appeal with costs.

MACLEOD, C. J.—I agree. It would have been better if the attention of holders of mortgage-decrees had been drawn to the alteration made by section 48 of the Code of 1908, so that they might have been able to realize that no fresh application for execution could be entertained after the expiry of twelve years from the date of their decrees.

Appeal dismissed.

ALLAHABAD HIGH COURT.
PRIVY COUNCIL APPEAL No 10 OF 1920.
August 11, 1920.
Present:—Sir Grimwood Meare, KT., Chief Justice, and Mr. Justice Gokul Prasad.
Thakar BHAGWAN SINGH—
APPLICANT
versus
FIRM BHAWANI DAS-BHAGWAN DAS
—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 110, O XLV, r. 4—Privy Council appeal—Connected suits—Value in one below Rs. 10,000—Certificate, whether should be granted.

Where in two connected suits the points raised are identical and the valuation of the subject-matter in one exceeds Rs. 10,000 and in the other is less than that amount, and the former is certified as a fit one for appeal to the Privy Council, the latter should also be similarly certified.

Application under Order XLV, rule 2, Civil Procedure Code.

The Hon'ble Mr. *N. P. Asthana*, for the Applicant.

Messrs. *Gulzari Lal, P. L. Banerjee* and *U. S. Bajpai*, for the Respondent.

JUDGMENT.—The valuation of this suit is below Rs. 6,000 and so is the valuation of the appeal to His Majesty in Council, but this Court has set aside the decree of the lower Court. There was another suit on *hundis* in which the same question was raised between these very parties, namely, Privy Council Appeal No. 9 of 1920. It is true that in the lower Court this suit was decided by a separate judgment but in the appeal in this Court the evidence in the two suits was considered as a whole at the request of the parties who are the same and this Court came to a decision on the whole of the evidence in favour of the respondent. In the connected suit we have already given leave to appeal to His Majesty in Council. It is contended that no permission to appeal should be given because there is no question of law involved and the value is below Rs. 10,000 and that Order XLV rule 4 of the Code of Civil Procedure is not applicable. We do not agree with the last contention.

An appeal is, after all, a proceeding in continuation of a suit. The value of the two suits in the Court of first instance as also of the proposed appeal to the Privy Council is above Rs. 10,000 and this Court has reversed the decree of the Court of first instance. The points raised in the two cases are identical, and we think that this is a proper case to which the procedure sanctioned by Order XLV, rule 4, should be applied and the parties given an opportunity of having one decision from the highest Court of Appeal. We, therefore, certify that this case fulfills the requirements of section 110 of the Code of Civil Procedure (read with Order XLV, rule 4) as regards the nature and value of the subject matter of the suit.

Leave granted.

LAJPAT RAI *v.* LACHHMAN DAS.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 152 OF 1920.

December 14, 1920.

Present:—Mr. Justice Scott-Smith.

LAJPAT RAI—PLAINTIFF—PETITIONER

versus

LACHHMAN DAS—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22 (4)—Appeal rejected as insufficiently stamped—Cross-objections, whether can be heard.

An insufficiently stamped memorandum of appeal is of no validity at all and the rejection of such a memorandum is not a dismissal in default within the meaning of Order XLI, rule 22, (4) of the Civil Procedure Code Unless and until an appeal is properly filed in Court there can be no cross-objections, and if an insufficiently stamped memorandum of appeal is rejected because it is insufficiently stamped, no cross-objections can be entertained or heard.

Petition for revision of the order of the District Judge, Lahore, dated the 18th October 1919, reversing that of the Subordinate Judge, Lahore, dated the 11th April 1919.

Mr. *B. D. Qureshi*, for the Petitioner.

Lala *Dharm Chand*, for the Respondent

JUDGMENT.—The facts are given in the order of Major Nicholas, District Judge, of which revision is sought. Lajpat Rai's appeals having been dismissed because they were insufficiently stamped and because he failed to make up the stamp-duty as ordered by the Court, the question is whether the cross-objections of Lachhman Das, respondent, can be heard. The District Judge has held that they should be heard and he remanded the case to the Subordinate Judge for decision thereof. It is contended by Mr. Qureshi on behalf of the petitioner, firstly, that because the decree was in accordance with the award of arbitrators, no appeal lay and therefore, there can be no cross objections; secondly, that as no appeal was legally filed, no cross-objections lay; and thirdly, the cross-objections were insufficiently stamped. The second objection appears to me to have force. There was no valid appeal before the District Judge until it was properly stamped in accordance with the provisions of the Court Fees Act. Section 28 of the Act says: "No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped."

The insufficiently stamped memorandum of appeal put in by Lajpat Rai was, therefore, of no validity at all. Unless and until an appeal was properly filed in Court, there could be no cross objections, and if an insufficiently stamped memorandum of appeal is rejected because it is insufficiently stamped, I do not see how the cross-objections can be heard. Lala Dharam Chand, Vakil for the respondent, refers to Order XLI, rule 22 (4), Civil Procedure Code, which lays down that where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default the objection so filed may, nevertheless, be heard and determined after such notice to the other parties as the Court thinks fit. He urges that Lajpat Rai's appeals were dismissed for default but, in my opinion, the rejection of an insufficiently stamped memorandum of appeal is not a dismissal for default within the meaning of this section. He cited *Sheobaksh Singh* v. *Thakur Dayal Singh* (1). In that case the appellant was ordered to furnish security for costs and on his failure to comply with the order his appeal was rejected and it was held that the rejection amounted to a dismissal for default within the meaning of Order XLI, rule 22 (4), Civil Procedure Code, and that the respondent was entitled to have his cross objections heard and disposed of according to law. That case is clearly distinguishable from the present, because there the appeal was lawfully filed presumably upon a properly stamped memorandum of appeal. I hold that as there was no valid appeal before the Court, the respondent could not ask that his cross-objections should be heard.

I, therefore, allow the revision and set aside the order of the District Judge remanding the case to the Subordinate Judge, Lahore. The parties will bear their own costs of these proceedings.

Revision allowed.

(1) 50 Ind. Cas. 729; 4 P. L. J. 161.

GANGA RAMA v. SAKHARAM BABAJI.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 760 OF 1919.

July 20, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

GANGA RAMA BHILARE—DEFENDANT—APPELLANT

versus

SAKHARAM BABAJI VANI—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 27—Transfer of Property Act (IV of 1882), s. 54—Agreement to sell property specifically devised—Death of vendor before sale, effect of—Specific performance, decree for, against whom to be made.

Where a person makes an agreement to sell property which he has already specifically devised and dies before the sale takes place, the vendee is entitled to enforce the agreement specifically against the devisee and to obtain a conveyance from him. [p. 797, col. 1.]

Second appeal from the decision of the Assistant Judge, A. P., at Satara, in Appeal No. 151 of 1919, confirming that of the Subordinate Judge at Wai, in Civil Suit No. 350 of 1917.

Mr. *S. R. Bakhale*, for the Appellant.

Mr. *Coyajee* (with him Mr. *P. B. Shingne*) for Respondent No. 2.

Mr. *J. G. Rele*, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff instituted this suit for obtaining specific performance of an agreement to sell the property in suit passed by Janu, the original defendant No. 1, on the 31st of August 1915. Janu died pending the suit. His daughter was substituted in his place as his heir. She admitted the plaintiff's claim, but the 2nd defendant, daughter of Janu's son, contended that at the time of the agreement Janu had become too senile and imbecile to understand the nature of the agreement and that he had bequeathed all his property to her by his Will dated the 25th of June 1911. The Trial Court decided that the 1st defendant, as the heir of Janu, must give the plaintiff a proper conveyance within one month, that the 2nd defendant had no interest in the plaint property and that the consideration to be paid by by the plaintiff should go to the 1st defendant. In appeal this decision was confirmed.

It is not now contended that the agreement to sell should be set aside on the ground that Janu was unable to understand the nature of the agreement. The real question is, what was the effect on the property brought about by the agreement to sell and what is the proper construction of the document executed by Janu on the 25th of June 1911? As regards that document, I think it must be taken as devising specifically to Gangu certain properties including the property in suit and as the document does not contain any residuary bequest, if Janu had disposed of any of the properties mentioned in that document during his lifetime, the sale-proceeds, if they had not been deposited in the house No. 11, would have belonged to the residuary estate and would go to his heir. We have in this case an agreement by a testator to sell a house specifically devised by his Will, and the testator dying before the agreement to sell had been executed. Section 54 of the Transfer of Property Act says that a contract for the sale of immoveable property does not create any interest or charge on such property, but it gives a right to the purchaser to get a conveyance for payment of the purchase money. Under section 27 of the Specific Relief Act such a contract may be enforced by a purchaser against a person entitled to the estate of the deceased. The only question then would be whether the purchaser in this case should claim a conveyance from the heir or from the specific devisee. But for the contract of sale this house would have gone to Gangu absolutely. It appears to me that it goes to her with the obligation to fulfil the contract of the testator and to pass a conveyance of the house to the purchaser on receipt of the purchase-money. The case of *Farrar* v. *Winterton* (1) has been cited, but there the decision turned on an important difference between the English and Indian law, *viz.*, that the testatrix, having entered into a contract to sell, parted with her beneficial interest in the land so contracted to be sold. That decision, therefore, cannot apply in this case, as the contract to sell created no interest in the purchaser of the property and the beneficial interest remained with Janu. It might be argued that the contract to sell

(1) (1842) 5 Beav. 1; 6 Jur. 204; 59 R. R. 392; 49 E. R. 476.

the property specifically devised amounted to a revocation of the specific devise. But that would only result if the contract had been carried into execution. The entry into the contract may have shown an intention to revoke the legacy, but it would amount to nothing more.

Therefore, in my opinion, the plaintiff is entitled to succeed. The decree of the Trial Court must be amended by stating that the 2nd defendant must give the plaintiff a proper conveyance within one month from the date the papers are returned to the lower Court. The consideration will be paid by the plaintiff to the 2nd defendant.

Plaintiff will deduct all his costs throughout from the purchase-money, and the other parties will bear their own costs.

FAWCETT, J.—It has been ruled by the Privy Council in *Maung Shwe Goh* v. *Maung Inn* (2) that section 54 of the Transfer of Property Act prevents the purchaser under an inchoate contract, which remains unperformed, being treated in India as the owner in equity of the estate as he would be treated in England, and, therefore, the case of *Farrar* v. *Winterton* (1), relied on by respondent No. 2's Counsel, cannot apply to this case.

I would add also that the principle of redemption of legacies, which is reproduced in section 139 of the Indian Succession Act, would not apply to this case, because that depends upon the property specifically bequeathed having been converted into property of a different kind, and it has been ruled—if authority is necessary on such a point—that a direction to sell not carried out till after the testator's death will not affect a redemption: *Harrison* v. *Asher* (3).

I concur, therefore, in the order proposed by the learned Chief Justice.

Decree amended.

(2) 38 Ind. Cas. 938; 44 C. 542; 21 M. L. T. 18; 15 A. L. J. 82; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 21 C. W. N. 500; 5 L. W. 532; 10 Bur. L. T. 69; 44 I. A. 15 (P. C.).

(3) (1848) 2 De G. & Sm. 436; 17 L. J. Ch. 452; 12 Jur. 838; 79 R. R. 280; 64 E. R. 196.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 160 OF 1919.

May 20, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Kanhaiya Lal.

LACHMI NARAYAN—DEFENDANT—APPELLANT

versus

DEOKI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Debts of father—Liability of son—Mortgage to pay off previous mortgage, binding effect of.

Where a Hindu father incurs debts for the benefit of the family, and the debts are not tainted with immorality, such debts are binding on his son by reason of the pious obligation attaching to him to pay the debts of his father. [p. 798, col. 1.]

A mortgage of family property for the payment of a previous mortgage debt, which saves the family property for the enjoyment of the family, is binding on the family. [p. 798, col. 1.]

Appeal from an order of the Officiating Subordinate Judge, Allahabad, dated the 27th August 1919.

Mr. *B. R. Mukerji*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.

KANHAIYA LAL, J.—The question for consideration in this appeal is, whether a certain mortgage-bond executed by Gokla, the father of the defendant-appellant, for Rs. 550 was executed for legal necessity. The Court of first instance found that no legal necessity had been established. The lower Appellate Court, however, came to the conclusion that out of the sum of Rs. 550 secured by the mortgage there was a legal necessity to the extent of Rs. 325 which had been paid to a prior creditor named Raghunandan. In the mortgage bond in suit it is recited that Rs. 325 were left with the mortgagee for payment to Raghunandan on account of four prior usufructuary mortgage-deeds. These mortgage-deeds were produced but not proved. The learned Counsel for the defendant-appellant contends that, if Rs. 325, for which a legal necessity has been found by the Court below to have been established, were paid in satisfaction of those prior usufructuary mortgage-deeds, that payment cannot be taken to be a payment made in satisfaction of an antecedent debt within the meaning of the decision of their Lordships of the Privy

YOOSOF OOSMAN BROS. & CO. v. WIN NE YA.

Council in *Sahu Ram Chandra* v. *Bhup Singh* (1) as interpreted in the later decisions of this Court in *Brij Narain Rai* v. *Mangla Prasad* (2) and *Ram Singh* v. *Chet Ram* (3). It does not appear, however, necessary to go into the question, because none of the mortgage deeds were proved. If the mortgages existed and the family property was saved by the payment of the mortgage money to the prior mortgagee, the family was presumably benefited by the restoration of the family property, which might otherwise have been lost to the enjoyment of the family. If those mortgage bonds did not exist, then the debts must be taken to have been simple debts binding on the defendant-appellant by reason of the pious obligation attaching to him to pay the debts of his father, if not tainted with immorality. There is no allegation in this case that the debts were so tainted. In either event, the appeal fails and is dismissed with costs.

PIGGOTT, J.—I am certainly not prepared to dissent. My feeling in the matter is that, if we felt compelled to bring this particular case within the purview of the decisions of this Court to which reference has been made, which decisions personally I am prepared to treat as correctly interpreting the view of the law laid down by their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1), unless and until the entire question is reconsidered by a Full Bench of this Court, it would be incumbent upon us to direct further enquiry to be made upon such a variety of points that we should be virtually directing a new trial upon issues never definitely fixed in the Courts below. I feel that the necessity for doing this should be avoided in the interests of the parties themselves, if we can do so without committing ourselves to any clearly erroneous proposition of law. Taking a broad view of the equties of the case, I see no reason whatever to doubt that the appellant Lachhmi Narain is making a good bargain for himself, in that he has secured the reduction of his liability under the mortgage in suit to the sum of Rs. 325 which actually went in satisfaction of a debt incurred by his father with another creditor. I concur in the order proposed dismissing this appeal with costs.

BY THE COURT.—We dismiss this appeal with costs.

Appeal dismissed.

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 493; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 50 Ind. Cas. 101; 41 A. 235; 17 A. L. J. 249; 1 U. P. L. R. (A.) 49.

(3) 51 Ind. Cas. 119; 41 A. 529; 1 U. P. L. R. (A.) 52; 17 A. L. J. 706.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 173 OF 1918.

January 9, 1920.

Present:—Mr. Justice Robinson,

YOOSOF OOSMAN BROS. & CO.—APPELLANT

versus

WIN NE YA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act of 1908), O. XLI, rr. 20, 33—Appeal, second—Appellate Court, power of, to add respondents, after expiry of limitation.

An Appellate Court has power, in second appeal, to add as respondents to the appeal persons who were parties to the suit in the original Court but were not impleaded as respondents in the lower Appellate Court, although the time within which an appeal might have been preferred as against them has expired. [p. 799, col. 2.]

Second appeal from the decision of the Divisional Judge, Tenasserim, setting aside the judgment and decree of the Sub-Divisional Judge, Tavoy.

Mr. *Anklesaria*, for the Appellant.

Mr. *Keith*, for Respondents Nos. 1 and 2.

Mr. *May Oung*, for Respondents Nos, 3 and 4.

JUDGMENT.—A promissory-note was executed by one Sein Nyee Ma in favour of the plaintiff-firm for the price of goods supplied. Sein Nyee Ma is now dead and the plaintiffs brought a suit against defendants Nos. 1, 2 and 3 as his heirs and legal representatives to recover the amount due on the promissory-note. Defendants pleaded ignorance of the note and put plaintiffs to proof of execution. They further pleaded that the note, if executed, was executed on behalf of a partnership in which he was a member. Thereupon, plaintiffs obtained

leave to amend their plaint by adding the surviving partners. They deny that the goods were purchased for or on behalf of the partnership. The real question, therefore, in the case was, the note being proved, whether defendants Nos. 1, 2 and 3 or defendants Nos. 4 and 5 or both were liable to the plaintiffs. The first Court held that the debt was a partnership debt and dismissed the suit as against the heirs and legal representatives. Defendants Nos. 4 and 5 then filed an appeal. The learned Divisional Judge, after pointing out what was the real issue in the case, held that as neither side has appealed against the judgment and decree dismissing the suit against defendants Nos. 1, 2 and 3 he need not consider whether they were not liable. In this he was clearly wrong; he had power under Order XLI, rule 20, to have made these defendants parties to the appeal and he clearly should have done so. He held that the debt was not a partnership debt and allowed the appeal. An appeal was then filed to this Court by the plaintiffs and their prayer was that the judgment and decree of the lower Appellate Court be set aside and that of the Trial Court be restored or, in the alternative, that the case be remanded to the lower Appellate Court with directions to make defendants Nos. 1, 2 and 3 parties and to re hear the appeal and decide which of the two sets of defendants was liable to the plaintiffs. My brother Maung Kin issued notice after hearing the Counsel for the appellants and defendants Nos. 4 and 5 to defendants Nos. 1, 2 and 3 to show cause why they should not be made parties to this appeal. After hearing them he directed the defendants Nos. 1, 2 and 3 be made parties (respondents) to this appeal, but he did not write any order recording his reasons for so doing. It is perfectly clear that this Court has power under Order XLI, rule 33, to add them as respondents. There had been under the old Code some difference of opinion between the High Courts as to this power, but it is not necessary to consider the authorities, which are all referred to in my brother Maung Kin's first order, because, in the present Code, a new rule has been added making the matter perfectly clear. That this power exists has been very recently pointed out in the case of *Jogesh Chandra* v. *Sarada Kumar* (1) and also in the case of *Kidar Singh* v. *Ganesh* (2). This is not contested by the Counsel for the respondents and the question that I have now to decide is which of the parties (respondents) are liable for this debt. The execution of the promissory-note by the deceased is now admitted and it is clear that defendants Nos 1, 2 and 3 would be liable, if it was a partnership debt, to the extent of the share in the partnership which has come to their hands, and if it was a private debt to the extent of the estate that they have received. As to whether it is a partnership debt or not the following facts seem to render the matter perfectly clear: The promissory-note was executed by the deceased in his own name, not in the name of the firm and not on behalf of the firm. It has been proved that when the firm purchased goods of this character they invariably purchased them for cash and not on credit. The evidence, so far as it goes, is to the effect that no such goods were received by the firm and it is further proved that deceased's wife had also a shop in which such goods were sold and the goods not having been received by the firm they were possibly bought for his wife's shop. As against this, there is no evidence whatever and I agree with the learned Divisional Judge in holding that the debt was not a partnership debt. The appeal, therefore, as against defendants Nos. 4 and 5 must stand dismissed.

As regards defendants Nos. 1, 2 and 3 it is not now denied that they would be liable, but it is urged that the suit as against them having been dismissed by the Trial Court and no appeal having been preferred the decree has become final and that the appeal is barred by limitation. That it is not so is also not seriously contested. The Court has power to add parties as respondents in an appeal though the time within which the appeal might have been preferred as against them has expired. This was held by a Full Bench of the Allahabad High Court in the case of *Bindeshri Naik* v. *Ganga Saran Sahu* (3).

(1) 49 Ind. Cas. 834; 23 C. W. N. 223.
(2) 42 Ind. Cas. 411; 4 O. L. J. 532.
(3) 14 A. 154; A. W. N. (1892) 13; 7 Ind. Dec. (N. S.) 469.

The same view was taken in *Girish Chander Lahiri* v. *Sasi Sekhareswar Roy* (4). There will, therefore, be a decree in favour of the plaintiffs-appellants against defendants Nos. 1, 2 and 3 as heirs and legal representatives of Sain Nyee Ma for the amount claimed and costs in this and the original Court. The appellants must pay the costs of the defendants Nos. 4 and 5 in this and the lower Court.

Appeal allowed.

(4) 33 C. 329.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 887 OF 1919.

July 20, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice and Mr. Justice Fawcett.

BASVANT MUSHAPPA HUBLI—PLAINTIFF—APPELLANT

versus

MALLAPPA KALLAPPA HUBLI—DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Shudra—*Widow, unchaste, whether can adopt.*

An adoption made by an unchaste *shudra* widow is not invalid by reason of the widow's unchastity. [p. 800, col. 2.]

In the Bombay Presidency a widow has implied authority to adopt from the date of her husband's death unless it can be shown that the husband had either expressly or impliedly revoked such authority. Therefore, any conduct of the widow after the husband's death cannot affect the authority which she acquired at the time of his death. [p. 800, col. 2.]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 106 of 1919, confirming that of the Assistant Judge, Belgaum, in Civil Suit No. 410 of 1917.

Mr. *D. R. Manerikar*, for the Appellant.

Mr. *J. G. Rele*, for the Respondent.

JUDGMENT.—The plaintiff is the adopted son of Kallappa having been adopted after his death by his widow, Dyamawa. He claims the suit property as the sole heir of Kallappa. The defendants originally were the widow, Dyamawa, the minor daughter, Baswant, the brother of Kallappa and the natural father of Dyamawa. The first two died during the suit and it was alleged that the lands in suit were in the possession of Baswant and the cattle with Shankargowda, the fourth defendant. The defendants disputed the adoption. They also alleged that if the adoption had actually taken place it was invalid, because the widow Dyamawa was pregnant and in a polluted state at the time of the adoption. The Trial Judge found that the adoption had taken place and he also held that the unchastity of the widow did not invalidate the adoption. The defendants relied on the authority of *Sayamalal Dutt* v. *Saudamani Dasi* (1) in which an adoption was declared void by reason of the unchastity of the giver, but the ground of that decision was that the widow could not perform the necessary religious ceremonies. The parties in this case are *shudras* and, therefore, that argument does not apply.

In first appeal the only point argued was, whether or not the plaintiff proved his adoption. The District Judge agreed with the decision of the Trial Court that the adoption had been proved. It was not argued that the adoption having taken place it was invalid on the ground of the widow's unchastity and we are told that as the District Judge threatened the defendants with prosecution for perjury, that legal argument was dropped. However that may be, it has been argued now that the unchastity of the widow invalidated the adoption. Apparently, the argument is that if the husband could have known in his lifetime that his widow would not behave properly after his death, he would have expressly revoked the authority to adopt. But in this Presidency the widow has implied authority to adopt from the date of her husband's death unless it can be shown that her husband had either expressly or impliedly revoked such authority. Therefore, any conduct of the widow after the husband's death cannot affect the authority which she acquired at the time of his death. The facts in the case of *Dnyanoba* v. *Radhabai* (2) to which we have been referred, were entirely different. The widow had been deserted by her husband for thirty years on

(1) 5 B. L. R. 362; 2 Ind. Jur. (N. S.) 24; Bourke 189.

(2) (1894) P. J. 22.

the ground that she had misconducted herself and her husband had taken to himself another wife. It was, therefore, quite open for the Court in that case to come to the conclusion that the husband had revoked expressly any authority his wife would otherwise have to adopt after his death. In my opinion, therefore, the decision of the Court below was right and the appeal must be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 84 OF 1919.
May 22, 1920.
Present :—Mr. Justice Piggott and
Mr. Justice Kanhaiya Lal.
Lala SUKHNATH RAI AND ANOTHER—
APPLICANTS
versus
Lala NEHAL CHAND AND ANOTHER—
OPPOSITE PARTIES.

Arbitration, reference to—Acquiescence—Award—Jurisdiction, want of, objection as to, whether can be taken.

The parties by an agreement submitted matters in dispute between them to arbitration, but owing to their conduct the arbitrators were unable to proceed. One of the parties then instituted a suit in the Court of the Munsif in respect of certain matters included in the submission, as the Munsif had no jurisdiction to deal with the entire subject-matter of the submission, but the suit was dismissed on the ground that it was not maintainable in view of the agreement to refer to arbitration which still subsisted. On appeal, the dismissal was set aside and the case remanded to the Munsif to take action under paragraph 18 of the Second Schedule to the Civil Procedure Code; the Munsif accordingly stayed the suit, and formally referred the matter to the arbitrators and umpire requesting them to proceed with the arbitration: the parties acquiesced in this decision, appeared before the arbitrators and the matter was fully litigated before this Tribunal: the arbitrators made their award, and an application to make the award a decree of Court was allowed by the Subordinate Judge notwithstanding the objection of the opposite party to the jurisdiction of the arbitration Tribunal to deal with the matter, and an appeal against this order proving unsuccessful, the matter came before the High Court in revision:

Held, that the applicants for revision having accepted the decision of the Munsif, and submitted themselves to the decision of the Arbitration Court, it was not open to them to seek a reversal of the award on the ground of want of jurisdiction. [p. 804, col. 1.]

Civil revision against the order of the District Judge, Saharanpur, dated the 6th May 1919.

Mr. *M. L. Agarwala*, for the Applicants.

Mr. *S. A. Haidar*, for the Opposite Parties.

JUDGMENT.—This is an application in revision by two persons, Sukhnath Rai and Chandu Lal, who may hereafter be conveniently spoken of as the applicants. They were parties to a properly drawn up submission to arbitration, dated the 3rd of November 1915, under which certain matters in dispute between them and the opposite party were referred for decision to two named arbitrators and a named umpire. It seems that violent disputes broke out between the parties shortly afterwards and that a considerable period of time elapsed during which no action was taken by the arbitrators. The question who is to blame, or who is most to blame, for this state of things is not really before us. The applicants finally addressed a letter to the arbitrator and received from him a reply which they have sought to interpret as a withdrawal on his part from the arbitration, or to put it more strictly, a refusal to act any longer as umpire under the submission. Following upon this, the applicants instituted a suit in the Court of the Munsif. It is one of the minor complications in the case that this suit related to a portion only of the matters covered by the submission, so that the suit itself was within the pecuniary jurisdiction of a Munsif, whereas the submission related to subject-matters of greater value in respect of which a suit, if instituted, would have had to be brought in the Court of a Subordinate Judge. In reply to this suit, the opposite party pleaded the submission to arbitration. It then became the duty of the Court to proceed under paragraph 8 of the Second Schedule to the Code of Civil Procedure. It was incumbent upon it to enquire whether the parties were still bound by the submission and it was within its discretion to consider, further, whether, under the circumstances, it would elect to proceed with the trial of the suit in spite of the submission to arbitration. How far the learned Munsif went into these

questions is really not a matter which we are called upon to consider at this stage. He undoubtedly fell into one mistake. He overlooked the provisions of paragraph 22 of the Second Schedule to the Code of Civil Procedure and, having come to the conclusion that the parties were still bound by the terms of the submission, held that under section 21 of the Specific Relief Act he had no option but to dismiss the suit. Against this decree the present applicants very properly appealed and the appeal was heard by the Additional Subordinate Judge. That Court contented itself with pointing out the error into which the Munsif had fallen. It set aside the decree dismissing the suit and remanded the case to the Court of the Munsif, with directions that he should take proper action according to law under paragraph 18 aforesaid. On this the learned Munsif passed an order staying the suit. This he undoubtedly had jurisdiction to do and, the matter not having been contested any further in appeal, his order to this extent is undoubtedly binding on the parties, with all that is implied in the passing of such an order. The Munsif went on to take a step the propriety of which is, perhaps, more doubtful. He formally referred the matter to the arbitrators and the umpire, requesting them to proceed with the arbitration. The difficulty about this order is that the submission to arbitration related to other matters besides that in issue in the Court of the Munsif and, as already pointed out, the subject-matter of the submission would have been beyond the jurisdiction of the Munsif's Court in the event of a regular suit having been brought in respect of the same. However, the arbitrators and the umpire proceeded to take action in accordance with the Munsif's direction. The applicants behaved as if they were prepared to acquiesce in the decision of the Munsif, which they certainly made no attempt to contest before any higher Court. They appeared before the arbitrators, litigated their case before this tribunal which had been chosen by the parties themselves and took their chance of a favourable decision. Being now dissatisfied with the award, they have, by means of the application now before us, disclosed the fact that they were all the time keeping in reserve an objection to the jurisdiction of the arbitration Tribunal to deal with the matter at all. Apart from any question of law the equities of the case are clearly against allowing such a course of procedure to prevail.

We may at once note that an application to have the award made a decree of Court was subsequently allowed by the proper Tribunal, namely, by that of the Subordinate Judge, and that an appeal against the order of the Subordinate Judge has been dismissed by the proper Appellate Court, the Court of the District Judge. The application in revision before us is against the order of the District Judge refusing to reverse the order of the Subordinate Judge by which the award was directed to be filed.

Two different points have been made before us in support of the application. It is suggested that, in consequence of the correspondence which took place between the arbitrators and the umpire, and the letter written by the umpire the jurisdiction of the arbitration Tribunal had come to an end, because the arbitrator had in effect refused to continue to act. We doubt whether there is much to be said in support of this contention on the terms of the correspondence, but we have really not felt called upon to go into the matter. Directly the present applicants filed their suit in the Munsif's Court it became a matter for judicial enquiry, in the Tribunal chosen by these applicants themselves, whether or not the parties were still bound by the submission to arbitration. It may or may not be the case that in dealing with this matter the learned Munsif in the first instance, the Subordinate Judge in appeal and the learned Munsif again when the case came back to him, failed adequately to appreciate the nature of the objection or to deal with it in a complete and satisfactory manner. In substance, however, the point was determined against these applicants when the Munsif passed his order staying the suit. An order of stay under paragraph 18 of the Second Schedule to the Code of Civil Procedure suspends the trial of the suit, pending proper action by the arbitration Tribunal. It involves, if it does not directly proceed upon, a finding that there is in existence a submission to arbitration still binding upon the parties. This point has, in our opinion, been judicially determined against the applicants and that decision is not now open to our interference in revision.

The other point taken is based upon the wording of paragraphs 17 and 18 of the Second Schedule to the Code of Civil Procedure and purports to rest upon a decision of the Madras High Court in the case of *Appavu Rowther* v. *Seeni Rowther* (1), which decision, again, is founded upon an English case therein referred to and upon a decision of this Court in *Sheo Babu* v. *Udit Narain* (2). The objection may fairly be stated as follows: For the sake of simplicity let us suppose that *A.* and *B.* are parties to a submission to arbitration. After a certain interval of time *B.* has become dissatisfied with the submission and believes, rightly or wrongly, that he is no longer bound by its terms, or, at any rate, desires that the matter should be taken out of the hands of the arbitration Tribunal and litigated in the ordinary course. On the other hand, *A.* desires that the arbitration should proceed in accordance with the submission. Paragraphs 17 and 18 of the Second Schedule to the Code of Civil Procedure provide alternative remedies to meet the case of *A.* and that of *B.* It is open to *A.* to come before any competent Court with an application under paragraph 17 to obtain an adjudication from that Court whether or not, in the interests of justice, the submission to arbitration should now be enforced. On the other hand, it is open to *B.* to bring the same question to an issue by instituting a suit in respect of the whole or any part of the matter covered by the submission to arbitration. On the institution of a suit by *B.*, and on objection being taken by *A.* the Court is required to satisfy itself that there is no sufficient reason why the matter should not be referred in accordance with the submission. The English case referred to by the learned Judges of the Madras High Court is based upon a provision of the English Statute substantially similar to that of paragraph 18 aforesaid. It is authority for the following proposition of law, as applied to the case we have been stating. From the moment when *B's* suit has been instituted it is not competent to the arbitrators to proceed to a decision under the terms of the submission. They are bound to wait until the Court in which the suit has been instituted determines whether it will proceed with the suit itself or will stay its proceedings and refer the parties to their own chosen Tribunal, namely, the arbitrators. In an earlier part of this judgment we have assumed that it would be within the discretion of the Court judicially exercised for adequate reasons, to hold that the interests of justice would be better served by its proceeding with the trial of the suit and superseding the arbitration. So far as the Second Schedule to the Code of Civil Procedure goes, this point is perhaps arguable and we ought not to be regarded as being committed to a final decision on this point. It is conceivable, however, that there may be cases in which, by reason of long delay, particularly if that delay is found by the Court to be clearly attributable to the conduct of the party which now desires to enforce the submission, that the Court might elect to proceed with the trial of the suit simply on this ground. Ordinarily, at any rate, the question for determination will simply be whether or not the parties are still bound by the terms of their own submission. The point sought to be raised before us is as to the procedure which ought to be followed when the Court has come to the conclusion that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission and has made an order staying the suit for the purpose of allowing the arbitration to proceed. The contention before us is that, in spite of such an order, the arbitration will not be proceeded with unless and until the party desiring it to proceed makes a further application to a competent Court under paragraph 17. Now, one thing is perfectly clear to us, that neither the Madras case nor the cases upon which that decision is founded can be quoted as authority for any such proposition. As a matter of fact, there is an *obiter dictum* of the Madras Judges which is absolutely against the applicant's contention. The learned Judges assumed that, in any given cases, if the Court decides that the trial should be stayed, it may ask the arbitrator or arbitrators to proceed to a decision themselves, which is what the learned Munsif did in the present case. If it were not for the difficulties raised about the jurisdiction of the Munsif to deal with the entire subject matter of the submission, we should not be disposed to say anything

(1) 42 Ind. Cas. 514; 41 M. 115; 33 M. L. J. 177; 6 L. W. 248.

(2) 24 Ind. Cas. 490; 12 A. L. J. 757.

KHALILAL RAHAMAN *v.* MARIAN BIBI.

more about the question. It seems to us, however, that, in any case, whatever difficulty may be raised about the jurisdiction of the Munsif, is completely removed by the conduct of the present applicants in accepting the Munsif's decision and submitting themselves to the decision of the arbitration Court The question whether the parties were still bound by the submission had been in substance decided against these applicants. The very utmost they could say would be that this decision had been given by a Court not competent to deal with the entire subject matter of the award. If that was their only difficulty it could have been met in more ways than one. It may be that they could have brought the matter to an issue by filing another suit in the Court of the Subordinate Judge in respect of the entire subject-matter of the submission At any rate, when there is a dispute between the parties to a submission as to whether or not the terms of that submission are still binding on them, that dispute can be decided, like all other disputes, in one of the two ways by the verdict of a competent Court or by agreement between the parties, that is to say, by the party which has raised the objection determining not to press the same. In this case the Munsif had given a certain decision. If he was wrong, the matter could have been carried before a higher Tribunal. These applicants accepted that decision and went before the arbitrators. We think there is no authority whatever for the proposition that, in these circumstances, the arbitrators had jurisdiction to proceed with the matter. On this view of the case, we dismiss this application with costs, including fees on the higher scale.

Application dismissed.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL NO. 4 OF 1919.
January 12, 1920.
Present :—Mr. Justice Robinson.
KHALILAL RAHAMAN—APPELLANT
versus
MARIAN BIBI—RESPONDENT.

Muhammadan Law—Marriage—Agreement by husband not to contract second marriage, validity of—Divorce, grounds for—Contract Act (IX of 1872), ss. 23, 27.

An ante-nuptial agreement by a Muhammadan husband not to contract a second marriage is legal and is not invalid as being immoral, or opposed to public policy or in restraint of marriage. [p. 804, col. 2; p. 805, col. 1.]

A Court has power to grant a divorce to a Muhammadan wife not only on the ground of habitual ill-treatment by the husband or non-fulfilment by him of ante-nuptial engagements, but for other reasons also, *e. g.*, desertion or neglect. [p. 805, col. 1.]

Second appeal from the decision of the District Judge, Thayetmyo, confirming the decree of the Township Judge, Minhla.

Mr. *Ba U*, for the Appellant.

Mr. *Thein Maung*, for the Respondent.

JUDGMENT.—This was a suit for a divorce brought by a Muhammadan wife and has been decreed by both the Original Court and the Court of Appeal. The facts are that an ante-nuptial agreement was executed by the husband in which, amongst other stipulations, he gave his wife the power of divorcing him by saying *talak* three times under certain conditions and also undertook that he would not marry any other woman or keep a mistress. He lived with his wife in her parents' house for about six months and then left her for six months but returned and again lived with her for six months. After that he went away and has provided her with no maintenance. He never returned to her and he has married two other wives in breach of his agreement. It has been held also by both Courts that he was guilty of cruelty and the plaintiff seeks divorce on the grounds of cruelty and desertion and for breach of the condition that he would not take another wife and failure to support her. It has been argued that the ante-nuptial bond is invalid as being immoral and opposed to public policy, and void as being in restraint of marriage. Reliance is placed also on section 72 of Sir Roland Wilson's work in which he specified the only grounds on which a Muhammadan marriage may be dissolved by judicial decree. It has repeatedly been held that such conditions as appeared in this contract are neither immoral nor opposed to public policy and it has further been held that the condition to take no other wife is not void under section 26 of the Contract Act. No authority is given for the dictum

in section 72 of Sir Roland Wilson's work. In Syed Ameer Ali's work on Muhammadan Law, 4th Edition, at page 359, it is pointed out that a condition in an ante nuptial agreement that the husband should not contract a second marriage is legal and reference is made to the case of *Poonoo Bibee* v. *Fyez Buksh* (1), where this view was upheld. At page 581 of the same work it is laid down that when the husband is guilty of conduct which makes the matrimonial life intolerable to the wife, when he neglects to perform the duties which the law imposes on him as obligations resulting from marriage, or when he fails to fulfil the engagements voluntarily entered into at the time of the matrimonial contract, she has the right of preferring a complaint before the *Kazi* or Judge and demanding a divorce from the Court. The Judge has the power of granting a divorce not only for habitual ill treatment, for non-fulfilment of ante-nuptial engagements but for other reasons also. And the learned Author proceeds to give various grounds on which divorce may be granted and amongst them are the following :—

When the husband leaves her without any means of subsistence.

When he quits without making any provision on her behalf.

When he persistently neglects to visit her.

When he treats her habitually in a cruel manner.

All these grounds have been held to exist in the present case It is also urged that by the ante-nuptial agreement power is given to her to divorce him by *talak* and that she should have adopted that remedy instead of coming to the Court. But I can find no authority for this, and the plaintiff cannot be deprived of her ordinary legal right to come to the Court and to obtain a decree if she establishes grounds justifying it.

The appeal is dismissed with costs.

Appeal dismissed

(1) 15 B. L. R. App. 5; 23 W. R. 66.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 897 OF 1919.

August 5, 1920.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

RAMCHANDRA BALWANT ATHALE—DEFENDANT—APPELLANT

versus

BALAJI GANESH KULKARNI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch I, Art. 142, 144—Suit by heirs to recover property—Limitation—Trespassers, whether can be allowed to tack possession.

A suit by the heir of a deceased person to recover the property of the deceased from a person who also claims as heir is governed by Article 144 of Schedule I to the Limitation Act. [p. 806, col. 1.]

A trespasser cannot be allowed to add to the period of his hostile possession the period of possession of a former trespasser from whom he does not derive title in any way [p. 806, col.].

Second appeal from the decision of the Assistant Judge, A. P., at Satara, in Appeal No 259 of 1918, varying the decree passed by the Joint Subordinate Judge at Satara, in Civil Suit No. 795 of 1915.

Mr. *H. G. Kulkarni*, for the Appellant.

Mr. *J. R. Gharpure*, for the Respondent.

JUDGMENT.—The plaintiff sued to recover possession of certain land. His suit was rejected in the Trial Court, but the learned Appellate Judge gave him a decree for possession of the lands comprised in Group No. 1 including the strips enclosed in a red line (Exhibits 77) consisting of the Survey Numbers set out at page 2 of the print. This land originally belonged to Laxman and Vithal. Laxman died in 1895 and Vithal in 1903. But before Vithal died one Chinto got possession in execution by mistake of the plaint lands as far back as 1893. After Vithal's death Bhagirthibai, his sister, was put on the record to continue the proceedings and eventually an order was passed that she should be put in possession of the plaint property, and, on the 14th of October 1903, she actually got possession. This suit was filed on the 11th of October 1915 and as it is admitted that the plaintiff was the nearer heir to Vithal than Bhagirthibai, from whom the defendant claims, there can be no doubt that he proved his title to the plaint property, and with regard to the properties in Group No. 1, which got into Bhagirthibai's

possession on the 14th of October 1903, defendants have not been able to prove adverse possession for twelve years, nor can they tack on the possession of Chinto as they did not claim through him. I think the learned Judge is correct when he says that Bhagirthibai, the latter of two trespassers, cannot be allowed to add to the period of her hostile possession the period of possession of a former trespasser, Chinto, from whom she did not derive title in any way. It might have been different if the plaintiff himself had been dispossessed and was suing for possession under Article 142. He might then have to prove that he had been in possession within twelve years before suit. This suit comes under Article 144. Time begins to run when the possession of the defendant, or anybody through whom he claims, becomes adverse to the plaintiff.

The decision of the learned Judge in the Court below is right and the appeal will be dismissed with costs.

The cross-objections are also dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 33 OF 1919.
January 20, 1920.
Present :—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Young.
ESTHER E. S. COHEN—APPELLANT
versus
E. I. COHEN AND ANOTHER—RESPONDENTS.

Marriage settlement—Child's portion, vesting of—Presumption.

In marriage settlements the presumption is that a child's portion vests at marriage in the case of a daughter and at majority in the case of a son, unless there is anything in the deed to the contrary. [p. 807, col. 2.]

If, therefore, the language of the instrument be uncertain but is capable of the construction that sons at 21 and daughters at 21 or marriage shall take a vested interest the Court will so decide it by force of the presumption. [p. 807, col. 2.]

Appeal against the judgment of Robinson, J., on the Original Side.

Mr. *Das* (with him Mr. *Campagnac*), for the Appellant.

Mr. *N. N. Burjorjee*, for the Respondent.

JUDGMENT.—This is an appeal from a decision of Robinson, J., on the Original Side dismissing a suit by a beneficiary to compel her trustees to carry out a trust.

The trustees were her father and uncle; the trust sum was a fund of Rs. 11,000 held under a marriage settlement.

The terms of this settlement were (*i*) income to the wife for life, (*ii*) income at her death to the husband for life, (*iii*) at his death to apply the income for the maintenance, education and support of the children till the youngest attained majority and then to divide the fund equally between all the children. The alleged breach was the payment of Rs. 5,000 to one of the children.

It was alleged by the trustees that this was done by consent of all the beneficiaries.

The circumstances which it is alleged caused the consent were that the youngest daughter had reached marriageable age and the father was desirous of seeing her married.

It was, therefore, necessary to provide her with a dower.

The father, whose circumstances had become straitened, could not do so, so he says, and the trustees plead that the beneficiaries agreed that if the father would give up his life-interest, and divide Rs. 6,000 amongst them forthwith, they would on their part consent that the balance Rs. 5,000 of the fund should be paid to the daughter for her dower.

The girl admittedly became engaged, but the match was broken off. Then another suitor came forward and the proposal for dowering her out of the trust fund was again mooted. The father and three sons say that the plaintiff, Esther Cohen, consented. She denies it: she admittedly never signed the deed of consent. The onus is clearly upon the trustees to prove her consent.

The trustees and the three beneficiaries who support them are, to a certain extent, interested and possibly on this account it was alleged in the written statement that she had admitted in the presence of one E. J. Moses

that she agreed to and accepted the proposal.

Both the trustees in evidence also stated that Moses had told them this but he is not called and no reason is given for the omission. He is the son-in law of the uncle trustee who says he meets him two or three times a day.

It seems incredible that both should have misunderstood him. The only inference to be drawn from the unexplained omission to call him is that his evidence would not be in their favour.

Seeing that they thought his evidence so important that they specifically relied upon it in their written statement, the omission to call him without assigning any reason precludes us from holding they have proved their case. Moreover, the probabilities of the case are on the plaintiff's side. When she was asked to sign, her husband was absent in Calcutta and she was admittedly unwilling to execute the instrument of release in her husband's absence. The defendants say that she promised to do so on his return, but it is far more likely that she would decline to bind herself without consulting her husband. Mr. Beale's evidence, on which stress is laid by the learned Judge, does not show that when the plaintiff's husband returned from Calcutta she actually agreed to sign. He told Mr. Beale, "that he would bring his wife to do so (*i.e.*, to sign) a few days later on." But this may well mean that the plaintiff and her husband were considering the matter. It is far from an admission of consent. Plaintiff and her husband were not on good terms with the 1st defendant. There had been litigation between them concerning the plaintiff's dower and in 1915 the plaintiff had demanded her full share of the Rs. 11,000 trust money. On the whole, it appears unlikely that the plaintiff gave her consent.

The result is that there has been a breach of trust which the trustees must repair.

The plaintiff says the whole sum of Rs. 11,000 must be restored because if her brothers and sisters predeceased their father she would be entitled to the whole.

This, however assumes that her brothers and sisters had no vested interests.

The mother is dead: the class therefore cannot be enlarged. In marriage settlements the presumption is that a child's portion vests at marriage in the case of a daughter and at majority in the case of a son unless there is anything in the deed to the contrary. Thus in *Swallow* v. *Binns* (1), cited at page 469 of Lewin on Trusts, 12th Edition, Vice-Chancellor Wood stated that, upon instruments of this nature (such as settlements and Wills of parents) there is an implication of law arising upon the instrument itself subject, of course, to any expressions to the contrary, that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grand children as the case may be, at the period when those portions will be wanted, namely upon their attaining the age of 21 years or (as is usually provided in the case of daughters) upon their attaining 21 or marriage: and that such portions shall then vest whether the children do or do not survive their parents, and Mr. Lewin cites it as a general rule that where a parent or person *in loco parentis* provides portions for children the strong presumption is that he means to provide portions for all children as may live to require them, *i.e*, for sons who may attain 21 and daughters who attain 21 or marry. If, therefore, the language of the instrument be uncertain but is capable of the construction that sons at 21 and daughters at 21 or marriage shall take a vested interest the Court will so decide it by force of the presumption.

There is nothing in the instrument in our opinion, to prevent the application of this presumption, and as all the children have attained 21 we consider that all their shares have vested. The period of division if the parents were dead as provided by the deed is when the youngest child attains 21 and there is nothing to prevent the father surrendering his life-interest and the trustees dividing the fund amongst the children if the father so desires.

The father so desires in the case of those children who are willing in return to contribute to their sister's dower. The other children are willing, the plaintiff is not. What she wants is her whole one-

(1) (1855) 1 K. & J. 417; 1 Jur. (N. S.) 843; 103 R. R. 154; 69 E. R. 522.

eighth or Rs. 1,375, *vide* her lawyer's letters of 1st March 1918 and 11th March 1918.

This the trustees cannot be compelled or even allowed to give her unless with the father's consent. Unless he consents to surrender his life-interest in this portion and give it to his daughter, he is entitled to enjoy its income during his life and she is entitled to nothing until he dies.

The trustees still have the Rs. 750 in hand and must make good the Rs. 625, and will then either hold the Rs. 1,375 in trust or give it to the plaintiff, as the father may decide.

The appeal is, therefore, allowed, but we consider that as the suit was really brought by the plaintiff to obtain Rs. 1,375 immediately, it is not a case in which she should have costs, and we leave each party to bear their own here and below.

Appeal allowed.

LAHORE HIGH COURT.
FIRST CIVIL APPEAL No. 1766 OF 1920.
November 30, 1920.
Present :—Mr. Justice Shadi Lal,
Chief Justice, and Mr. Justice Leslie Jones.
INDRAJ—DEFENDANT—APPELLANT
versus
RANJI LAL AND OTHERS—PLAINTIFFS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Adoption by widow—Suit for declaration by reversioners—Gift by widow—Second suit for declaration—Question of relationship, whether* res judicata.

N., the widow of *H.*, adopted one *J.* Plaintiffs, claiming as reversioners of *H.*, brought a suit for a declaration that the adoption shall not affect their reversionary rights in the estate of *H* and obtained a decree. Subsequently, *N.* made a gift in favour of *I.* Plaintiffs again brought a declaratory suit contesting the validity of the gift :

Held, that the question of plaintiffs' relationship to *H.* was *res judicata* in the subsequent suit, inasmuch as *I.* was claiming under *N* who was a party to the previous suit and was bound by the decree passed in that suit. [p 809, col 2.]

First appeal from the decree of the Senior Subordinate Judge, Delhi, dated the 27th March 1916.

Lalas *Fakir Chand* and *Mehr Chand Mahajan*, for the Appellant.

Lala *Moti Sagar*, R. S., and Lalas *Durga Das* and *Rup Ram* for the Respondents.

JUDGMENT.—The village of Sultanpur Dibbar, in the Province of Delhi, is divided into two *Panas*, *Pana* Khetwan and *Pana* Kalian. The former *Pana* is sub divided into three *Thullas*, *Thulla* Dowlata, *Thulla* Gulab and *Thulla* Har Sahai. One Har Sahai, a Jat, was the sole proprietor of the whole of the *Thulla* Har Sahai, and it is his estate which has given rise to considerable litigation. It appears that Har Sahai died in 1886 leaving him surviving his son, Ammi Lal, and a widow, *Musammat* Nanhi. The son Ammi Lal died a year after, and on his death the estate which he had inherited from his father seems to have been mutated in favour of his widow and his mother, *Musammat* Nanhi.

Upon the record there is no evidence to show what happened to Ammi Lal's widow, but this much is certain that in 1888 *Musammat* Nanhi, alleging the adoption of one Jit Singh by her to her deceased husband, made a gift of a moiety of the estate in favour of the alleged adopted son, and got a mutation effected in pursuance of the gift. Thereupon, the proprietors of *Thulla* Dowlata denying the *factum* and the validity of the adoption brought an action against both *Musammat* Nanhi and Jit Singh impeaching the alienation, and obtained, on the 21st January 1889, a declaration that, "Jit Singh is not the adopted son or appointed heir of Har Sahai, and that the gift of half the land of Har Sahai made to him by Har Sahai's widow is void as against the plaintiffs as reversionary heirs, and that on the death or re-marriage of the widow Jit Singh must restore the land to plaintiffs."

Musammat Nanhi has again made a gift, and this time to Jit Singh's brother Indraj by means of a deed executed by her on the 7th August 1915. The proprietors of *Thulla* Dowlata have consequently brought the present action for a declaratory decree that the alienation shall not affect their reversionary rights after the death of *Musammat* Nanhi.

The plaintiffs' allegation as to their being collaterals of Har Sahai is challenged by the defendants, and the crucial question for determination is whether the finding on the

issue of relationship recorded by the District Judge in 1889 operates as *res judicata*. Now, it is not disputed that some of the plaintiffs in the present suit were also plaintiffs in the previous suit, and the rest being the descendants of the plaintiffs in the former suit must be treated as their representatives-in-interest. Further, it is admitted that the fact that Indraj was not a party to the previous litigation does not make any difference, as he derives his title from *Musammat* Nanhi, and there can be no doubt that if the latter is bound by the finding in the aforesaid case, her donee, who claims under her, is equally bound. The matter in controversy is consequently reduced to this. Does the decision in the former suit on the question of the plaintiffs' relationship with Har Sahai operate as *res judicata* as against *Musammat* Nanhi? Now, upon a perusal of that judgment we consider that it being admittedly *inter partes* should prevent *Musammat* Nanhi and those claiming under her from re agitating the question of relationship in this suit.

The learned Vakil for the appellant, however, contends that no relief was claimed against *Musammat* Nanhi in that suit, and that she was consequently only a *pro forma* defendant. Now, we are not concerned with the question whether a plaint could or could not have been framed without impleading her as a defendant; the fact remains that the action as brought by the plaintiffs in 1888 did challenge her right to make an adoption and to alienate the property which she held as a widow's estate. To that action she was impleaded as a defendant. It appears that the plaintiffs' relationship was denied and consequently the issue as to the relationship became a matter of controversy between the plaintiffs on the one side and the defendants on the other side. That issue was tried and finally determined by the Court with the result that the plaintiffs were held to be collaterals of Har Sahai and the defendants were defeated. It is to be observed that from the judgment and the decree passed in that case *Musammat* Nanhi could have preferred an appeal and impeached the correctness of the decision on the question of relationship arrived at by the Trial Court against her. It cannot, therefore, be urged that she had no right of appeal and that the decision should not operate as *res judicata*. We accordingly hold that the plaintiffs' relationship is *res judicata*; and though they are remote collaterals they are entitled to impeach the alienation made by the widow.

Mr. Mehr Chand for the appellant contends that, even if the plaintiffs are collaterals, they have no right to inherit the property in the presence of Indraj, who is Har Sahai's sister's son. Now, as pointed out above, Har Sahai left a son Ammi Lal who succeeded him, and Indraj must, therefore, be viewed as the last male owner's father's sister's son. Now, the parties are Jats residing in a village, and it is a matter of common knowledge that under the Customary Law, by which they are presumably governed, a father's sister's son has no right of succession in the presence of even remote collaterals.

These are the only two points argued by the learned Vakil for the appellant, and upon both of them our opinion is against him. We accordingly affirm the decree of the Subordinate Judge and dismiss the appeal with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT,
SECOND CIVIL APPEAL No. 139 OF 1919.
January 22, 1920.
Present:—Mr. Justice Robinson.
S T.K. CHETTY FIRM—APPELLANT
versus
BALASUNDRAM—RESPONDENT.

Specific Relief Act (I of 1877), s. 42, proviso, scope of—Declaration, suit for—Consequential relief not asked—Procedure—Amendment of plaint.

A suit should not be dismissed by an Appellate Court on the ground of its being one asking merely for a declaratory decree and no consequential relief where that objection has never been taken by the defendants to the suit. The plaintiff should in such a case be allowed an opportunity of amending his plaint. [p. 811, col. 1.]

Section 42 of the Specific Relief Act does not require a plaintiff to include in his prayer every relief or every claim that he can make against every and any person but it only requires that he should ask for such reliefs as against the particular defendant in the suit. [p. 811, col. 2.]

S. T. K. CHETTY FIRM v. BALASUNDARAM.

Second appeal from the decision of the Divisional Judge, Hanthawaddy, confirming that of the Sub-Divisional Judge, Insein.

Mr. *Lambert*, for the Appellant.

Mr. *Chari*, for the Respondent.

JUDGMENT.—Plaintiff, being the owner of a certain house, mortgaged it to the firm of C. P. L. K. N., who got a mortgage decree against him. The mortgagee tried to sell the property in execution but no sale was carried through. He then transferred his decree to the present appellant firm of S. T. K. S. T. K. brought the house to sale and bought it themselves. They obtained a sale certificate in 1911. The plaintiff now seeks a declaration that the sale-certificate granted is void on the grounds that no notice of the assignment of the decree had been given to him, and that no notice of the intended sale was given to him. He claims to be in possession at the time of suit. In 1915 the S. T. K. firm applied for possession but their application was dismissed as barred by limitation. In 1915 one Desai was in occupation of the house and is so still, he says, as the tenant of S. T. K. The plaintiff filed a suit against Desai as his tenant and the matter came up to this Court but it was held that no tenancy was proved. Plaintiff then sued Desai for use and occupation but he again lost his suit it being held that he was not the owner of the property. Plaintiff now files the present suit and it was decided in his favour in the first Court. When the plaint was instituted on the 2nd December 1918 the Court held that the suit was in effect one for cancellation of a document and that it must be stamped to the full value of the property. Plaintiff paid the deficient stamp-duty. The decree of the first Court was based on the two grounds of want of notices mentioned above and the decree given was that the Court sale at which S. T. K. had bought the property was void and it was set aside and the sale-certificate issued was declared to be void. The only point that is now argued in this appeal is that the plaint was one for declaration merely and that there was no prayer for the specific relief of possession and that the suit, therefore, should have been dismissed. It is admitted that this point was raised specifically for the first time in the Divisional Court. But Mr. Lambert argues with some ingenuity that in the written statement S. T. K. denied that plaintiff was in possession and explains the failure to plead that the suit should be dismissed for want of a prayer for consequential relief on the ground that plaintiff was at that time claiming to be in possession, and that that plea could not, therefore, be properly raised until the question of possession had been decided. He says that he urged that the issues were insufficient and asked that a further issue as to possession should be drawn. But he admitted he did not suggest any issue as to the suit failing for want of a prayer for consequential relief. He says he dealt with this omission in his argument. He admits that he cannot now argue as to want of notice.

It must be taken that the present point was taken for the first time properly in first appeal. In the case of *Bombay Burmah Trading Corporation Limited* v. *F. Yorke Smith* (1) Mr. Justice Farran pointed out that the plaint did not ask for consequential relief but that no objection had been taken by the defendants on that ground under section 42 of the Specific Relief Act and that as no fiscal regulation was contravened by the omission, he saw no reason why the Court should raise the objection of its own motion. The point was raised in argument in appeal and in dealing with it the learned Chief Justice stated: "It is also to be remarked that this objection has been taken for the first time on appeal—a circumstance which by itself is, in our opinion, fatal to it." The reason for this appears to me is to be found in the case of *Kunj Bihari* v. *Keshavlal Hiralal* (2) where Sir Lawrence Jenkins points out, in quoting section 42 of the Specific Relief Act: "Nothing is said here about dismissing his suit: all that is enacted is that no Court shall make a declaration where the plaintiff, being able to seek further relief, omits to do so." The Court, therefore, cannot dismiss the suit. It can only refuse to make a declaration unless and until the defect is remedied. The result of such a defect and the proper method of dealing with it is

(1) 17 B. 197; 9 Ind. Dec. (N. S.) 129.
(2) 28 B. 567; 6 Bom. L. R. 475.

pointed out in the case of *Limba* v. *Rama* (3) where it was held that a suit should not be dismissed by an Appellate Court on the ground of its being one asking merely for a declaratory decree and no consequential relief where that objection has never been taken by the defendants to the suit. The plaintiffs should in such a case be allowed an opportunity of amending their plaint. Had, therefore, this objection been specifically raised in the first Court it would have been open to plaintiff to apply to amend his plaint or he could have maintained his position that he was in possession when if he failed to prove it the suit might possibly have been dismissed, and even if the Divisional Judge had entertained the objection his proper course would have been to have remanded the case so that plaintiff might have an opportunity, if he chose, to avail himself of it of amending his plaint. But it is unnecessary to deal with the matter further here for various reasons. In the first place, the effect of the Court's order in demanding stamp-fees to the full value of the property was to convert the suit from one for a mere declaration into one for cancellation of the sale at which S. T. K. bought. He should, no doubt, have insisted on the amending of the plaint but, unfortunately, that was not done. However, even if the suit be treated as one for a bare declaration it is clear that any consequential relief the plaintiff should ask for would be relief consequent on the main prayer of his suit. The appropriate consequential relief necessary to support the suit as laid would be the relief cancelling the sale and not one for possession. S. T. K. was apparently not in possession. He endeavoured to obtain possession and the Court had held that he was not entitled to possession as his claim thereto was barred by time. Desai was the person who was in actual possession and he was not a party to this suit and no decree for possession, therefore, would have been effectual as against Desai and plaintiff would still have had to bring another suit to obtain possession. That necessity would not have been done away with by the consequential relief even if it had been granted in the present case, and, therefore, the object of section 42 in requiring that the plaintiff shall ask for consequential relief where it is open to him would not have been satisfied. Section 42 does not require a plaintiff to include in his prayer every relief or every claim that he can make against every and any person but it only requires that he should ask for such reliefs as against the particular defendant in the suit. In my opinion, therefore, there is no force in the particular point that has been pressed in this appeal, and that, even if it could have been allowed it would not have effected more than to allow the plaintiff an opportunity of amending his plaint. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 33 B. 548; 7 Ind. Dec. (N. s.) 368.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 248 OF 1919.

September 21, 1920.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

RAVJIBHAI KASHIBHAI—DEFENDANT—APPLICANT

versus

DAHYABHAI ZAVERBHAI PATIL—PLAINTIFF—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II Para. 16—Award—Decree passed on award without giving time for filing objections—Appeal, whether lies—Revision.

Where a Court passes a decree in terms of an award without giving the parties time to file objections, no appeal lies against the decree, but the High Court has power to set aside the decree in the exercise of its discretion under section 115 of the Civil Procedure Code. [p. 812, col. 1.]

Application from the decision passed by the Subordinate Judge, Nadiad, in Suit No. 384 of 1918.

Mr. *G. N. Thakor*, for the Applicant.

Mr. *M. H. Mehta*, for Opponent No. 1.

JUDGMENT.— Following the case of *Walji Mathuradas* v. *Ebji Umersey* (1), we think that we must hold that there is no appeal in this case as it has not been shown that the award is illegal *ab initio*. What the

(1) 29 B. 285; 6 Bom. L. R. 132.

petitioner complains of is that the Court pronounced judgment according to the award on the day the award was filed, and did not wait the ten days prescribed by Schedule II, paragraph 16 (1), of the Code and Article 158 of Schedule I of the Indian Limitation Act. No doubt, it was held in *Najm-ud-din Ahmad* v. *Albert Puech* (2) that where a judgment is pronounced before the time has expired an appeal will lie. With all due respect, I cannot see how an appeal will lie in such a case, because it is not suggested that there is any defect in the award. It may be that the award is a nullity or illegal *ab initio*. Then, as laid down by Sir Lawrence Jenkins in the case I have referred to, there may be an appeal. But where the learned Judge has not followed the procedure laid down by the Second Schedule of the Code and does not allow a party the time which the law allows him to make objection, but proceeds to pass at once a decree in accordance with the award, then it cannot be said that there is any defect in the award itself, and under sub-paragraph (2) of paragraph 16 of the Second Schedule it appears to be plain that no appeal would lie, but we think it is a case in which we should exercise our discretion under section 115 of the Civil Procedure Code, and, therefore, we set aside the decree and the case must go back to the lower Court to enable the petitioner to file his objection which he must do within ten days after he has notice of the proceedings having reached the lower Court.

Costs will be costs in the suit.

Decree set aside; Case remanded.

(2) 29 A. 584; 4 A. L. J. 450; A. W. N. (1907) 184.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2487 OF 1920

December 15, 1920.

Present :—Mr. Justice Le Rossignol, Mr. Justice Broadway and Mr. Justice Wilberforce.

KARORI MAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAMJI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Decree, construction of—Mortgage, suit on—Compromise—Decree permitting redemption within a certain time, effect of—Fresh mortgage, whether created—Decree based on nullity, whether can be challenged.

A decree once granted cannot be challenged on the ground that it is based on a nullity; a decree based on a void contract is good until it is set aside in appeal, and a decree based on a void mortgage contract cannot be otherwise regarded. [p. 813, col. 2.]

In a suit for foreclosure of a mortgage the parties arrived at a compromise and a decree was passed awarding possession to the mortgagee with the provision that the defendant could redeem one-half or the whole of the mortgage within one year, and so avoid wholly or in part the execution of the decree. The mortgagor failed to redeem, and the mortgagee obtained possession of the property as owner in execution of his decree. Subsequently, the mortgagor sued to redeem the mortgage :

Held, (1) that the effect of the previous decree was that the Court decreed possession to the mortgagee as owner, but suspended execution of the decree for one year during which the mortgagor could avoid execution in whole or in part; [p. 814, col 1.]

(2) that no fresh mortgage was created by the decree; [p 814, col. 1.]

(3) that the mortgagee having become owner of the mortgaged property, the suit for redemption was not maintainable. [p. 814, col. 1.]

Second appeal from the decree of the District Judge, Karnal, dated the 6th September 1919, affirming that of the Subordinate Judge, Second Class, Rohtak, dated the 25th April 1919.

Lala *Moti Sagar*, R. S., for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—On 21st March 1898 the father of the plaintiffs in this case mortgaged land without possession to one Sheo Ram, now represented by defendant No. 1. The mortgage was to be for four years and the contract included a stipulation of conditional sale.

The mortgage-debt was not paid by due date and foreclosure notice issued. The year of grace expired on 10th July 1903 and

in December 1903 Sheo Ram sued as full owner for possession. On 9th January 1914 the parties came into Court with a compromise, on which the Court was prayed to issue a decree.

Thereupon the Court decreed possession to plaintiff with the proviso that the defendant could redeem one-half or the whole of the mortgage within one year and so avoid either wholly or in part, the execution of the decree.

In June 1906 the decree was executed and Sheo Ram obtained possession as owner.

In 1919 the present suit by the mortgagor's sons was instituted, and the prayer was for redemption on the ground that the decree of 1904 created a fresh mortgage which still subsisted.

The Courts below held, following *Debi Sahai* v. *Ramji Lal* (1), that the mortgage still subsisted and decreed for the plaintiffs.

On second appeal to this Court, the Division Bench, doubting the correctness of *Debi Sahai* v. *Ramji Lal* (1), referred this and three other cases to a Full Bench.

In our opinion this appeal should succeed.

In *Debi Sahai* v. *Ramji Lal* (1) the precise terms of the first Court's decree on the compromise are not reproduced but it would appear that the decree was a decree for possession as owner subject to certain conditions, by fulfilment of which the mortgagor might avoid execution. After full consideration, we regret, with all deference, that we are unable to accept the view that such a decree created a fresh mortgage.

Debi Sahai v. *Ramji Lal* (1) is a somewhat lengthy judgment, but it decided in reality only one point, *viz.*, that, in the circumstances described, the decree of the Court creates a fresh mortgage between the parties.

The learned Judge's reasoning, however, is hard to follow, for in the body of their judgment, they find that the decree of the Court on the compromise is not wholly illegal and cannot be treated as a nullity; it is only the condition which is intended to operate by way of conditional sale and which is embodied in a decree...that must be treated by the Courts, under the imperative provisions of section 10 of the Punjab Alienation Act, as wholly null and void.

(1) 46 Ind. Cas. 460; 56 P. R. 1918; 127 P. W. R. 1918.

Even if this view be accepted, and the offending portion of the decree be excised, the remainder gives the decree holder possession as full owner not as mortgagee, and that fact would preclude all subsequent redemption.

A decree once granted cannot be challenged on the ground that it is based on a nullity; a decree based on a void contract is good until it is set aside in appeal, and a decree based on a void mortgage contract cannot be otherwise regarded.

If then it is only the provision which provides for conditional sale which is void we are left with that portion of the agreement and decree, which gives the plaintiff a right of entry as owner which again leads us to absurdity.

But we are left with the question whether a compromise, as above described, does amount to a fresh mortgage.

Now, it is quite conceivable that the parties by compromise should create a fresh mortgage by which the terms of the original mortgage are extended or modified and the compromise and decree might involve even a transfer of possession to the mortgagee *as mortgagee*. But where neither on the mortgage covenant, nor on the compromise, is the mortgagee as such entitled to possession, a decree awarding him possession, if he ever gets it, as full owner, cannot be regarded as creating a fresh mortgage. On the contrary, such a decree determines the mortgage either by redemption or by foreclosure. Judged by the intention of the parties, the transaction was not in the nature of a fresh mortgage, for their intention was that, after a further period of grace, the mortgage should be determined. Judged by the decree, the same result is arrived at, for the mortgagee is given a period of grace to avoid foreclosure, but on his failure to avail himself of the period of grace, the mortgagor secures an absolute title with possession.

It is instructive to compare a decree in an ordinary suit for foreclosure with that in this case. A reference to Order XXXIV, rule 2 of the Code shows that the Court must pass a preliminary decree declaring the amount due and giving the mortgagor a period of grace not exceeding six months wherein to pay that amount into Court.

It would be idle to argue that this decree creates a fresh mortgage merely because the

amount payable is determined and a period of grace not contemplated by the original mortgage is conceded.

In this case, the Court decreed possession but suspended execution for one year during which the mortgagor could avoid execution in whole or in part.

We hold that no fresh mortgage was created.

The mortgagee took possession as full owner (he was entitled to possession in no other capacity) and has been holding as full owner adversely ever since. We accordingly accept the appeal and dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 91 OF 1918.

April 7, 1920.

Present:—Justice Sir Asutosh Mookerjee, KT., and Justice Sir Ernest Fletcher, KT.,

SURENDRA KRISHNA MONDAL—DEFENDANT—APPELLANT

versus

Sreemati RANEE DASSI—PLAINTIFF—RESPONDENT.

Will—Execution, proof of—Burden, how discharged—Succession Act (X of 1865), s. 46—Evidence Act (I of 1872), ss. 68, 154—Sound mind—Hostile witness, who is—Attesting witnesses, necessity for calling—Unattested alterations in Will—Presumption—Presumption, how may be rebutted.

The onus of proof lies in every case upon the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator, and this burden is, in general, discharged by proof of capacity and the fact of execution. [p. 816, col. 2.]

A hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth, and when such a witness is treated as hostile and examined by the party calling him, this must be done to discredit the witness altogether and not merely to get rid of part of his testemony. [p. 819, col. 1.]

Although, in order to prove due execution of an instrument requiring attestation, it is, in general sufficient, where several witnesses have subscribed, to call one of them, but in the case of a Will, it is desirable that all capable of being called should be examined to remove all suspicion of fraud. The mere fact, however, that one attesting witness to a Will is not called would not invalidate the Will provided there were two attesting witnesses as required by law. [p. 821, cols. 1 & 2.]

Where unattested alterations occur in a Will, the presumption of law is that such alterations were made after the execution of the Will, but this presumption may be rebutted (1) by direct evidence showing that the alterations accord with the obvious intention of the testator, and (2) by internal evidence and by inferences drawn from the condition of the Will [p. 822, col. 2; p. 823, col. 1.]

Appeal against the judgment of Mr. Justice Chaudhuri, dated the 28th August 1918.

Mr. *A. N. Chaudhari*, (with him Mr. *S. C. Bose*), for the Appellant.

The Hon'ble Mr. *T. C. P. Gibbons*, Advocate General (with him Mr. *B. K. Ghose*), for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This appeal is directed against the grant of Letters of Administration, with a copy of the Will annexed, to the estate of one Raj Krishna Khan who died on the 20th November 1917. He was born in 1897 and in 1914 was married to a girl twelve years old. At the time of his death, he left him surviving his mother, his minor widow and an infant brother. He was a member of the well-known family of Khans of Mankundu of the District of Hooghly and possessed properties of considerable value. He had taken to evil ways very early and was addicted to wine and women; for six or seven years before his death, he had kept a woman of the name of Sosilabala whom he did not abandon even after his marriage. On the 4th November 1917, he went to Puri for a change; the party consisted of five persons besides himself, namely, his manager, Bibhuti Bhusan Mukerjee, his mistress, Susila, another woman of the name of Puti, who apparently cooked for them, a hanger-on of the name of Binod and a servant Bipatram Kahar, who had been in his employ for about a year and a half. Raj Krishna had been to Puri in the year previous and had stayed in the house of one Krishna Chandra Guchika, a Panda of the temple of Jagannath. On the occasion of the second visit also, he took up his residence in a house of the Panda near the gate of the temple. On the 15th November Raj Krishna was taken ill

at Puri, and it is said that as his condition did not improve he executed the disputed Will on the forenoon of the 18th November 1917. He died the afternoon of the 20th November 1917. The party returned to Calcutta on the morning of the 22nd November. On the 23rd March 1918, Rani Dasi, the mother of the testator, applied for Letters of Administration with copy of the Will annexed, for the use and benefit of her infant son, Bankim Chandra Khan. The estate was valued at Rs. 3,09,708. The application was supported by the affidavits of two of the attesting witnesses. A caveat had been already lodged on the 27th November 1917, by Surendra Krishna Mondal, the father of Bhramarbala Dasi, the widow of the deceased. After a protracted trial, Mr. Justice Chanduri came to the conclusion that the Will was genuine and had been duly made and attested. This conclusion has been strenuously assailed on behalf of the appellant and the judgment under appeal has been subjected to a searching criticism.

The Will, as already stated, is alleged to have been executed on the forenoon of the 19th November 1917. There is practically no evidence as to what happened to the testator during the first ten days of his stay at Puri; but we know this much that his manager, Bibhuti Bhusan Mookerjee, who had accompained him from Calcutta on the 4th November, left Puri the very next day and returned to Calcutta. On the 15th November, Bipatram telegraphed to Bhibuti as follows: "Babu sick; moneyless; wire money; otherwise come". Bibhuti, on receipt of this message, forwarded Rs. 25 by money order, and next morning (16th November) wired back: "Sent Rs. 25 by money order yesterday." The case attempted to be made out in the evidence is that the illness of Raj Krishna did not take a favourable term, and he was attended, from the 16th November, by a medical practitioner named Haris Chandra Rao. On the evening of the 18th November, while Raj Krishna was apparently in considerable distress, he expressed an apprehension that he might not survive. On this Susila began to cry. Thereupon Raj Krishna promised to make provision for her and asked Bipatram to procure one or two demi papers so that he might make his Will. Early next morning, Susila, Puti and Binod went to take a bath in the holy tank of Markanda. Bipatram, during their absence, procured the demi paper. Raj Krishna dictated and Bipatram took down on slips of paper what Raj Krishna said. Bipatram, it must be mentioned here, did not know how to write Bengali and was probably very imperfectly acquainted with the Bengali language. He accordingly wrote down in Kaithi character what was said by his master and the result was a jargon of an extraordinary and unprecedented character. The draft was read out and was altered in one respect, namely, as regards the amount of maintenance for the wife of the testator, which was raised from Rs. 40 to Rs. 50. Bipatram then copied the contents of the pencil draft on the demi paper in ink and read out the document. His master thereafter asked him to make an addition, which was written out by Bipatram on the left hand margin of the document. Bipatram then signed his name by order of his master, and made over to him the pencil draft and the demi paper. Raj Krishna tore off the draft, kept the demi paper under the pillow and asked Bipatram to go and fetch the Panda and the Doctor. On the way, he met the Charidar (an officer of the Panda) and requested him to send the Panda. He then went to the Doctor who promised to call at 11 o'clock. He next went to the Telegraph office and sent a message to the manager at Calcutta in the following terms: "Babu seriously ill; moneyless; come immediately." This telegram, as appears on the face of the message, was handed in at 11·30 A. M. and reached Calcutta 12·34 P. M. Bipatram has sworn, however, that he made over the paper to the Telegraph clerk actually much earlier than the time noted on the message. He then returned to the house. The Panda, the Charidar and the Doctor arrived at about 11 o'clock. Raj Krishna took out the document from under the pillow. After some conversation, the document was, at the request of Raj Krishna, read out by Bipatram, Raj Krishna then executed it, affixing his signature in two places, once under the main writing, and again under the marginal note. The document

was next attested by the Panda Krishna Chundra Guchika, the Charidar Hari Bandhu Mahanti, and the Doctor Haris Chandra Rao, it was then placed inside a portmanteau. Next morning Bibhuti arrived from Calcutta. There has been some controversy as to whether Bibhuti was at Puri on the 19th November, when the Will is said to have been executed. There is no room for doubt that the Doctor is mistaken on this point, and the evidence shows conclusively that on receipt of the telegram sent on the 19th November Bibhuti started from Calcutta in the evening and arrived at Puri the next morning. When Bibhuti arrived Raj Krishna made over the Will to him. On that day a telegram was sent by Bibhuti to Calcutta in the following terms: "Raj Krishna better; we start to morrow; send Gari". This message was, as noted on the telegraph form, handed in at 3-5 P. M. and reached Calcutta at 4-5 P. M. The evidence shows that Raj Krishna died that afternoon, and there has been much speculation as to why this false message was sent; it is sufficient to say that the point has not been satisfactorily cleared up. Bibhuti and other members of the party left Puri on the 21st and arrived at Calcutta the next morning. On that very day the Will was taken to the Solicitor for the propounder. Such in outline is the story of the events which are alleged to have taken place at Puri between the 15th and 20th November 1917, and we have to determine whether this version is substantially true.

There has been some discussion at the Bar to the burden of proof in this class of cases where a Will is set up as executed under unusual circumstances. It is sufficient to recall, in this connection, the observations of Baron Parke in *Baker* v. *Batt* (1):

"If the party upon whom the burden of the proof of any fact lies either upon his own case, where there is no conflicting testimony, or upon the balance of evidence where there is, fails to satisfy the Tribunal which is to decide of the truth of the proposition which he has to maintain, he must fail in his suit. And thus in a Court of Probate where the *onus probandi* most undoubtedly lies upon the party propounding the Will, if the conscience of the Judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last Will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to Probate. And it may frequently happen that this may be the result of an inquiry, in cases of doubtful competence in particular, without the imputation of wilful perjury on either sides, or it may be; the Judge may not be satisfied on which side the perjury is committed, or whether it certainly exits."

To the same effect are the observations of Lord Brougham in *Panton* v. *Williams* (2):

"There is no duty cast upon the Court to strain after Probate, and to grant it where grave doubts remain wholly unremoved, and great difficulties oppose themselves to our progress, which we are quite unable to surmount. It may suffice to say that the proof eminently lies on him who sets up a Will, and further that it is more fatal than to his adversary if he leaves difficulties entirely without explanations. It is much less material that those who seek to impeach a testamentary instrument should be unable to explain certain things in their case and should be forced to admit that their argument is not in every point consistent with all the facts, than that they who seek to establish the Will should give no rational, consistent or intelligible solution of those difficulties which encumber their suppositions and obstruct the path towards the conclusion they would have us arrive at."

We have, consequently, the firmly established rule that the *onus probandi* lies in every case upon the party propounding a Will, and, in the words of Baron Parke in *Barry* v. *Butlin* (3), he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. The burden of proof thus cast upon the propounder is, in general, discharged by proof of capacity and the fact of execution and when these have

(1) (1838) 2 Moo. P. C. 317; 12 E. R. 1026; 46 R. R. 52.

(2) (1843) 2 Curt. 530; 163 E. R. 498; Reversed (1843) 2 Notes of Cases XXI.

(3) (1838) 2 Moo. P. C. 480 at p. 482; 1 Curt. 614; 46 R. R. 123; 12 E. R. 1089.

been proved, the Court will, under ordinary circumstances, assume from them the knowledge of and assent to the contents of the instrument by the deceased, and, without requiring further evidence, will pronounce for the Will.

Now, in the case before us, the Will was challenged by the caveator on two distinct grounds, namely, first, that the Will was not genuine and that what purported to be the signatures of the deceased on the document had been forged ; and, secondly, that the testator had from the 18th November to a few hours before his death given himself up to a bout of continuous drinking and was not in a fit condition physically on the 19th November to execute the document. As regards the first of these grounds, no serious attempt was made in the Court below on the side of the caveator to assist the Court to arrive at a decision. On the other hand, the propounder produced various signatures of the deceased whose genuineness could not possibly be called in question. There is a striking resemblance between the two sets of signatures, but not that absolute identity which in many instances may furnish indications of deliberate imitation by the careful forger. Mr. Justice Chaudhri, on this part of the case, placed reliance upon the testimony of Babu Sailendra Nath Ghosh, a Solicitor of this Court, and Babu Surendranath Kundu, a Pleader of the Alipore Court, both of whom had ample opportunities of forming an opinion as regards the handwriting of Raj Krishna, and from their knowledge of his signature, stated their belief that the signatures on the Will were made by the deceased. In this Court no attempt has been made to impeach the validity of this conclusion and we accept the finding that the signatures are genuine.

We have next to consider the question of testamentary capacity, that is, whether the testator had, at the time, sound mind within the meaning of section 46 of the Indian Succession Act. The requirements of the law on the subject are beyond dispute.

Mere ability to sign one's name does not necessarily imply the possession of the full mental powers requisite for a valid disposition of property. Nor is it sufficient to show that the testator was conscious when he executed the instrument. As Cresswell, J., said in *Sefton* v. *Hopwood* (4), "it is not sufficient in order to make a Will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have, what the old lawyers called, 'a disposing mind', he must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible Will or a reasonable Will or a kind Will....But he must be able to understand his position ; he must be able to appreciate his property, to form a judgment with respect to the parties whom he chose to benefit by it after death, and if he has capacity for that it suffices." Sir John Nicholl observed in *Marsh* v. *Tyrell* (5): "It is a great but not an uncommon error to suppose that, because a person can understand a question put to him and can give a rational answer to such question, he is of perfect sound mind and is capable of making a Will for any purpose whatever, whereas the rule of law, and it is the rule of common sense, is far otherwise." As Redfield, J., said in *Converse* v. *Converse* (6), "in order to execute a valid Will, one must have sufficient active memory to recall his family and his property and to form a rational judgment in regard to the deserts of the one, and the disposition of the other with reference to such deserts." This was emphasised by Hannen, J., in *Burdett* v. *Thompson* (7), where he modified his previous observation in *Boughton* v. *Knight* (8) :—

"Whatever is the highest degree of soundness of mind, is required to make a Will. From the character of the act, it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature or through other circumstances, may be supposed to have claims on the testator's

(4) (1858) 1 F & F. 578 at p 579.
(5) (1828) 2 Hagg. Eccl. 84 at p. 122; 162 E. R. 793.
(6) (1849) 21 Ver. 68; 52 Am. Dec. 58.
(7) (1873) 3 P. & D. 72*n*.
(8) (1873) 3 P. & D. 64; 42 L. J. P. 25; 28 L. T. 562.

bounty, and the power of considering these several claims and of determining in what proportions the property shall be divided amongst the claimants." To the same effect are the observations of Erskine, J., in *Harwood* v. *Baker* (9): "A testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one:" *Woomesh Chunder Biswas* v. *Rashmohini Dasi* (10) affirmed by the Judicial Committee in *Rash Mohini Dasi* v. *Umesh Chunder* (11), *Susil Kumar Banerjee* v. *Apsari Debi* (12). This is not a novel rule but is dictated by plain common sense and has been recognised for over three centuries; *Marquess of Winchester's case* (13), *Combe's case* (14). This does not imply, however, that the testator must possess these qualities of the mind in the highest degree possible, or that he must possess them in as large a measure as he may formerly have done though the mind may have been in some degree debilitated and the memory may have become in some degree enfeebled, it is sufficient that there is enough left to enable the testator clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair and just testament. [Per Cockburn, C. J. in *Banks* v. *Goodfellow* (15) citing with approval *Den* v. *Vancleve* (16)]. Now, in the present case, the caveator specifically alleged that Raj Krishna was, from the effects of drink, in such a condition on the morning of the 19th November that he was really not competent to make a testamentary disposition. The evidence negatives this theory and points to the conclusion that even if he was not wholly free from the exciting influence of drink at the time when the Will was executed the excitement, if it existed at that time, did not exist in such a degree as to prevent the testator from appreciating and understanding the testamentary act in all its bearings. This would clearly not invalidate the Will. *Ayrey* v. *Hill* (17). and *Banks* v. *Goodfellow* (15).

The truth is that there was no serious attempt to make out the case alleged in the caveat. The cross examination of the witnesses was rather directed to show that the condition of the testator, due to illness, was such that he must have lost testamentary capacity. From this standpoint, the case is not wholly free from difficulty by reason, principally, of the mode of examination-in-chief and cross-examination of the two important witnesses who were examined on commission at Puri. Under Order XVI, rule 19, Civil Procedure Code, the Panda and the Doctor, who resided at Puri, more than 200 miles distant from Calcutta, could not be summoned to attend in person and give evidence in Court, consequently, a commission had to be issued for their examination. We regret to observe that the examination-in-chief, as also the cross-examination, were conducted in a manner open to grave objection. Not only were the proceedings unduly prolonged, sometimes by an attempt to shake the credit of a witness by introduction of evidence to contradict him in violation of the provisions of section 153 of the Indian Evidence Act, but leading questions were put in examination in chief in contravention of other provisions of the law. It has been maintained before us that as the propounder was obliged under section 68 of the Indian Evidence Act to call the attesting witness to the Will, such witness should be treated as a witness called by the Court and liable to be cross-examined, as a matter of right, by the party citing him. In our opinion, this contention cannot be upheld. Section 154 of the Indian Evidence Act provides that the Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination

(9) (1840) 3 Moore P. C. 282; 13 E. R. 117; 50 R. R. 37.
(10) 21 C. 279; 10 Ind. Dec. (N. S.) 818.
(11) 25 C. 824 (P. C.); 25 I. A. 109; 2 C. W. N. 321; 7 Sar. P. C. J. 298; 13 Ind. Dec. (N. S.) 537.
(12) 27 Ind. Cas. 276; 20 C. L. J. 501; 19 C. W. N. 826.
(13) (1599) 6 Coke 23; 77 E. R. 287.
(14) (1606) Moo. K. B. 760; 72 E. R. 888.
(15) (1870) 5 Q. B. 549 at p. 567; 39 L. J. Q. B. 237; 22 L. T. 813
(16) (1819) 2 Southard N. J. Law 660.
(17) (1824) 2 Add. 206; 162 E. R. 269.

by the adverse party. There is, in this respect, no distinction on principle between an attesting witness whom a party is obliged to call and any other witness whom he may cite of his own choice. But the Court may, in the exercise of its discretion, be more easily persuaded in the former case than the latter. In view of the provisions of the Indian Evidence Act, it is thus plain that there is no room for application, in this country, of the view taken in the cases of *Bowman* v. *Bowman* (18), *Jackson* v. *Thomason* (19) and *Coles* v. *Coles* (20), that a necessary witness, that is, one whom a party is compelled to call and who may, therefore, be considered rather the witness of the Court than of the party, as an attesting witness to a Will, [*Gill* v. *Gill* (21) can be discredited as of right by his own side. It is, indeed, doubtful whether the principle recognised in these cases, though recently affirmed in *Jones* v. *Jones* (22), is still good law in England. *Price* v. *Manning* (23), *Phillips* v. *Davis* (24). Per Deane, J. But two important points must be borne in mind; first, that a witness is considered adverse when, in the opinion of the Judge, he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof; in other words, as Wilde, J., remarked in *Coles* v. *Coles* (20), a hostile witness is one who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth; and, secondly, as Lord Campbell, C. J., observed in *Faulkner* v. *Brine* (25), when a witness is treated as hostile and cross-examined by the party calling him this must be done to discredit the witness altogether and not merely to get rid of part of his testimony. These principles have all been disregarded in the examination-in-chief and cross-examination of the Panda and the Doctor. The Commissioner could not exercise the discretion vested in the Court under section 154 of the Indian Evidence Act, and the mischief due to improper cross-examination could not be remedied in the Trial Court. Consequently, very little reliance can be placed upon the assertions of the Panda and the Doctor, and this was the view adopted by Mr. Justice Chaudhuri. We are fortified in this opinion by the suspicious alteration in the affidavits sworn by these two persons; apparently, according to the affidavit as originally drawn up, they were prepared to declare that the Will was written at the dictation of the testator; these words were subsequently crossed out for some unexplained reason. Notwithstanding this conclusion, there is, however, a substantial residue of evidence adduced by the propounder, and we cannot decline to estimate its value and effect.

Bipatram Kahar, the servant who acted as scribe, and Susilabala, the mistress, were both examined in Court. Mr. Justice Chaudhuri has accepted both of them as witnesses of truth, though some of the statements of the servant relating to what happened after the return of the party to Calcutta may be open to doubt. There can be no question that, if their testimony is accepted as substantially correct, the case for the propounder is fully established. The respondent has, as might be expected, earnestly pressed upon us that a Court of Appeal should be extremely slow to disagree with the primary Court on a question of appreciation of oral evidence, and we are not unmindful that it is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusion of fact of those who have. Reference may, in this connection, be made to the observations of Sir Richard Couch in *Shama Charan Kundu* v. *Khettromoni Dasi* (26), and of Lord Collins in *Shunmugaroya Mudaliar* v. *Manika Mudaliar* (27), where he quotes with approval the words of Lindley, M. R., in *Coghlan* v. *Cumberland* (28); see also the graphic description given by Sir

(18) (1840-44) 2 Moo & Rob. 501.
(19) (1861) 1 B. & S. 745; 31 L. J. Q. B. 11; 8 Jur. (N. S.) 134; 6 L. T. (N. S.) 104; 10 W. R. 42; 124 R. R. 724; 121 E. R. 891.
(20) (1866) 1 P. & D. 70 at p. 71; 35 L. J. P. 40; 13 L. T. 608; 14 W. R. 290.
(21) (1909) P. 157; 78 L. J. P. 60; 100 L. T. 861; 53 S. J. 359; 25 T. L. R. 400.
(22) (1908) 24 T. L. R. 839; 52 Sol. Jo. 699.
(23) (1889) 42 Ch. D. 372; 58 L. J. Ch. 649; 61 L. T. 537; 37 W. R. 785.
(24) "Times" 18th Dec 1907.
(25) (1858) 1 F. & F. 254.

(26) 27 C. 521 (P. C.); 27 I. A. 10; 2 Bom. L. R. 568; 4 C. W. N. 501; 7 Sar. P. C. J. 638; 14 Ind. Dec. (N. S.) 343.
(27) 3 Ind. Cas. 799; 32 M. 400; 36 I. A. 185; 10 C. L. J. 276; 11 Bom. L. R. 1206; 6 M. L. T. 304; 19 M. L. J. 640 P. C.).
(28) (1898) 1 Ch. 704; 67 L. J. Ch. 402; 78 L. T. 540.

SURENDRA KRISHNA MONDAL v. RANEE DASSI.

John Coleridge, of the difficulty of appreciating the value of oral testimony from the written record ; *Reg.* v. *Bertrand* (29). No useful purpose would be observed by an attempt to formulate a general principle applicable to all such cases where appreciation of oral testimony is concerned. The decisions reviewed in *Lallbee Mahomed* v. *Dadabhai Jivanji Guzdar* (30) show that two conflicting view points have to be reconciled, namely, on the one hand the undoubted duty of the Court of Appeal to review the recorded evidence and to draw its own inferences and conclusions, and, on the other hand, the unquestionable weight which might be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner. In the present case we have carefully scrutinised the testimony of Bipatram and Susila in the light of the searching criticisms made by Mr. Chaudhuri. We have not overlooked the position in life of the two witnesses ; but, clearly, it cannot be affirmed as a general rule that a person is not trustworthy because he is in receipt of a small salary, or that a woman is not reliable as a witness because she is deficient in virtue. The statements of these two persons, so far as an opinion may be formed from the written record, have on the whole the ring of truth. Bipatram takes no benefit under the Will ; Susila no doubt receives an annuity of Rs. 40 a month and there is a direction for payment of all her debts. The circumstance that she is a legatee under the Will and was with the testator on the day the Will was prepared, must no doubt, on well established principles excite to some extent the suspicion of the Court and call upon it to be vigilant and jealous in examining the evidence in suppport of the instrument, *Barry* v. *Butlin* (3), *Baker* v. *Batt* (1), *Tyrrell* v. *Painton* (31), *Gopeesur Dutt* v. *Bissessur Dutt* (32) But it cannot be overlooked that she was not present in the house when the Will was prepared under the direction of the testator. She was not in the room when the Will was executed ; she has not propounded the Will and apparently has not interested herself in these proceedings ; and, finally, the amount of the annuity granted to her is practically insignificant in relation to the value of the estate left by her paramour. The descriptions given by the servant and the mistress are substantially in agreement, and the minor discrepancies pressed upon our attention only tend to show that they are not tutored witnesses. On their testimony, the Court may justly base the conclusion that Raj Krishna had testamentary capacity when the Will was prepared and executed. No doubt, the evidence shows that he was very ill and possibly his suffering was acute. But the manner in which he gave directions for the preparation of the Will shows that his mental faculties were unimpaired.

Mr. Chaudhuri, who has argued this appeal with great care and earnestness, has, however, very properly emphasised what he called improbabilities and suspicious circumstances and has pressed us to reject as untrustworthy the evidence adduced in support of the execution of the Will by a testator of sound disposing mind. The respondent on the other hand, has contended that the Court should not allow its decision to be affected by consideration of probabilities, when there is direct positive testimony to support the case for the propounder ; and has in this connection relied upon the decisions of the Judicial Committee in *Bombay Cotton Manufacturing Co.* v. *Motilal* (33), and *Chotey Narain Singh* v. *Ratan Koer* (34). In the first case, Sir George Farwell, said :

"The Appellate Court refused to accept as conclusive the judgment of the lower Court as to the veracity of the witnesses. It is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the Appeal Court. But, generally speaking, it is undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends

(29) (1867) 1 P. C. 520 at p. 535; 4 Moo. P. C. (N. S.) 460; 36 L. J. P. C. 51; 16 L. T. 752; 16 W. R. 9; 10 Cox. C. C. 618; 16 E. R. 391.

(30) 34 Ind. Cas. 807; 43 C. 833 at p. 849; 23 C. L. J. 190.

(31) (1894) P. 151; 6 R. 540; 70 L. T. 453; 42 W. R. 343.

(32) 13 Ind. Cas. 577; 16 C. W. N. 265; 39 C. 245.

(33) 29 Ind. Cas. 229; 39 B. 386; 42 I. A. 110; 19 C. W. N. 617; 17 M. L. T. 403; 28 M. L. J. 593; 21 C. L. J. 528; 17 Bom. L. R. 455; 2 L. W. 521; (1915) M. W. N. 788 (P. C.).

(34) 22 C. 519 (P. C.); 22 I. A. 12; 6 Sar. P. C. J. 561; 11 Ind. Dec. (N. S.) 346.

on the credit which attaches to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these observations, their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wish to point out that, where the issue is simple and straightforward, and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case should not be lightly disregarded."

In the second case, Lord Watson, said: "The theory of improbability remains to be considered; and the first observation which their Lordships have to make is that, in order to prevail against such evidence as has been adduced by the respondent in this case, an improbability must be clear and cogent; it must approach very nearly to, if it does not altogether constitute, an impossibility.'

We shall, consequently, refer to the chief circumstances which, according to the appellant, make the case for the propounder so improbable and suspicious as to justify the rejection of the positive evidence as concocted and unreliable.

As regards the surrounding circumstances, it is urged that as the testator might easily have secured the services of a competent lawyer at Puri (where there is a District Bar) he could not have relied upon a servant on small pay who was ignorant alike of the language and of the script used by Bengalis. This, no doubt, is a matter for legitimate comment. But to assert that what is alleged to have been done was impossible, is a proposition which verges too closely on the absurd to be seriously entertained. On the other hand, it would not be surprising if Rajkrishna, who had gone to a strange place with a mistress, felt reluctant to call in the aid of a respectable Pleader or Mukhtear. As regards the witnesses, the persons who are alleged to have attested, are precisely the men who might be expected to do so—the Panda, under whose protection, as it were, the testator had taken up his residence, the Charidar, an officer of the Panda, the Doctor who attended him, and his own trusted servant. The omission to examine the Charidar has been justly commented upon. For, although where an instrument requiring attestation is subscribed by several witnesses, it is in general sufficient to call only one of them (Indian Evidence Act, section 68), in the case of Wills it is desirable that all capable of being called should be examined to remove all suspicion of fraud: [*Macgregor* v. *Topham* (35), *Andrew* v. *Motley* (36), *Hindson* v. *Kersey* (37)]. It has, indeed, been suggested that the Charidar has been kept back, because he did not attest the Will at the time of execution, but only affixed his signature later. This, if true, is not of much moment; the validity of the Will is not affected thereby, provided it is established that there were two attesting witnesses as required by law. Nor can importance be attached to the failure to examine the cook and the hanger-on. Further, we are not prepared to attach any weight to the suggestion that the Will was prepared on the 20th November, after the arrival of the manager, Bibhuti Bhusan Mukerjee, from Calcutta. This rests on a very slender basis, namely, the statement of the Doctor, made with considerable hesitation, that Bibhuti was present at the time when he attested the Will. We cannot ignore the fact that this hypothesis was not put forward in the caveat, which was filed after the legal advisers of both parties had visited Puri, as they did shortly after the Will had become known in Calcutta. The attestation clause signed by the Doctor states expressly that the document was signed by the testator at 11 30 A. M. on the 19th November. Consequently, there is no room for possible contention that the Will was manufactured by Bibhuti after his arrival from Calcutta, and either after the death of the testator or so soon before his death that he must have lost all testamentary capacity by that time. We must hold, then, that the Will was prepared, executed, and attested on the forenoon of the 19th November and could not have been inspired by Bibhuti.

As regards the contents of the Will, we have to examine the argument that the disposition is so improbable that it could not have been made by a person in the position of the testator. The disposition may be summarised as follows:—(1) an annuity of Rs. 50 a month to the wife of the testator;

(35) (1850) 3 H. L. C. 132 at p. 155; 10 E. R. 51.

(36) (1862) 12 C. B. (N. S.) 514; 32 L. J. C. P. 128; 133 R. R. 421; 142 E. R. 1243.

(37) (1765) 4 Burn. Ecc. L. 116 at pp. 119, 120.

2) an annuity of Rs. 40 a month to his mistress and payment of all her debts, and (3) an annuity of Rs. 125 a month to his manager, Bibhuti Bhusan Mukerjee, who is, in addition, released from liability to account in respect of certain expenses incurred, and (4) bequest of the residue to his infant brother. It may be conceded that, in view of the income of the estate, the amount of the allowance fixed for the wife does look inadequate But it must be remembered that the unhappy girl was not much of a wedded wife to the depraved young man, who, from before his marriage, had led a life of debauchery and habitually indulged in wine and women. Further, there was no one present at Puri who had the remotest interest in reducing the allowance of the wife. The annuity for the mistress as also the provision for discharge of her debts do not seem to be over liberal, when we remember the deep attachment the testator felt towards her and the length of time they had lived together; there is, at any rate, no indication that she exercised any undue influence on the young man in this matter. The provisions made for the manager as also his release from liability to account, have naturally formed the subject of strong comment, and are unquestionably calculated to rouse suspicion. But it is plain that the manager was not at Puri when the Will was prepared and had no opportunity to influence the judgment of his master at that time. On the other hand, the evidence shows that he was a valued and trusted officer who had secured for his master the enjoyment of his share of a valuable estate after it had been freed from every incumbrance. It is not for the Court to place itself in the position of the testator and to determine whether the master had set an inordinate value on the services of his officer; much less should we determine the amount of the sums which passed through his hands, as a question may hereafter arise as to the extent to which he has been absolved from liability. We only hold that the disposition in his favour was not so improbable as to verge towards impossibility. We have, finally, the residuary devise in favour of the brother It is not suggested that there was any body present at Puri who could have moved the testator in favour of his minor brother. This disposition, at any rate, must have been the act of the testator, influenced by obvious considerations of the ultimate preservation of the family estate, which would otherwise pass into the hands of the minor childless widow, liable to act under the guidance of her paternal relations. We cannot also overlook the significant fact that there was not even a small legacy in favour of the trusted servant Bipatram. Upon an examination of all the provisions of the Will, it is impossible for us to hold that they are so unnatural and unreasonable that they could not possibly have been made by a person with a sound disposing mind in the position of the testator.

There remains one objection which, though it looked formidable at one stage, does not require elaborate consideration. Attention was drawn to the fact that the word "*Sthabar*" (immoveable property) in the Will, looked like an interpolation, and specific evidence, it was said, must be adduced to show that the interpolation was made before execution and attestation. The alteration is admittedly not initialled as contemplated by section 58 of the Indian Succession Act. Now it is well settled that where unattested alterations occur in a Will, the presumption of law is that such alterations were made after the execution of the Will, and, in the absence of evidence rebutting the presumption, Probate will be granted of the Will in the original state, omitting the alterations. This rule has been affirmed by the Judicial Committee, *Cooper* v. *Bockett* (38), *Greville* v. *Tylee* (39) and has been subsequently followed, *Sykes, In the goods of* (40), *Adamson, In the goods of* (41) and *Pandurang Hari Vaidya* v. *Vinayak* (42). The present case, however, is free from difficulty; there is positive evidence that the Will, as it now stands, was read over in its entirety before the testator executed it. The presumption mentioned is, consequently, rebutted by direct proof, and this accords with the obvious intention of the testator, who wished to make a disposition of his entire estate and not die intestate in respect of the most valuable portion thereof. It may be added that the presumption may be rebutted not merely by direct proof, but also by

(38) (1844) 4 Moo P. C. 419; 10 Jur. 931; 59 R. R. 37; 13 E. R. 366.

(39) (1851) 7 Moo. P. C. 320; 88 R. R. 57; 13 E. R. 904

(40) (1873) 3 P. & D. 26; 42 L. J. P. 17; 28 L. T. 142; 21 W. R. 416.

(41) (1875) 3 P. & D. 253 at p. 255.

(42) 16 B. 662; 8 Ind. Dec. (N. s.) 913.

internal evidence and by inferences drawn from the condition of the Will, *Hindmarch, In the goods of* (43), *Cadge, In the goods of* (44), *Tonge, In the goods of* (45). As regards the marginal note also, there is no real difficulty; it was signed by the testator, and on the evidence, had been written out before execution and attestation.

Finally, Mr. Chaudhuri has made almost a grievance that the manner in which the learned Trial Judge intervened with questions during the examination and cross-examination of witnesses, misled him and left him under the impression that the Court was not prepared to accept the statements made by the witnesses concerned. This is obviously not a matter which can be set right on appeal, unless, indeed, it is established that the intervention of the learned Judge with questions with a view to clear up obscurities to fill up lacunæ, to supplement deficiencies, and generally to elicit the truth, exceeded the bounds of even the comprehensive provisions of section 165 of the Indian Evidence Act and so impeded the legitimate work of Counsel engaged in the cause as to amount to a mis-trial, leading to failure of justice. This has not been, and, on the record as it stands, cannot be, urged. But it is manifest that during the progress of the trial, it is not wise for Counsel to anticipate the final opinion of the Judge even as to the veracity of a witness which may have to be jugded, not solely from his individual statements, but from his testimony taken in conjunction with all the other facts brought out in the Court of litigation.

After the most anxious consideration we have been able to give to this case, we have arrived at the conclusion that Mr. Justice Chanduri has rightly pronounced in favour of the Will and that the appeal must consequently be dismissed.

As regards the costs of the appeal, we direct that the costs of both the parties be paid out of the estate. The case is by no means free from difficulty and, in view of the course which the trial took in the Court below, we cannot hold that the appeal was not justified

FLETCHER, J.—I agree.

Appeal dismissed.

(43) (1866) 1 P. & D. 307 at p. 308; 36 L. J. P. 24; 15 L. T. 391.

(44) (1868) 1 P. & D. 543; 37 L. J. P. 15; 17 L. T. 484; 16 W. R. 406.

(45) (1866) 66 L. T. 60.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 124 OF 1919.

February 11, 1920.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Young.

THE RANGOON MUNICIPAL COMMITTEE—DEFENDANT—APPELLANT

versus

THE BURMA RAILWAYS COMPANY, LIMITED AND OTHERS—PLAINTIFFS—RESPONDENTS.

Burma Municipal Act (III of 1898), s. 98—Duty of Municipality to remove and dispose of night soil, whether imperative—Nuisance committed by Municipality—Injunction to restrain nuisance.

Per *Twomey, C. J.*—Section 98 of the Burma Municipal Act does not impose an imperative duty upon a Municipality to remove and dispose of night soil. [p. 836, cols. 1 & 2.]

Per *Young, J.*—Section 98 of the Burma Municipal Act imposes upon a Municipality the duty both of removing and disposing of night soil. [p. 839, col. 2.]

Per *Curiam.*—The Legislature did not contemplate a nuisance as the necessary result of a Municipal Committee exercising the powers conferred upon it by section 98 of the Burma Municipal Act. Therefore, if a nuisance is committed by a Municipal Committee in removing or disposing of night soil under that section, it is liable to be restrained by injunction. [p. 840, col. 1.]

Appeal against the following judgment of Robinson, J., in Civil Regulation No. 322 of 1918, dated the 19th June 1919, on the Original Side.

ROBINSON, J.—The defendant Committee have since 1890 occupied a plot of land in the angle between Strand Road and First Street and in 1891 they established thereon a night soil depôt. The plaintiff Railway Company occupy a plot of land the other side of First Street to this depôt, and they have erected thereon Jamadars' and clerks' quarters for occupation by members of their staff. The 2nd and 3rd plaintiffs are goods clerks in the employ of the Railway Company living in these quarters which abut on First Street. The quarters were erected some two years after the night soil depôt was brought into operation.

Early in 1908, the Railway Company began to complain of the smell from the depôt and, on the 3rd February 1908, wrote to the Health Officer saying that the smell had been actually getting worse and had latterly increased to such an extent that the clerks had vacated their quarters and men could not be induced to live there. It was asked if anything could be done to abate the

nuisance. On the 11th February the Health Officer replied that there is bound to be a certain amount of nuisance in connection with a night soil depôt; he admittd that the nuisance had been worse on two or three occasions recently because of blockages having occurred but said his department was doing its very best to diminish the nuisance complained of. On the 29th May 1909 the Railway Company again wrote to him that the stench was reported to be unbearable when the night soil carts were being emptied as the prevailing wind blows from the receiver towards the quarters; that it had also been reported that during the last year or so there had been a considerable increase of sickness, especially bowel complaints in this area which was put down to the smell. It was stated that the Chief Medical Officer of the Railway was of opinion that the present state of affairs was not merely a nuisance, but dangerous to the health of the surrounding community, and it was asked that the Municipality should take active measures to abate the nuisance. On the 8th June the Health Officer replied that the problem of disposing of the night soil of a very large area with the least possible amount of nuisance was obviously a difficult one, and that its solution was likely to be expensive. He said the Engineer was preparing plans and estimates for such a reconstruction of the depôt as would probably greatly diminish the nuisance complained of.

There the matter seems to have rested for the time being, but on the 12th December 1910 the Railway Company wrote forwarding a letter from their Chief Medical Officer and asking that active measures to abate the nuisance complained of might be taken at an early date. The Chief Medical Officer who stated that he had visited the depôt while operations were being carried on expressed the opinion that it amounted to a nuisance which rendered the quarters uninhabitable; that the nuisance has not in any way diminshed, and that if the night soil depôt continues to be used that portion of the railway land should not be used for railway quarters. The Health Officer replied on the 23rd December 1910 that from their nature it was impossible to render night soil depôts entirely free from offence but that the Chief Engineer had recommended alterations which it was hoped would be shortly carried out and should considerably minimise the nuisance. There again the matter was allowed to rest, but on the 23rd March 1914 the Railway Company wrote to the President of the Municipality calling his attention to the previous correspondence by which they had been endeavouring to get something done to improve the state of affairs and saying that each time they had been put off with promises. They stated that their Chief Medical Officer had again reported that nothing whatever had been done to do away with the nuisance which was a very serious one and rendered the quarters uninhabitable, and asked what the Committee proposed to do in the matter. On the 4th April the Secretary of the Municipality replied that the Municipality had made several costly experiments at another depôt with the object of mitigating the nuisance but that the results had so far disappointed expectations; that further experiments are being tried; that if they proved successful they will be introduced at the depôt at Keighley Street; that, in the meantime, very strict supervision was kept over the work carried out at the depôt, and that everything that could be done to reduce the nuisance was being done. On the 8th May the Railway Company again wrote that the matter seemed to be no nearer solution than when it was first raised and reiterated that the depôt was a nuisance and rendered the quarters uninhabitable, and that if the nuisance cannot be mitigated within three months it would be necessary to appeal to higher authorities against further use of the site as a depôt for dumping the night soil. On the 3rd December 1914 the Railway Company forwarded another report from their Chief Medical Officer and asked if the Committee wished to make any remarks on the subject before the matter was placed in the hands of their lawyers. On the 7th December the Committee replied that they could not admit that the conditions at the depot were as bad as represented or that it was indifferent with regard to effecting any reasonable improvement that may be suggested. It was said that it had been decided to repave the depôt with stone setts which would result in a considerable abatement of the nuisance and that until some prac-

tical alternative to night soil depôt is suggested the Municipality was not in a position to dispense with them. On the 16th March 1918 the Railway wrote giving notice of suit under section 42 of the Burma Municipal Act for an injunction to restrain the nuisance and for damages by way of compensation.

The plaint sets out the existence of this night soil depôt for the purpose of transferring night soil from carts in which it is collected to one of the Municipal drains. It alleges that such transfer takes place every night and gives rise to an intolerable stench and noxious vapours which spread themselves over the lands occupied by the plaintiffs corrupting the air and rendering the quarters unfit for human habitation. It alleges that the cause of action is a continuing cause and prays for an injunction restraining the defendant Committee from so maintaining and conducting such depôt as to constitute a nuisance ; such further and other relief as on the premises shall seem just and for the costs of the suit. The Municipal Committee in their written statement deny the allegations of fact as to the stench and noxious vapours ; deny entirely that the quarters are rendered unfit for human habitation ; allege that every care is taken that no unreasonable smell shall arise. They admit that the Railway Company had called upon them to abate the nuisance and they plead that the plaintiffs are not entitled to succeed by reason of their acquiesence and delay in taking action and by the fact that they are barred by limitation. They plead that plaintiffs are not entitled to an injunction as the balance of public convenience requires that the operations complained of shall be carried out and by reason of the fact that no more suitable place exists in Rangoon for transfer of sewage from the night soil carts to the sewer. They plead that no cause of action lies against them by reason of statutory authority given for the provision of the said site for disposal of sewage. Lastly, they plead that the operations have been carried out lawfully, in good faith and with due care and attention and that, therefore, no suit is maintainable.

I framed issues as to whether a nuisance was committed ; as to whether the defendant Committee were exempted by statutory authority from being sued ; as to the alleged acquiescence and delay ; as to the question of the balance of public convenience, and as to whether section 42A of the Act justified the plea that no suit was maintainable.

I will first deal with the question of statutory authority as given by the Burma Municipal Act and whether the defendant Committee is, therefore, not liable to be sued for an injunction. The defendant Committee claims that the Act imperatively requires them to provide for the disposal of offensive matter ; that to do so is not possible without creating some nuisance and that this must have been realized by the Legislature which, therefore, when enacting this provision, must have contemplated interference with private rights. It urges that its operations are not for gain but solely for the public benefit and that in respect of night soil their duty is so obviously imperative that the rights of individuals must be subordinated to the advantage of the community as a whole. The general principle on which this claim to exemption rests is well recognized and has frequently received judicial expression. In respect of acts giving powers to construct a railway it is pointed out by Lord Halsbury, Lord Chancellor, at the end of his judgment in *London and Brighton and South Railway Company* v. *Truman* (1) that they "were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not." And this is so although the Railway Company works for the gain of its share-holders as a commercial adventure. There is next the cases where powers are given to Companies, such as, Gas and Electric Lighting Companies. In respect to them no such assumption can be made. It is true their operations may result in great convenience to the public at large but they are carried out primarily for the pecuniary advantage of the share-holders and it is for them to prove affirmatively the exception they may claim. Lastly, we have the cases of Corporations and public bodies not working for private gain but primarily for the public good. In the case of the last class, amongst which a Municipal Committee is included, no right

(1) (1886) 11 App. Cas. 45; 55 L. J. Ch. 354; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388.

to create a nuisance or to interfere with private rights is to be assumed and it must be proved that they are entitled to exemption from an action to restrain them. The onus of proving this is on them, and it cannot be claimed that they come without proof within the rule allowed in the case of Railway Acts. To establish this it is sufficient to refer to passages in the judgments in the *Metropolitan Asylum District* v. *Hill* (2) where Lord Blackburn says: "It is clear that the burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears," and Lord Watson says: "The onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance." As to the law applicable to the claim to exemption, that is made it is set out clearly in this authority and I need not refer to the other cases in which it has also been laid down. Lord Selborne, Lord Chancellor, deals with the Act then under consideration and he says: "If express words,' or necessary implication and intendment, must be shown, in order to authorize the Poor Law Board, or any managers of an asylum, to create a nuisance, in the exercise of the discretionary powers given to them, I can find none in this Statute.

"The result is: (1) That this Act does not necessarily require anything to be done under it which might not be done without causing a nuisance; (2) That as to those things which may or may not be done under it, there is no evidence on the face of the Act that the Legislature supposed it to be impossible for any of them to be done (if they were done at all) somewhere and under some circumstances, without creating a nuisance; and (3) That the Legislature has manifested no intention that any of these optional powers, as to asylums, should be exercised at the expense of, or so as to interfere with, any man's private rights," and again: "If the Legislature had authorized some compulsory interference with private rights of property, within local limits which it might have thought fit to define for the purpose of establishing this asylum to be used for the reception of patients suffering from small-pox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed) the present case might have been like *Rex* v. *Pease* (3) and the *Hammersmith and City Railway* v. *Brand* (4). No person outside the statutory line of compensation even if the use of the asylum in the manner authorized by the Statute had been productive of serious damage to him, could then have obtained any relief or remedy, upon the footing that what the Statute authorized was a legal nuisance to himself, or, in itself an actionable wrong. But the case is different, when (as here) no interference at all with any private rights is authorized, and no place, or limit of space, is defined within which the establishment of such an asylum is made lawful". Lord Blackburn says: "I think that the case of the *Hammersmith and City Railway* v. *Brand* (4) in your Lordships' House, settles, beyond controversy that where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle any one to an action, the right of action is taken away.

". . . The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done... without injury to others. What was the intention of the Legislature in any particular Act is a question of the construction of the Act." Lord Watson, after pointing out that it was not asserted that express power of authority to that effect had been given by the Act but that the contention was that, having regard to the nature of the public duties laid upon the appellants,

(2) (1881) 6 App. Cas. 193; 50 L. J. Q. B. 353; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664.

(3) (1832) 4 B. & Ad 30; 1 N. & M. 690; 2 L. J. (N. S.) M. C. 26; 38 R. R. 207; 110 E. R. 366.

(4) (1869) 38 L. J. Q. B. 265; 4 H. L. 171; 21 L. T. 238; 18 W. R. 12.

and the necessities of the case, it must, on a fair construction of the Act, be held that the Legislature did intend them to exercise, and authorize them to exercise, such powers, says: "I see no reason to doubt that, wherever it can be shown to be matter of plain and necessary implication from the language of a Statute, that the Legislature did intend to confer the specific powers above referred to the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribe by Statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed.

"On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at Common Law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result." Then, after dealing with the question of onus which lies upon the person claiming to justify the nuisance, he continues: "Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature; and, in the second place, that they cannot possibly obey those orders without infringing private rights."

I will next consider the provisions of the Burma Municipal Act to see whether they are such as justify the claim of the defendant Committee in the light of these expositions of the law applicable. Section 98 of the Act provides for special conservancy in certain towns and lays down that the Committee of any Municipality to which the Local Government may apply the provisions of the section shall provide for the cleansing of all street drains and public places within the limits of the Municipality, and the removal therefrom of all refuse and rubbish and shall provide for the removal of all house refuse. Sub-section (2) enacts—"The Committee shall provide within the limits of the Municipality sites and places for the collection, deposit, or disposal of all refuse, rubbish, and offensive matter: provided that the Local Government may require the said Committee in lieu of, or in addition to, such sites and places, to provide sites and places for such deposit and disposal beyond such limits." Sub-section (3) empowers the Committee to require owners or occupiers of premises to provide proper receptacles for collecting and keeping refuse rubbish and offensive matter prior to removal. This section was applied to the Municipality of Rangoon on the 1st July 1898. Sub-section (2) is clearly imperative in its terms and the Committee is left no option. It has to provide sites and places for the disposal of offensive matter. A discretion is given to the Committee as to the exact location of such sites and places but they must be within the limits of the Municipality. The proviso shows that it was recognized that it might become necessary to require the Committee to provide such sites and places beyond Municipal limits in lieu of one or more of those provided within those limits.

Mr. Giles argues that this section does not deal with night soil at all; that it and section 97 are joined under the one sub-heading "Deposit of offensive matter," and that both sections refer to refuse and rubbish from streets and houses. He argues that night soil is not dealt with as offensive matter but as sewage and is provided for in section 112.

"Sewage" is defined in section 2 (9) as meaning "night soil and other proper contents of water-closets, etc.," and the expression offensive matter is not used in the definition.

"Sewerage-connection" is defined in section 2 (11) as including "(*a*) any sewer between

any water closet, etc, on the one hand, and any sewer set apart by a Committee for sewage and other offensive matter, on the other hand. Section 150 speaks of "the water of any sink, sewer or cesspool or any other offensive matter" and section 151 speaks of "night soil or filth or any noxious or offensive matter." It is not used in these sections as something different from night soil and the like, but as a general term *ex majori cautela* to cover possible omissions. It is urged that there are many provisions relating to sewage latrines, cesspools, night soil and the like, and that to include it here with house refuse and rubbish which might become offensive is at least strange. It may be that the drafting of the Act is open to criticism, in fact it has been criticized by both sides in this case, but I see no reason to doubt that in this section, which would not apply to all Municipalities, it was used as a general term to cover all offensive matter and that it does cover night soil. It is said that it is already provided for in section 112 but that section is permissive and deals with removal from buildings, lands or receptacles and is intended to provide a right of entry for this purpose. It does not deal with the disposal of the matter removed. Before a Committee can impose a scavenging-tax, it has to make provision for removal and disposal but it may remove without imposing a tax.

I must therefore, hold that section 93 (2) does apply to the matter in dispute and it imposes an imperative duty on the Committee to provide sites and places for the disposal of night soil.

The Act clearly does not permit a nuisance to be committed in the disposal of night soil in express terms and the next question is whether the nuisance was so certain a consequence that it must be assumed that the Legislature realized when passing the Act that the imperative duty imposed could not be performed without creating a nuisance, that is, without interfering with private rights. Lord Blackburn said in the *Metropolitan Asylum District* v. *Hill* (2): "If it be the fact that such an asylum must be a nuisance, unless on a site so extensive as to keep all habitations at a considerable distance, it may be that such a site cannot be obtained at all in the neighbourhood of the metropolis, or only at a cost so enormous as to make it practically impossible. If that is the case it might be for the consideration of the Legislature whether the certain danger of infection, from leaving the infectious sick paupers where they fell ill, exceeded that which would arise from a well regulated hospital erected in another place, to such an extent that it was for the public benefit that this latter risk should be run, and whether the rights of owners of property there should stand in the way of such a public benefit, or should be made to give way, with or without compensation." And so, in this case, if it is established or can be held that the depôt cannot be used without causing a nuisance it may well be that the Legislature held that the public advantage so far exceeded the injury to private individuals that the latter must give way.

For the defendant Committee it is argued that the imperative duty imposed is to dispose of offensive matter, that is, matter which remains, of necessity, offensive, and therefore a potential source of nuisance until finally disposed of; that the evidence and especially the experiments made show that it cannot be disposed of by any known method and the exercise of every care and precaution without causing a nuisance; that there is no provision, such as there is in many Acts, that no nuisance shall be caused; that the Legislature must have contemplated the extension of the town, and that it has provided for compulsory compensation in cases where the person injured is not in default.

It is not lightly to be assumed that the Legislature intended to take away private rights even in the case of a body acting solely for the benefit of the community as a whole. It is to be noted that section 98 (2) requires the provision of "sites and places" for the disposal of this offensive matter and, therefore, it is no doubt the case that some such method of removal and disposal as is in use was contemplated and not a disposal by a sewer system. Even in the area dealt with by this depôt there is a portion that is within the sewered area of Rangoon, but in that portion no less than 580 latrines exist, the contents of which are disposed of at this depôt. It is no doubt right to assume that the possibility of the extension of the residen-

tial area of the town was present to the mind of the Legislature and that depôts so situated when first fixed as not be a nuisance might later become a source of nuisance, but there I think the argument must stop. It cannot be carried further to show that, therefore, the probability of a nuisance was such that it must be assumed that it was the intention to take away the right of action. The proviso to section 98 (2), in my opinion, establishes the contrary inference, for it retains a power in the Local Government, when the necessity arises, to require the Committee to fix a site or place outside Municipal limits in lieu of one or more of such depôts. This makes it all the more essential for the Committee to establish affirmatively that private rights were deliberately taken away.

As to compensation, section 146 is relied on. It provides that the Committee may make compensation out of the Municipal fund to any person sustaining any damage by reason of the exercise of any of its powers and that it shall make such compensation where the person sustaining the damage was not himself in default. It goes on to provide that any dispute as to the amount of any compensation shall be settled in such manner as the parties may agree upon, or in default of agreement in the manner provided by the Land Acquisition Act so far as the provisions of that Act can be made applicable.

Mr. Giles urges that this section is only intended to enact the fund out of which compensation, allowed by the Act in various other sections, is to be paid. He refers to sections 91, 94, 118, 119, 120, 123 and 132, and argues that any other interpretation makes it superfluous. I do not think the argument can be accepted. General provisions for compensation are not unusual and there is no such necessity for specifying the fund out of which it is to be paid as to account for its enactment for that purpose alone. There is no doubt a mandatory provision for payment of compensation where the person injured is not in default and it would cover the present case, but it is not enacted particularly for this matter. Provision for the payment of compensation is undoubtedly an important factor to be weighed in deciding the question now under consideration. It has frequently been held that the absence of a provision for compensation would make it most difficult to establish the proposition contended for. But it has never been held that the presence of such a provision *ipso facto* establishes the intention to take away private rights. It is said that the provision for acquiring the land shows that the Legislature contemplated a nuisance. The provision is a general one intended to apply to many and varied instances and cannot therefore, I think, be so used. The result of acquiring the railway land would only dispose of one out of many possible claimants and might well result in the Committee having to acquire at great cost lands it did not require, under penalty of closing the depôt, moving the Local Government and then acquiring sites outside the Municipality.

We have, then, an imperative duty and a general provision for compensation which does not carry as much weight as a special provision to meet the particular case.

Next, there is the allegation that these depôts cannot be carried on without creating a nuisance. It is said that every effort has been made to abate the nuisance but that no method has been found or is known to exist by which a nuisance can be avoided. The method employed is as follows: Night soil is collected and removed to the depôt in carts. At the depôt there is an alley-way running due east and west from First Street on the one side to Strand Road on the other. The alley-way has walls about 4 feet high on each side and in the middle, and about 25 feet from First Street, there is a manhole connecting with the end of one of the main disposal sewers of Rangoon. The walls at this manhole are raised 11 feet and are surmounted by a water tank to which are attached two hoses. Over the manhole is a horizontal grid with narrow parallel bars and lower down there are two more and nearly vertical grids. The carts come up the alley-way and stand over the first grid, the top is opened and a hose-pipe inserted which carries water into the cart to wash the contents out through an opening in the bottom of the cart. The second hose-plays on the matter falling on the grid to wash it down through the grid without delay. Carts coming from native *bastis* contain various extraneous matter besides night soil, such as sticks, broken stones, grass and broken bottles, which

cannot be allowed into the sewer and the grids are intended to hold them up. To separate them from the night soil they are played on by a strong current of water. When cleansed they are removed to an ordinary day conservancy cart standing outside the wall. The cart is then thoroughly washed down and an antiseptic used and then passes on.

The shaking up of the night soil in the carts on their way to the depôt generates a quantity of noxious gas which is released when the lid is opened. This is blown by the wind and is said to cause a very foul smell which is an intolerable nuisance to those residing to windward of the depôt. It is also said that the procedure described causes a vast quantity of bacteria to be wafted into the air which are carried about and are a source of grave potential danger to the health of the neighbourhood. To remedy this nuisance experiments have been made. A telescopic tube was provided which could be connected with the opening at the bottom of the cart so that the contents might be carried underground before being released. This method was abandoned because the extraneous matter often blocked the opening in the cart and had to be forced through by bamboos. It also blocked the pipe and could not be moved without opening the lid or disconnecting the pipe so that the smells were let loose. It does not seem that these difficulties should have been insurmountable.

The next experiment was an enclosed chamber with a tall chimney and a fan to create an indraught. It had doors at each end, 10 feet by 8 feet for the ingress and egress of the carts and were opened only for that purpose. It was found that when the doors were opened the noxious vapour got out and the smell was as bad as ever. The failure was due to the indraught not being strong enough and to the doors being too large apparently. It was tried for four months. Here, again, it would seem as if there was not sufficient cause to abandon the experiment without further effort.

It is claimed that every effort has been made to avoid a nuisance but that it is impossible. However, the question is whether it was so clearly impossible that it must be assumed that the Legislature was aware of this and nevertheless imposed the imperative duty. It may be taken that it was known that carts would be used, but these carts need not be a nuisance. If the lids are properly fixed down the only smell from the cart would be from matter carelessly spilt when filling the cart. As to the disposal at the depôt it is clear that no method was laid down and that the matter was left entirely to the Committee. I cannot hold it has been established that the Legislature intended to sanction the method then in use or to control the Committee in any way. Nor can I find any sufficient ground for holding that the disposal by carts at a depôt was so certain to result in a nuisance that it must have been in the contemplation of the Legislature. Lord Hatherley, L. C., in *Attorney-General* v. *Leeds Corporation* (5) in dealing with the case of a sewer said: "Yet the Legislature may have thought that the thing could be done (and, for aught I know, it is not impossible it can be done) without creating a nuisance." In my opinion, that is exactly the position here. In *Jordeson* v. *Sutton Southcoates and Drypool Gas Company* (6) North, J., held—"To make out their case the Company must show that they cannot, without interference with the plaintiff's rights, do something they are bound to do." They have not shown that in this case and I must, therefore, hold that this suit will lie against them.

Before leaving this matter I think I ought to refer to the case of *Muhammad Mohidin Sait* v. *Municipal Commissioners for the City of Madras* (7) which was strongly relied on by the defendant Committee. It dealt with the use of a burial and burning ground. By their act the Commissioners were under a statutory obligation to open burning grounds and provision was made for compensation. A power to acquire compulsorily land for such burning grounds was also provided. It was held that no suit would lie and that the case was governed by the principle enunciated in Truman's case. The fact which distinguishes that case from the present one, in my opinion, is that no allegation was made of any negligence whatever in the manner of using the burning

(5) (1870) 5 Ch. App. 583; 39 L. J. Ch. 711; 19 W. R. 19.
(6) (1898) 2 Ch. D. 614; 67 L. J. Ch. 666; 79 L. T. 478; 47 W. R. 222; 63 J. P. 137
(7) 25 M. 118.

ground and, further, the method in which the imperative duty was to be performed was not open to question but was settled by long established custom and the habits and feelings of the community.

I will next deal with the other issues relating to the maintainability of this suit.

It is said that by long acquiescence and delay plaintiffs are barred. I do not think there is any proof of either on the part of plaintiffs. Objection was taken as long ago as 1908 and the Committee promised an abatement of the nuisance. This was repeated from time to time. The nuisance, if it is a nuisance, is a continuing nuisance and recurs every night. In *Attorney-General* v. *Leeds Corporation* (5) it was held that though the sewer had been completed and in operation sixteen years before proceedings were taken, the Court would interfere at the suit of the landowners and that was partly based on the fact that it was a continually increasing evil. Again, in *Ogston* v. *Aberdeen District Tramways Company* (8) the nuisance began in 1880, it got acute in 1886, and proceedings were not taken till 1895.

As regards the argument based on the balance of public convenience, that is not of itself any ground on which to hold that a suit would not lie. It is a matter which, under certain circumstances, might possibly be taken into consideration, in dealing with the intention to be attributed to the Legislature and this I have already pointed out and have dealt with it.

As to section 42A of the Act, that section bars a suit in connection with acts lawfully done in good faith and with due care and attention. If the defendant Committee was authorized to do what is complained of in the manner they have done the suit fails, but if they have been and are committing a nuisance not legalized the section is clearly no bar.

I have then to decided whether they have committed a nuisance.

The nuisance alleged is two-fold :

(1) by reason of the unbearable smell, and

(2) on the ground of the potential danger to the health of those residing in the quarters.

(8) (1897) App. Cas. 111; 66 L. J. P. C. 1; 75 L. T. 638; 91 J. P. 436.

As to the former, it is not denied that at certain seasons of the year and when the wind is in the direction of the quarters there is a bad smell. But it is said the resulting nuisance is very much exaggerated and that such nuisance as there may be is only occasional and does not amount to a nuisance at law. The evidence is strangely divergent. The Chief Engineer and Dr. Blake, the officer-in charge of the conservancy, cannot deny that in the hot weather and when the wind is in the south-west the smell is very bad. Any resident of Rangoon who has had the misfortune to meet one of the night-soil carts knows the almost overpowering stench that emanates from them. Dr Blake admits that one must become aware of it long before you meet the cart and remain aware of it for something like twenty yards after the cart has passed By the churning up of the contents a large quantity of noxious gas is evolved, and this when let loose at the depôt must give rise to an intolerable stench. It may be that it is somewhat less in the cold season but that in Rangoon is a very short period. Dr. Spence paid a visit at the end of December to the depôt and says there was no smell to speak of. In fact, he implies that even to windward of the dump you had to seek for it to become aware of it. But he went once only and under the most favourable circumstances. He and all the other witnesses agreed that they would not live there by reason of the smell. On the other side we have the raiterated opinion of the Chief Medical Officer that the smell was unbearable and made the quarters unfit for human habitation. Major Whitmore and Dr. Hayne describe it as "overpowering" and 'horrible." They went there in May and June, which are said to be the worst months. The second plaintiff deposed that he had to shut his windows to try and keep the smell out and that it was so bad as to cause him and his family at times to vomit. It is a very great hardship to have shut out the breeze on hot weather nights and in the rains. Major Whitmore's evidence shows that when the wind is towards the quarters there is an overpowering smell in First Street on which they abut when it is from the north-east or away from them there is not much smell in First Street. He expresses the opinion that the smell alone must interfere

with the comfort of those living in the quarters, and was a great nuisance to them. Dr. Hayne's evidence shows the smell was very bad and at times horrible and it varied in intensity on different occasions. He considers that at night the depôt made comfort impossible for the inhabitants of the quarters. He also considers that the area available there is far too small to avoid causing a nuisance.

In reply to this, Dr. Blake says the smell gets less the farther you go from the grid and there is no smell in the day time. The smell is worst when the lid is first opened and decreases and is less in wet weather. If the wind is from the north-east there would be no smell at the quarters. He has to admit that the smell is a nuisance when the wind is towards the quarters. He admits the smell from a passing cart is often sickening. If so what must it be when at its worst when the lid is first opened? Carts waiting their turn would wait in the road, and those approaching from the First Street side would stand practically outside the quarters and that would be unpleasant for those in the quarters. Even in the cold weather he admits there is sometimes a smell at the quarters.

The evidence establishes, in my opinion that there is an unbearable smell from the depôt and when the wind is towards, or even partially towards the quarters, the smell must be a substantial and, indeed, a grievous interference with the comfort of those living in the quarters. A smell which can properly only be described as sickening or unbearable or overpowering or horrible is not a matter which can be allowed to be a nuisance at one time and not at another. It cannot be argued that the disposal must so certainly result in a nuisance, that the fact must have been in the contemplation of the Legislature for the purposes of the statutory exemption but is not one in fact. The fact that there may be and possibly are days or seasons of the year when by reason of the direction of the wind little smell is perceptible at the quarters and that there is no smell in the day time is not sufficient, and I hold that the depôt is, by reason of the smell complained of, a nuisance in law to the inhabitants of the quarters.

I do not propose to go deeply into the second ground pleaded. The experts differ. Major Whitmore, while admitting that a large number of experiments would be preferable, holds that those he made justify an inference as to the likelihood of the dump causing bacterial infection. He considers it established that there is a material increase in the number of bacteria in the air owing to the dump. Colonel Pearse, on the other hand, considers there are not sufficient data to form any opinion and he is not prepared to admit that the increase of the bacteria can be said to be caused by the dump and not come from anywhere else. It may be that the most obviously probable source is the dump and that there are more bacteria to be found to windward of the dump than upwind from the dump. Major Whitmore considers that the dump is a source of potential danger to the health of the persons living in the quarters. It may be so, but I can come, on the evidence before me, to no definite conclusion. If it is such a source of danger it is all the more a nuisance, but even if that be held not established it is still a nuisance.

Plaintiffs seek an injunction restraining the Committee from committing this nuisance. The Committee strenuously opposes the granting of an injunction and mainly on the ground that it would result in such serious consequences to the community in general. It does not deny liability to compensate in damages, indeed it refers to the express provision that damages shall be paid where the person injured is not in default. That provision is, however, a general one and not enacted for this particular matter. Plaintiffs have not asked for damages and cannot be compelled to accept them in lieu of an injunction if they have established their right to an injunction. In the case of *Attorney-General* v. *Leeds Corporation* (5), to which I have already referred, an injunction was granted restraining the use of a sewer unless and until it was not a nuisance. The same argument as to the public necessity was used but was rejected and Sir W. M. James, V. C., said: "I am not much impressed, as several of my predecessors were not, by the danger to the health of the inhabitants of the town if I interfere with their sewage. I believe they will

find means of removing the sewage without the danger to health which has been suggested; but at all events, I think, the people below the town have a right to say that a nuisance must not be created for them."

In *Shelfer* v. *City of London Electric Lighting Company* (9) the question whether an injunction should be granted was fully considered. Their Lordships concurred in the dictum of Lord Kingsdown in *Imperial Gas Light and Oake Co.* v. *Broadbent* (10), "but when he has established his right at law, I apprehend that, unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of the violation."

It was said by Lord Lindley, L. J.: "The Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrong doer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrong doer is in some sense a public benefactor (*e. g.*, a gas or water Company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed." Lord Justice A. L. Smith in this case laid it down as a good working rule that—

"(1) if the injury to the plaintiff's legal rights is small;

(2) and is one which is capable of being estimated in money;

(3) and is one which can be adequately compensated by a small money payment;

(4) and the case is one in which it would be oppressive to the defendant to grant an injunction:—

then damages in substitution for an injunction may be given."

Moreover, it has never been allowed to a wrong-doer to force a neighbour to sell by persisting in continuing the wrong.

This case does not fall under the rule enunciated by Lord Justice A. L. Smith, nor does it present any such special circumstances as would justify the refusal of the injunction to which the plaintiffs have established their right.

At the same time, I am not unmindful of the possibility nor do I desire to minimise the fact that to prohibit the depôt may result in serious inconvenience to the public at large and I trust that the order I propose to pass may render it possible, while supporting the plaintiff's rights, to permit of a solution of the difficulty. If time is granted, it may be that the plaintiff Company may come to an arrangement whereby its land may be acquired without loss, or the defendant Committee may be able to provide that the depôt be worked without causing the nuisance complained of or obtain legislation legalizing the nuisance, or, if none of these be possible, that time will enable the orders of the Local Government to be obtained and the depôt to be removed to some place outside Municipal limits without interference with the needs of the public.

I grant a decree that an injunction do issue prohibiting the defendant Committee from so using this depôt as to cause a nuisance to the plaintiff Company and those dwelling on its land; and, further, that the said injunction be suspended for a term of six months from this date with liberty to the defendant Committee to apply for an extension of the said term for good and sufficient cause for such further period as to the Court may seem just.

The defendant Committee will pay the costs of the plaintiff Company, and, in view of the complexity of the case, I fix Advocates' fees at 10 gold *mohurs* a day for seven days.

Lastly, I desire to record my appreciation of the care and skill that Counsel have devoted to this important case and to thank them for the great assistance they have given me. As to experts' fees, I am not prepared to sanction them at present, as I believe the rules do not permit of their being given in the case of Government officials, but I will reserve the point and hear Counsel, both as to whether they can be and as to whether they should be allowed in this case.

(*July 3rd*, 1919.) I have now heard Counsel. There is no objection to the grant of expert fees to Major Whitmore as part of the costs.

Mr. Giles asks for Rs. 600. Counsel for defendants leaves the matter to the Court

(9) (1895) 1 Ch. D. 287; 64 L. J. Ch. 213; 12 R. 112; 72 L. T. 34; 43 W. R. 238.

(10) (1859) 7 H. L. C. 600; 115 R. R. 205; 29 L. J. Ch. 377; 5 Jur. (N. S.) 1319; 11 E. R. 239.

Major Whitmore went four times to the depôt in the middle of the night. He conducted experiments which required previous preparation and subsequent examination of a laborious and technical character, and I consider this amount reasonable. I allow Rs. 600 as expert fees.

Mr. *Mc Donnell*, for the Appellant.
Mr. *Ormiston*, for the Respondents.

JUDGMENT.

TWOMEY, C. J.—The Burma Railways Company (plaintiffs-respondents) occupying a plot of land adjoining one of the Rangoon Municipal night soil depôts sued for an injunction restraining the Municipal Committee (defendants-appellants) from maintaining and continuing the depot so as to constitute a nuisance. The transfer of night soil from carts to the Municipal drains was alleged to give rise to an intolerable stench and noxious vapours which render the plaintiffs' quarters unfit for habitation. The Municipal Committee denied the allegations as to stench and noxious vapours and alleged that every care is taken to prevent any "unreasonable" smell from arising at the depôt. But the principal defence was that no cause of action lies as the Committee have statutory authority under section 98 of the Burma Municipal Act for providing the site in question for the disposal of sewage. They also pleaded, under section 42A, that the operations have been carried out lawfully in good faith and with due care and attention. There were further pleas as to limitation and as to delay and acquiescence on the part of the plaintiffs, but we are not concerned with these pleas now.

The learned Judge on the Original Side has found that an imperative duty is laid on the Committee by section 98 of the Municipal Act to provide depôts for the disposal of night soil. But he has also found that section 98 is not sufficient to cover the Municipal Committee's actual operations at the night soil depôt because (*a*) the depôt is in fact a nuisance, (*b*) the Act does not expressly or by necessary implication permit a nuisance to be committed in the disposal of night soil, and (*c*) the Legislature cannot have contemplated the nuisance as an inevitable result of carrying out the provisions of section 98.

The Judge was further of opinion that the Committee could claim immunity under section 42A only if they could show that they were legally authorized to commit the nuisance complained of, *i.e.*, that it was lawfully done. In short, they would have to show that what they did is covered by section 98 before they could shelter themselves under section 42A, and they had not shown this. The memorandum of appeal does not refer to section 42A at all, and it may be taken that the Committee do not seriously dispute the Judge's finding as to that section.

It is also not disputed now that the method of disposal at the night soil depôt does in fact constitute a nuisance to the plaintiffs.

To succeed in this appeal the Municipal Committee have to satisfy us, first, that the Trial Judge's construction of section 98 as imposing an imperative obligation is correct and, secondly, that he has erred in his application of the section, *i.e.*, in not holding that the section protects the Committee even though their operations do in fact constitute a nuisance.

The Municipal Committee's case, with reference to section 98, is that sub-section (2) imperatively requires them to provide depôts for the disposal of night soil within the Municipal limits leaving it to the Local Government, if it thinks fit, to require the depôts to be outside the Municipal limits. The section does not mention night soil at all; but it is contended that the term "offensive matter" in sub-section (2) includes night soil. For the respondent Company it is argued that the section must, for two reasons, be regarded as permissive and not mandatory.

First, an option is left to the Local Government whether the section is to be applied or not to any particular Municipality. It has been applied by the Local Government to Rangoon; but, it is argued, the very fact that the Legislature did not directly apply it but left it to the Local Government to say whether it should be applied or not deprives the section of the mandatory character which it might otherwise bear. This view receives some support from the opinion expressed by Lord Watson

in *Metropolitan Asylum District* v. *Hill* (2). In that case the Act authorized the Poor Law Board to form districts in the metropolitan area as they might think fit and to direct that for each district so formed there shall be an asylum or asylums. It was held that as the Board was not bound to form a district they were under no statutory compulsion to establish an asylum. Partly on this ground it was held that the managers were not performing an imperative duty imposed by Statute in establishing a small pox hospital in a certain district. The compulsion, if any, was that of the Poor Law Board and not of the Legislature. Similarly, in the present case it is argued that any compulsion would come from the Local Government and not from the Legislature which has left to the Local Government the option of applying section 98 or not. I am doubtful whether this argument can be accepted. It seems to me that it would carry us too far. For, if a section which is *prima facie* mandatory is to lose its mandatory character merely because the Local Government has the option of applying it or not, it would follow that none of the provisions of the Act can preserve a mandatory character in view of sections 3 and 4, which leave it to the Local Government to decide whether the Act shall or shall not apply at all to a particular local area.

The second reason is more substantial, namely, that the Municipal Act has no compulsory provision for the removal of night soil from latrines, privies, etc., but confers only permissive authority under section 112. If the Committee choose not to exercise this permissive authority to *remove*, there would be no night soil for *disposal* at the depôts. It would follow that the Committee are not bound to undertake the diposal of nightsoil. Sub-section (1) of section 98 lays on the Committee the duty of removing "house refuse" of any kind from premises within the Municipal limits. But it was not contended at the trial of the suit nor is it urged in the memorandum of appeal that night soil is included in the term "house refuse" in sub section (1). The contention all through has been that night soil comes under sub section (2) by reason of its being "offensive matter," not by reason of its being "house refuse." Mr. McDonnell has now brought to our notice an English Municipal Enactment, Public Health (London) Act, 189[illegible], section 141, under which "night soil" is included in "house refuse" for the special purposes of that enactment. But we have to consider whether the term has this meaning in section 98 of the Municipal Act, and we must be guided by the provisions of the Act itself. "House refuse" is not defined in the Act. But "sewage" is defined in section 2, clause (9), as meaning night soil and other proper contents of watercloseta, latrines, etc. And the permissive section 112 expressly refers to the removal of "sewage." In my opinion, if it was the intention of the Legislature that section 98 should cover the disposal of night soil, it is unlikely that we should find in the section no express reference to night soil, or sewage as in section 112 which deals with the same subject. The provisions of section 98 point, I think, to such house refuse as, house and compound sweepings, garbage, rags and bones, waste paper and the debris of house keeping rather than to night soil.

There is no imperative obligation to remove "offensive matter" *as such*, and, therefore, no imperative obligation to dispose of it at depôts or otherwise. But in view of the Municipal Committee's contention in the Trial Court and in the memorandum of appeal that, "offensive matter" in section 98 includes night soil, I note that this contention appears to be untenable. The words "offensive matter" by themselves would of course include nightsoil. But we have to construe them here with reference to the context and especially with reference to the associated words "refuse and rubbish." The term "offensive matter" is used in association with the same words in section 143. The term "offensive matter" is also used in section 150 but in association with other words. From the terms of these sections and the side notes thereto it would appear that the words "offensive matter" in section 150 do include night soil while in section 148 they do not. In each of these sections the general words "offensive matter" are controlled and restricted by the particular words which precede them. The particular words in section 150 show that night soil is included while the particular words in section 148 indicate that

it is not. If we construe the term "offensive matter" in section 148 as including night soil, the absurd result would follow that people could be fined for depositing night soil in drains specially set apart for the purpose of carrying off sewage, *i. e.*, sewers. For such special drains are expressly excepted from the operation of section 150, but not from the operation of section 148.

Now, if night soil is not included in "offensive matter" in section 14-, we can hardly hold that it is included in "offensive matter" in section 98, the associate words, *viz.*, "refuse and rubbish," being the same in both sections.

"Rubbish," it may be pointed out, is clearly used as something distinct from sewage (and, therefore from night soil) in sections 50 and 112. "Refuse," in its ordinary meaning, does not include night soil. It is given in the Century Dictionary as a synonym for rubbish.

To sum up this part of the case it is, to say the least, very doubtful whether section 98 applies to night soil at all, and even if it does apply the section imposes no imperative duty to *remove* the night soil and, therefore, no imperative duty to dispose of it. It may be argued that if the Legislature ordains that sites shall be provided for the disposal of night soil the Legislature must be supposed to have contemplated as an imperative duty the actual removal of night soil to these sites for disposal there. But we are met by the difficulty that in section 98 (1) where the Legislature provides for the removal of refuse and rubbish, the Legislature *expressly directs* that it shall be done and does not leave it be inferred.

On the above grounds, I would hold that the power to remove and dispose of night soil is not proved to be mandatory, and if this view is correct there can be no doubt that the Committee are bound to exercise the power with due regard to the private rights of others. It would follow that the plaintiff Company are entitled to an injunction to restrain the Committee from infringing their rights by committing the nuisance complained of.

Turning now to the second part of the case, we will assume that the views expressed above are erroneous. Let us concede, as the learned Judge did, that section 98 does impose an imperative duty on the Committee to provide sites and places for the disposal of night soil, and, presumably, also to dispose of night soil at those places. We have to consider whether this would be a sufficient defence to the suit.

For the Committee it is contended that the Legislature having imposed upon them these imperative duties with reference to night soil, it must be taken that the Legislature also gave them full discretion to choose sites for the night soil depôts. In support of this contention we are referred to the rulings of the English Courts in the interpretation of Railway Acts, and especially to the case of the *London and Brighton Railway Company* v. *Truman* (1). It is clear from that case that a Railway Company, acting under its statutory authority, has an absolute discretion in selecting sites for additional stations yards and other conveniences in the vicinity of the railway. Lord Blackburn held that the Railway Company were not bound to prove the impossibility of erecting cattle yards and pens anywhere else within the defined limits without being a nuisance to anyone. It is urged that the Municipal Committee similarly are not bound to prove the impossibility of establishing their night soil depôts any where else without being a nuisance to the neighbouring occupiers. But it is clear from the judgments in *Truman's case* (1) that the principle of construction applied to Railway Acts is not of general application. The reason for the special construction given to Railway Acts is explained in the following passage of the judgment of Lord Selborne: "Although no exact site or local limits may be prescribed by the terms of the authority for the acquisition of that land, yet being directly subsidiary to the general traffic of the line, it follows from the very nature of the purposes authorized that it must be land contiguous to the railway or some of its stations, the local situation of the whole line of railway being within certain limits of deviation defined by the Act." It does not appear that the same principle has ever been applied in construing the powers of a sanitary authority for the disposal of sewage. Reference may be made to the following cases of this nature: *Attorney-General* v. *Leeds Corporation* (5), *Price's Patent Candle Co., Ltd.* v. *London*

County Council (11), *Attorney-General* v. *Council of the Borough of Birmingham* (12). In all these cases the sanitary authority was restrained from committing a nuisance in the disposal of sewage. It is true that in English Municipal Legislation there is a general provision requiring the powers of the sanitary authority to be exercised so as not to cause a nuisance. But these cases are instructive as showing the intention of the Legislature, at any rate in England, that such operations as the disposal of sewage must be carried out in such a way as not to cause a nuisance. There is no special clause in the Burma Municipal Act requiring the Committee to exercise its powers so as not to cause a nuisance. But neither is there any clause expressly excusing a nuisance. It is clear that the burden lies on the Municipal Committee to establish that the Legislature intended to take away the private rights of individuals. They must show that such an intention appears either by express words or by necessary implication. In dealing with this part of the case the learned Trial Judge points out that the methods of removal and disposal are left entirely to the Committee. The Act gives no direction about removal by carts or as to the methods to be followed at the night soil depôts. It may be, as the respondents now in fact contend, that these methods cannot be practised without committing a nuisance, but it is by no means established that they are the only praticable methods of dealing with the night soil, and the Judge was no doubt right in holding it not established that the Legislature must have had these very methods or some such methods in view. But it appears that even the present method of disposal can be practised without causing a nuisance, if it is carried out at a sufficient distance from dwellings. The plaintiff Company's buildings are within 50 feet of the depôt. Dr. Hayne gave his opinion that there is not a sufficient area at the depôt to deal with night soil business. He suggested that the area set apart for the purpose should be extensive enough to have a free space of 50 yards separating the actual depôt from neighbouring buildings. It seems probable that if the Municipal Committee had taken up a sufficient area of land for this purpose at the outset, no question of nuisance from this particular method of disposal would have arisen. Adopting the language of Lord Selborne in the *Metropolitan Asylum District* v. *Hill* (2), I would hold that there is no evidence on the face of the Municipal Act that the Legislature supposed it to be impossible for the effectual disposal of night soil to be carried out *somewhere and under some circumstances* without creating a nuisance.

No stress is now laid upon the fact that the night soil depôt was established some years before the plaintiff Company occupied a plot of land adjacent thereto and built quarters thereon for the members of their staff. In *Truman's case* (1) Lord Halsbury observed that the old notion of people losing their rights of complaint because they come to a nuisance has long since been exploded. Further authorities on that point are cited in Kerr on Injunctions, 5th Edition page 207.

In paragraph 5 of the memorandum of appeal reference is made to the provisions of section 146 of the Municipal Act, providing for the payment of compensation to persons sustaining damage by reason of the exercise of any of the powers vested in the Municipal Committee. This section was relied upon before the Trial Judge as going to show that the Legislature intended to take away private rights. But, as the learned Judge points out, the provision is in very general terms and has no special relation to the powers for removal and disposal of sewage. In my opinion, it would certainly be going too far to infer from this section that the Legislature contemplated the causing of a nuisance in the disposal of sewage.

I have not discussed the question whether the Municipal Committee acted negligently in carrying out the night soil disposal operations. There is evidence showing that more might have been done to mitigate the nuisance. But the point seems immaterial, in view of the finding which I think we must come to, *viz.*, that the Committee are not authorized expressly or by necessary implication to commit a nuisance and that

(11) (1908) 2 Ch. 526; 78 L. J. Ch. 1; 99 L. T. 571; 72 J. P. 429; 24 T. L. R. 823.
(12) (1858) 4 K. & J. 521; 70 E. R. 220; 6 W. R. 811; 116 R. R. 445.

the Legislature cannot be supposed to have contemplated the nuisance as a necessary result of exercising the powers conferred on the Committee by section 98.

For these reasons, I would dismiss the appeal with costs, Advocate's fees 10 gold *mohurs* a day for three days.

YOUNG, J.—Having had the advantage of reading the judgment of the Chief Judge, with the conclusion of which I agree, I need only add a very few words. Mr. McDonnell having candidly admitted that he did not think he could contend that the smell was not a nuisance, our task is considerably lessened and is confined to the questions, (*i*) whether the disposal of night soil by the Municipality is imperatively required by the Legislature, and (*ii*) whether a nuisance is the practically inevitable result.

The first question depends on the construction of the Burma Municipal Act, and I agree with the Chief Judge in thinking that section 98, if otherwise imperative, does not cease to be so from the fact that the section only becomes operative at the discretion of the Local Government. Under section 3 (1) the whole Act only becomes operative from the date on which the Local Government chooses to appoint, and whatever may have been the effect of the delegation of powers to the Local Government Board under the Metropolitan Poor Act, 1867, which caused Lord Watson in the *Metropolitan Asylum District* v. *Hill* (2) to hold that the compulsion was not that of the Legislature, I cannot think that in the Burma Municipalities Act the delegation by the Legislature to the Government itself of the power to apply the section makes the compulsion—if it otherwise exists—that of the Government and not that of the Legislature.

I am unable, however, to agree with the Chief Judge in thinking that the terms "refuse," "rubbish" and "offensive matter" in section 98 do not include sewage

Prima facie it is admitted that they clearly may: it, therefore, follows that good reason must be shown for excluding the meaning.

It is urged that in section 112 the Legislature expressly mentions sewage and an inference is drawn from the omission to mention it in section 98.

In my opinion, section 98 (1) is the compulsory counter-part of the optional section 112 (1).

Section 112 permits a Municipality to remove sewage and rubbish from any building or land within its limits. Section 98 compels it to remove refuse and rubbish of every kind from the same places. I think, the meaning is the same, and cannot think that the Legislature intended to leave the removal of sewage optional. Sub-clause (2) of section 98 provides the next step and requires the Municipality after it has removed this refuse and rubbish of every kind to provide sites and places on which it may be collected, deposited and disposed of. It adds the still more comprehensive term, "and all offensive matter."

I cannot think that any distinction is intended to be drawn or that any thing is intended to be collected, deposited and disposed of under sub-clause (2) which was not intended to be removed under sub-clause (1), and I consider offensive matter merely hyphened rubbish or refuse.

Then, it is further argued that the terms "refuse," "rubbish" or "offensive matter" do not always include night soil in the Act and reliance is placed on section 148.

This section penalises anyone who, without the permission of the Committee, deposits earth, refuse, rubbish or offensive matter in any public drain *or drain communicating therewith*, and it is argued that if these terms include night soil anyone would be liable to be fined for throwing it into a drain even though it were specially constructed for the purpose. The argument seems to me to lose sight of the governing words "without the permission of the Committee."

The Committee is especially careful to see to the provision of latrines and such like, and numerous sections give them wide powers to see that these are built in sufficient numbers and properly kept.

To argue that refuse cannot include night soil because the use of such places for their proper purposes would then be punishable under the section would to me

seem only possible if the words "without the permission of the Committee" were absent. The Committee must be assumed to permit the proper use of the places which it has ordered to be built for the very purpose.

Section 150 penalises the improper use of drains not set aside for the purpose: the term "offensive matter" is used and is admitted to include night soil. If the term includes it in one place, it probably includes it everywhere unless there are strong reasons to the contrary. It is urged that if night soil is included under the terms "refuse" or "offensive matter" in section 148, this section and section 150 overlap.

It may be so, but if so I would prefer to assume the fact rather than to hold the Legislature intended to include night soil under the term "offensive matter" in one section and exclude it in the preceding section.

I incline, however, to think that in the one section the draftsman had chiefly in mind solid matter and in the other liquid. In section 148 he speaks of "earth" and "offensive matter," in section 150 of "water" and "offensive matter."

As a matter of fact, the Legislature seems to me to be sometimes more timorous than at others. In section 98 it is bold and speaks of refuse and rubbish only. In section 151, determined to leave nothing to chance, it speaks of any carcase, dirt, dung, bones, ashes, night soil or filth or any noxious or offensive matter, and imposes a fine on any owner or occupier who does not put any such matter into a proper receptacle. Section 98 (3) authorizes the Committee to require owners and occupiers to provide such receptacles and I should regret to think it necessary to hold that any of these things had to be placed in "the proper receptacles" by owners and occupiers under section 151 but that the Municipality was not bound to remove them under section 98.

It may be said that we are concerned not to speculate as to the intentions of the Legislature but to construe its language.

This is true, but I am of opinion that "refuse," which primarily means anything refused or rejected, is amply wide enough to include night soil, and I cannot regard the fact that the Legislature speaks expressly of sewage in section 112 and of night soil in section 151 as any sufficient reason for supposing it did not intend to include it in the term "refuse" or "offensive matter" in section 98.

It is admitted that the Local Government has applied section 98 to the Municipality of Rangoon and I think under sub-clause (1) the terms "refuse" "rubbish" and "house refuse" include night soil and that the Committee is bound by law to remove it.

I think that under clause (2) the Committee is bound to provide places and sites for the collection, deposit and disposal of what it is bound to remove under clause 1, and that under clause (3) it is entitled to call upon owners and occupiers to provide proper receptacles for the reception of all such things, till the Municipal servants can remove them.

There is no express provision that it is to be the Municipality that is to dispose of the refuse, rubbish and offensive matter: all that it is expressly required to do is, to provide sites where such offensive matter may be collected, deposited and disposed of. It is not expressly required either to collect, deposit or dispose of such things.

If it has, as I think, to remove such offensive matter it would naturally have to deposit it in the places which it is bound to provide for the purpose, and if so I think it may be held that it is bound to dispose of it.

I think, therefore, that section 98 imposes on the Municipality the duty both of removing and disposing of the night soil.

We are not now concerned with any nuisance arising or alleged to arise from the removal of the night soil from premises —or its transport through the streets— but only with one that arises from its disposal at this particular site and place. The question is whether this enforced disposal of the night soil inevitably causes a nuisance. If it does, the Municipality is excused; if it does not, the Municipality is not.

Dr. Blake, the Municipal Veterinary Officer, in whose charge the various depôts lie, tells us that during the cold weather no smell from this particular depôt reaches across the street; that in May, which he says is the worst month, there would be a bad smell, but not beyond the width of

the street, and he, therefore, naturally admits that the larger the area of the depôt, the less the nuisance will be to outside people.

Dr. Hayne, the then Chief Medical Officer for the Railway, states that he thinks it would tend to check the smell to a great degree if the area were properly enclosed, but he does not think it large enough, and suggests that a depôt should be 100 yards square, so that the transfer of the night soil should take place 50 yards from any inhabited place.

Now this transfer operation which causes the nuisance complained of does not take place in the centre of the depôt but at the extreme end, and that end is the one nearest to the plaintiff's quarters.

These lie on the other side of First Street, if the width of the road, which Exhibit 1 shews to be only 30 feet makes, as Dr. Blake thinks, so much difference, the distance caused by the removal of the place of transfer further inside the depôt might prevent the nuisance altogether. There is no evidence that experiments have ever been made to settle the range of the smell.

The depôt has been in existence 30 years; if its existing area is insufficient, there is no evidence that more land might not have been taken up in the first instance: if the Municipality took up too small an area, that is their fault as well as their misfortune.

Lord Blackburn, in the *Metropolitan Asylum District* v. *Hill* (2) at page 208* of the Report, seems to have been doubtful as to the position if it were shown that the thing enjoined and done must create a nuisance unless it was done on a site so extensive that it could not be obtained at all or only at a cost so enormous as to make it practically impossible. In that case it was held that the act complained of was not imperatively enjoined by Statute. In the present case I think it is enjoined but nothing in the Act has been brought to our notice to shew that the Legislature thought it impossible to carry out the work without causing a nuisance: on the contrary, the Legislature in section 98 seems to have contemplated isolated areas being selected in the first instance, a growth of population attended possibly by a nuisance in the future, and if so a compulsory transference of the depôts to more remote sites, outside Municipal limits.

These words seem to me rather to negative the idea that the Legislature regarded the nuisance as inevitable or contemplated authorizing one.

It foresaw the possibility and provided for it. It gave the Municipality a wide area of selection in the first instance and provided for a subsequent compulsory change of site, if a nuisance arose. The nuisance arises from the transfer of the night soil and the transfer takes place by night. The land of this particular depôt is surrounded by roads and there is no complaint from passers by: the other buildings in the vicinity are stated to be warehouses occupied only by day and the omission of the defendants to insist that if it is a nuisance at all, it is a public one, seems to indicate that they only fear the plaintiffs and it would not seem difficult, or at any rate impossible, to safeguard the plaintiffs; or, in the last instance, if they wish to maintain the depôt to acquire their property, which has only buildings of the value of Rs. 2,000—Rs. 3,000 upon it. There are, it is true, provisions in the Act for compensation but I see no reason to suppose from this fact that the Legislature contemplated this nuisance being inevitable or that it is so in fact.

I therefore, agree with the Chief Judge in dismissing the appeal. I also agree in the order as to costs.

Appeal dismissed.

*Page of (1881) 6 App. Cas.—[*Ed.*]

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 1261 OF 1918.

July 15, 1920.

Present:—Mr. Justice Das and Mr. Justice Adami.

Musammat Bibi RAFIQ UN-NISSA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu KESHWAR NARAIN SINGH AND OTHERS—PLAINTIFFS, MUSAN TANTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Survey Act (V B. C. of 1875), s. 41—Order

KAFIQ UN NISSA v. KESHWAR NARAIN SINGH.

settling boundary dispute, effect of—Suit to recover possession of lands dealt with by order—Limitation—Boundary pillars, failure to set up, effect of—Presumption—Burden of proof.

An order under section 41 of the Bengal Survey Act has the force of a Civil Court decree, and the party in whose favour the order is passed should be considered to be in actual possession at the date of the order, and a person wishing to upset the order must bring a suit within 12 years from the date of the order. [p. 841, col. 2; p. 842, col. 1.]

An order settling a boundary dispute under section 41 of the Bengal Survey Act is not void if, after the decision is come to, boundary pillars are not set up. The placing of boundary pillars is a part of the procedure which is performed by the officers of the Survey Department after a boundary dispute is decided. It is to be presumed that the boundaries were duly laid down and the burden of proving the contrary lies on the party alleging it. [p. 842, col. 1.]

Appeal from a decision of the District Judge, Monghyr, dated the 27th May 1918, reversing a decision of the Officiating Additional Subordinate Judge, Monghyr, dated the 18th June 1917.

FACTS.—The finding of the lower Appellate Court was as follows :—

"There was a boundary dispute in 1902 and it was decided by the Settlement Authorities in favour of the defendants. The learned Munsif dismissed the present case as having been instituted more than 12 years after the decision of that boundary dispute. The decision of this appeal rests mainly on the question whether the provisions of section 41 of the Bengal Survey Act have been complied with. That section requires that the boundary shall be determined according to actual possession and the boundary is to be secured by boundary marks.....The Court below, it appears, has presumed that as there was a decision about boundary under section 41 there must have been *ballabandi*. The appellant's Pleader urges that it was not proper to so presume. He, as stated above, relies on the cases* mentioned above, which lay down that where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that the liability has been incurred to prove that the things prescribed in the Act have been actually done and that if an official act is proved to have been done it will be presumed to have been regularly done, but it does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential. The learned Pleader also relies on the case reported as *Deputy Legal Remembrancer* v. *Mir Sarwar Jan* (1). It has not been proved that any Assistant Survey Officer went to the spot for putting any boundary marks, nor does it appear that he did any act in connection therewith from which it could be inferred that boundary marks were put.....as required by section 41. Rejecting the worthless oral evidence on the point there are no materials from which it could be legitimately presumed that boundary marks were put..... We...find that no bonndary marks were put as required by the said section."

Messrs. *Syed Mohammad Tahir* and *P. Banerji*, for the Appellants.

Mr. *Jagannath Prasad*, for the Respondents.

JUDGMENT.

ADAMI, J.—The plaintiffs in the suit out of which this appeal arises sought for recovery of possession of certain lands between their Mauza Pipra and Mauza Tiloch which belongs to the defendants.

It appears that though title was found to be with the plaintiff in respect of the disputed land as shown by the Revenue Survey Maps, yet in 1902 a dispute having arisen between the owners of the two Mauzas a survey was made and it was found by the Survey Officers that the disputed land lies within Mauza Tiloch, and, therefore, the possession thereof was with the defendants. This decision was made under the provisions of the Bengal Survey Act on the 15th March 1902. The plaintiff instituted this suit on the 1st October 1915.

Under section 41 of the Bengal Survey Act the decision of the Survey Officer had the force of a decree of a Civil Court. The learned District Judge seems to have been mistaken as to the law in the case. It is quite clear that the decision having been under section 41 of the Bengal Survey Act possession was found to be with the defendants, and if the plaintiff wished to upset that decision it was incumbent upon him to institute

Ashanullah Khan Bahadur v. *Trilochan Bagchi*, 13 C. 197; 6 Ind. Dec. (N. S.) 630 and *Narendra Lal Khan* v. *Jogi Hari*, 32 C. 1107; 2 C. L. J. 107.

(1) 6 C. W. N. 845.

his suit within 12 years. This he has not done.

The learned District Judge in decreeing the appeal acted on the assumption that it was incumbent on the defendants to prove that the Survey Officers laid down boundary pillars, and as they failed to give satifactory proof of such laying down of pillars their defence must fail. The placing of pillars on the boundary, which has been fixed after enquiry, is a part of the procedure which is performed by the officers of the Survey Department after a boundary dispute has been decided and it is nowhere provided that an order settling a boundary dispute is void if, after the decision is come to, boundary pillars are not set up. In any case, the decision having been come to under section 41, we must presume that the boundaries were duly laid down. The learned District Judge found that the oral evidence on both sides as to the boundary marks was unreliable, and because the report of the Survey Officer did not state that boundary marks had been laid down, held that the defendants had failed to show that the provisions of section 41 had been complied with and so decreed the appeals. The burden of proof to show no boundary was demarcated lay on the plaintiffs.

I would allow this appeal and set aside the order of the lower Appellate Court and restore the decree of the Court of first instance with costs throughout.

DAS J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 967 OF 1919.

March 15, 1920.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Pujari BHIMAJI, MINOR, BY NEXT FRIEND *Pujari* NAGAPPA—PLAINTIFF—APPELLANT

versus

RAJABHAI HUSSAIN SAHIB AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4—Minor, certificated guardian of—Suit against minor—Another guardian appointed for suit—Appointment, legality of.

Where there is a certificated guardian of a minor, the appointment of another guardian for the purposes of a suit against the minor is illegal, and a decree obtained in such suit by the plaintiff is liable to be set aside on the ground of there being no legal representation of the minor in the suit. [p. 843, col. 2; p. 844, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Bellary, in Appeal Suit No. 136 of 1918, preferred against the decree of the Court of the District Munsif, Hospet, in Original Suit No. 484 of 1917.

FACTS appear from the judgment.

Mr. *P. R. Ganapathy Aiyar*, for the Appellant.—Order XXXII, rule 4, Civil Procedure Code, absolutely prohibits the appointment of a person other than a certificated guardian as guardian *ad litem* for a minor defendant in a suit. In the absence of the certificated guardian on the record, the minor cannot be said to have been properly represented. There is a legal disability attaching to such person to act. The Court's ignorance of the existence of the certificated guardian does not affect the question. See *Hanuman Prasad* v. *Muhammad Ishaq* (1), *Roshid-un nissa* v. *Muhammad Ismail Khan* (2), *Khiarajmal* v. *Daim* (3).

Mr. *K. Rajah Aiyar*, for the Respondents.—The decree against the minor is not altogether void. It is only an irregularity, see *Dammar Singh* v. *Firbhu Singh* (4) and the cases wherein it is followed, *Jogeshwar Narain* v. *Lala Moorlidhar* (5), *Midnapore Zemindari Company Limited* v. *Gobinda Mahto* (6). In *Maruthamalai* v. *Palani Gounden* (7) failure to give notice to a person in charge of a minor was held not to render void the appointment of third person as guardian *ad litem*. In *Rambrichh Ram* v. *Tarak Tewari* (8) it was held that where the

(1) 28 A. 137; A. W. N. (1905) 229; 2 A. L. J. 615.
(2) 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.).
(3) 32 C. 296; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).
(4) 29 A. 290; 4 A. L. J. 155; A. W. N. (1907) 70.
(5) 7 C. L. J. 270.
(6) 8 C. L. J. 31.
(7) 16 Ind. Cas. 182; 37 M. 535.
(8) 33 Ind. Cas. 605; 14 A. L. J. 589.

manager of a joint family effectively represented a minor member in a suit in which both were parties, a decree against the minor to whom no guardian was formally appointed was not invalid.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff, represented by his certificated guardian (appointed by the District Court), is the appellant before us. He sued to set aside the decree passed against him in a suit brought by the present 1st defendant as plaintiff on a mortgage-bond executed by the plaintiff's mother. The short question for decision is, whether the plaintiff was properly and legally represented in that suit. An officer of the Court was appointed in that suit at the instance of the then plaintiff (present 1st defendant) as guardian (for the suit) of the minor defendant (present plaintiff). If there was no proper representation, if the representation by that officer was not merely irregular but also illegal, there can be no doubt that this suit to set aside the decree and the other proceedings in the former suit is sustainable. The lower Courts held that, because the Court and the present 1st defendant (the then plaintiff) were not aware that a guardian had been appointed by the District Court for the minor, the appointment of an officer of the Court as the guardian for the former suit was neither illegal nor irregular and, therefore, the decree in the former suit should not be set aside. I am unable to agree with the conclusions of the lower Courts. Order XXXII, rule 4 (2), so far as it relates to a minor (defendant), is as follows :—

"Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall be appointed his guardian for the suit," (that is, in the case where a minor is a defendant) "unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be appointed." The old section 457, Civil Procedure Code, prohibited a married woman being appointed as guardian for the suit for a minor defendant and thus created a legal disability in her to act as such. Now Order XXXIV, rule 4 (2), in the case where a minor is a defendant, similarly prohibits any person other than the guardian appointed or declared by competent authority to act as guardian for the suit of a minor defendant. The Legislature clearly made this provision because it was strongly of opinion that it was not for the minor's welfare that anybody else except such certificated guardian, where one exists, should act for a minor defendant. Where there is such a clear prohibition by the Legislature the Court's ignorance of the existence of a certificated guardian cannot be taken into consideration in deciding the question whether there has been a proper representation of a minor in the suit, any more than the ignorance of a Court under the old provision that a woman appointed by it as a guardian was a married woman could affect the decision of the question whether the minor was properly represented by such a woman. I think the decision in *Hanuman Prasad* v. *Muhammad Ishaq* (1), confirmed in *Rashid-ud-nissa* v. *Muhammad Ismail Khan* (2), is almost conclusive on this point. On behalf of the respondents, we have been referred to the decision in *Dammar Singh* v. *Pirbhu Singh* (4) in which the question is very meagrely discussed and it was decided before the Privy Council's decision above referred to. The *obiter dicta* in *Jogeshwar Narain* v. *Lala Moorlidhar* (5) and *Midnapore Zemindari Company Limited* v. *Gobinda Mahto* (6) approving the decision in *Dammar Singh* v. *Pirbhu Singh* (4), do not carry us much further. The case in *Maruthamalai* v. *Palani Gounden* (7) was not a case decided on the rule which we are now considering, but the decision turned upon the question whether failure to give notice to a person alleged to be then in charge of the minor wholly vitiated the appointment of a third person by the Court as a minor's guardian, that is, whether non-compliance with the provisions of Order XXXII, rule 3 (4) made the appointment wholly illegal or whether it was only an irregularity. I do not think that a prohibition to any body else to act enacted in Order XXXII, rule 4 (2) can be put on the same footing as the direction to give notice to the person in whose care the minor is before making the appointment of a proper guardian. On the whole, I think that there was no legal representation of the minor plaintiff in the former suit. I hope that plaintiffs will hereafter

take care when they implead a minor as a party defendant and when they apply to the Court for appointing a guardian for the suit to enquire whether a certificated guardian has been already appointed for the minor defendant. I would also add that there are observations in the case *Narsingh Narain* v. *Sheikh Jahi Mistry* (9) which doubt the soundness of the decision in *Dammar Singh* v. *Pirbhu Singh* (4). I would decree the suit setting aside the decrees of the lower Courts. As allegations of fraud and collusion made in paragraphs 8 (*b*) and 8 (*c*) of the plaint were not proved according to the findings of both Courts and as the illegality of the appointment of the Court Officer under the provisions of the Code was not expressly set up in the plaint, I would direct the next friend to bear personally the costs of this litigation incurred on the plaintiff's behalf. The defendants will, of course, bear their own costs.

SPENCER, J.—I agree. I think that, when there is a definite prohibition of law in such words as those in Order XXXII, rule 4, Civil Procedure Code "no person other than such guardian shall act as the next friend of the minor, or be appointed guardian for the suit unless, etc.," a decree obtained against a minor represented by some other person is an illegal decree, void against the minor and not a decree obtained by a mere irregularity. I would follow in this matter the Privy Council's decision in *Rashid-un nissa* v. *Muhammad Ismail Khan* (2) and another case of the Privy Council in *Khiaraj mal* v. *Daim* (3) where it was held that a decree obtained against a person who was not properly represented on the record was void and without jurisdiction against such person. I agree with my learned brother that *Dammar Singh* v. *Pirhhu Singh* (4) is not a case which we can follow without hesitation. There was another case in *Rambrichh Ram* v. *Tarak Tewari* (8) quoted by the respondents' Pleader. In that case, the minors belonged to an undivided Hindu family and the manager of that family was a party and fully contested the suit. There was, therefore, no necessity to appoint a guardian at all and a decree obtained against the minors on whose behalf a guardian not properly representative of their interests was appointed was not on that account an invalid decree. The appeal will have to be allowed, the directions as to costs being as mentioned in my learned brother's order.

M. C. P.

Appeal allowed.

(9) 13 Ind. Cas. 414; 15 C. L. J. 3.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 180 OF 1919.

March 22, 1920.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Robinson.

MAUNG PO THEIN AND OTHERS —APPELLANTS

versus

MA WAING AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 145, scope of —Receiver, surety for, liability of.

Section 145 of the Civil Procedure Code applies where any person has become liable as surety for a Receiver and such surety can be ordered to pay the sum which he has bound himself to pay. [p. 846, col. 1.]

Appeal against the order of the District Judge, Hanthawaddy.

Mr. *Burjorjee*, for the Appellant.

Mr. *Davies*, for Respondent No. 1.

JUDGMENT.—Ma Waing sued her husband, Maung Shwe Tha, for divorce and partition of property. On the 22nd March 1915 Maung Shwe Tha was appointed Receiver of most of the joint property to collect the rents and profits thereof. On the 22nd May 1915 he and the present appellants executed a bond in favour of the District Judge of Hanthawaddy his successors and assings. The condition of the bond was that if Maung Shwe Tha should duly account for all the joint property and for every sum and sums of money he should so receive on account of the rents and mesne profits of the properties at such periods as the Court

shall appoint and should duly pay the balances as may be certified to be due from him as the Court "hath directed or shall hereafter direct" then the obligation shall be void otherwise it should remain in full force. The bond was in the sum of Rs. 20,000.

Mr. Chari was appointed Commissioner to take the accounts *inter alia* in respect of what was due by Shwe Tha as Receiver. He made a report in respect of the period up to the end of 1918 that Rs. 38,529 8 0 was due. Subsequently, he reported that Rs. 11,008 was due for three months of 1919. On the 4th April 1919 Shwe Tha was removed from the Receivership and Mr. Chari was appointed Receiver.

Mr. Chari, when Shwe Tha did not pay up the amounts held by the Court to be due by him, applied that the sureties should be called upon to pay the Rs. 20,000 for which they had executed the bond.

The sureties appeared and the Court passed an order, dated the 11th May 1919. It was directed that, as a matter of grace and in order not to put the sureties to any avoidable loss, Mr. Chari should sell such portions of Shwe Tha's share in the estate as are readily marketable and after deducting Shwe Tha's share of the joint debts credit 75 per cent. of the balance to Shwe Tha as Receiver, 25 per cent. being held in suspense for contingencies. It was then ordered that if, after this credit, there remained any sum still due from Shwe Tha as Receiver the proceedings against the sureties may be pressed.

This order was carried out and after the deductions had been made a sum of Rs. 17,022 5 2 was still due from Shwe Tha. This he has failded to make good. Then the Court was moved to call upon the sureties and, on the 12th September 1919, notice was issued to them to show cause why they should not pay up the amount. They obtained a week's adjournment to file objections. On the date fixed they appeared and wanted a further adjournment for a fortnight to file their objections. This was refused and, on the 31st October, an order was passed that they must pay up the amount within one week. Later in the day, Mr. Burjorjee appeared and asked to be heard on a legal point. A date was fixed for this and notice issued to Mr. Chari. On the date fixed Mr. Dantra appeared and asked for an adjournment as Mr. Burjorjee was out of Rangoon. This was very naturally refused. An order was then passed that, as the sureties had failed to pay the amount, Mr. Chari can take any steps he may think proper.

Mr. Chari then took out execution against the property of the sureties and this appeal was then filed. It is said to be an appeal against the order of the 31st October 1919 by which it was ordered that the sureties must pay up within one week.

That order, it is said, is *ultra vires*, as, on the failure of the sureties, the only action open was to apply to the Court to assign the bond on which being done the assignee could bring a suit on the bond.

If the order was passed under section 145 of the Code of Civil Procedure an appeal will undoubtedly lie and the question, therefore, is whether such an order could be made under that section. It is urged that section 145 only applies when the surety has given his bond for a party to the suit. Here the bond is given for Shwe Tha *qua* Receiver, and not as being a party.

Under the previous Code of 1882 the corresponding section applied only to decrees and where a person became liable as surety for the performance of the decree or any part thereof. In the present Code the scope of the section has been much enlarged by the addition of clauses (*b*) and (*c*) and by the inclusion in it of orders in addition to decrees. Clause (*c*) applies where any person has become liable as surety for the payment of any money under an order of the Court in any suit and the section provides that the order to pay may be executed against him to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees.

The language is very wide and there is nothing to indicate that it is or was intended to be limited to sureties for parties to the suit in their capacity as parties. It is, no doubt, true that one method of proceeding against a surety is to obtain an assignment of the bond and bring a suit on it. The section does not prevent this course

being adopted but provides a summary and more expeditious course. Had it been intended to limit its application it would have been clearly indicated. Instead of this, we find the scope of the section is extended and it is no longer confined to decrees and their performance but covers orders also. An order appointed him Receiver and called upon him to give security and the sureties undertook their liability if he failed to pay at any time he might be ordered to do so.

It is further urged that the sureties have had no opportunity to contest the correctness of the amount for which Shwe Tha as Receiver has been held liable, and that if a suit was brought on the bond they would be able to raise this defence. They received notice to show cause why they should not be called upon to pay but chose to file no objections. They were twice given adjournments to enable them to do so but still omitted to do so. We do not think they can be heard to do so now.

It is said that the Commissioner charged commission after agreeing not to do so, but that is purely a matter of the terms of his appointment.

Again, it is urged that the 25 per cent. should not have been held back. Should this amount be afterwards available towards Shwe Tha's liability they can recover any excess they may have had to pay. They bound themselves to make good any sum Shwe Tha might be ordered to pay at any time and here again they have failed to make out any case.

We must, therefore, hold that the order to pay was one falling within the scope of section 145 and that it may be enforced in execution.

So far as the possibility of the sum for which Shwe Tha is liable being reduced on appeal, their remedy lies by way of a stay of execution.

The appeal is, therefore, dismissed with costs.

Advocates' fees three gold *mohurs*.

Appeal dismissed.

COURT OF ELECTION COMMISSIONERS, UNITED PROVNICES.

PETITION UNDER ELECTORAL RULES.

December 24, 1920.

Present :—Messrs. F. B. Sherring, Sitla Prasad Bajpai and C. H. B. Kendall, Commissioners.

MR. SHAKIR ALI—PETITIONER

versus

M. ABDUL HAKIM—RESPONDENT.

U. P Electoral Rules, r. 11 (2)—*Declaration oppointing Election Agent not signed in presence of Attesting Officer, whether renders nomination invalid—Election petition, maintainability of, against order of Returning Officer—Objector, liability of, for costs.*

The mere fact that a declaration made under rule 11 (2) of the U. P Electoral Rules by a candidate appointing himself his Election Agent is not signed by him in the presence of the Attesting Officer, does not render the nomination of such candidate invalid. When the declaration has been filed by a candidate, the presumption is that that candidate asserts that the signature on the declaration is his own, and the Attesting Officer will accept this position until some person interested has made an objection. [p. 847, col. 2.]

An election petition is maintainable against the order of a Returning Officer declaring the nomination of a candidate invalid [p 488, col. 1.]

Where an objection is filed to the nomination of a candidate, and such nomination is declared invalid, the objector is liable for costs upon an election petition against such declaration, in the event of the petition being decided against him. [p. 848, col. 2.]

Report of the Commissioners appointed under the United Provinces Eletetoral Rules to try the election petition of Mr. Shakir Ali, Barrister-at-Law, Gorakhpur, against the election of M. Abdul Hakim, Vakil, Basti, to the Basti District Muhammadan Rural Constituency in the United Provinces Legislative Council.

REPORT.—Mr. Shakir Ali, Barrister-at-Law of Gorakhpur, presented an election petition under rules 30 and 42 (1) (*c*) of the United Provinces Electoral Rules before His Honour the Lieutenant-Governor of the United Provinces. His Honour appointed the undersigned as Commissioners to enquire into the petition. Enquiry has been made and the report is now forwarded.

The petitioner on October the 18th last presented Exhibit 1 before the Attesting Officer of Basti. It purports to be a declaration appointing himself as his Election Agent for the Muhammadan Rural Constituency of Basti.

On October the 30th Munshi Abdul Hakim, the rival candidate, presented an

SHAKIR ALI v. ABDUL HAKIM.

objection to the effect that the declaration, Exhibit 1, had not been made and signed by the petitioner in the presence of the Attesting Officer. On the same date, October the 30th, the Returning Officer passed an order, Exhibit 2, in which he found that the declaration, Exhibit 1, made by the petitioner was invalid and, therefore, he declared that the nomination of the petitioner was invalid. On the same date, by his order, Exhibit 4, the Returning Officer declared that Munshi Abdul Hakim, the respondent, being the only candidate was duly elected, as by the decision of the objection of Munshi Abdul Hakim the nomination of the petitioner had been declared invalid, leaving Munshi Abdul Hakim as the only candidate.

Against this decision of the Returning Officer the petitioner presented his petition before His Honour the Lieutenant-Governor.

Mr. Abdul Hakim, respondent, has stated before this Court that he admits that the signature on the declaration, Exhibit 1, is in the handwriting of the petitioner.

On the pleadings of the parties the following issues have been framed :—

1. Is it necessary that the signature should be made in the presence of the Attesting Officer in order to make the declaration, Exhibit 1, valid? Proof on respondent.

2. Does not an election petition lie against the order of the Returning Officer, Exhibit 2? Proof on respondent.

3. Is not respondent liable for costs, if the petition is decided against him? Proof on respondent.

With reference to Issue No. 1 the respondent argues that the wording of rule 11, clause (2) of the Electoral Rules, should be considered. The word "declaration" according to the respondent means that there must be some one to receive the declaration. A declaration presupposes two persons: one person making the declaration and another person receiving it, and, therefore, a declaration must be made in the presence of some one. It follows, therefore, that both the signature on the declaration and the writing of the declaration should have been made in the presence of the Attesting Officer. It is further argued that unless this is done, the declarant cannot be held liable. It is possible that the signature may be repudiated subsequently, and the Returning Officer or Attesting Officer can only be satisfied when the signature has been actually made in his presence.

We do not agree with this reasoning or with the interpretation of rule 11, clause (2), suggested by the respondent. That rule requires a candidate to make in writing and sign a declaration. Exhibit 1 is in writing and it is admittedly signed by the petitioner and in that writing the petitioner makes a declaration as to the appointment of an Election Agent. The rule says nothing at all as to any necessity for the declaration to be signed in the presence of any one. If this had been considered necessary, the rule would undoubtedly have said so explicitly. In the absence of any such requirement in the rule, the petitioner cannot be held bound to have made his signature in the presence of the Attesting Officer.

There appears to be no force in the argument that, unless the signature is made in the presence of the Attesting Officer, the candidate cannot be legally bound by the document. If the candidate has presented a declaration purporting to be signed by himself, which, as a matter of fact, is found subsequently not to have been so signed, the candidate will undoubtedly be liable to punishment under the Criminal Law. It is untrue, therefore, to say that the candidate will not be bound by a declaration written and signed otherwise than in the presence of the Attesting Officer.

It is also untrue to say that the Attesting Officer can only be satisfied of the genuineness of the signature if it has been made in his presence. When the declaration has been filed by a candidate the presumption is that that candidate asserts that the signature on the declaration is his own and the Attesting Officer will accept this position until some person interested has made an objection. It may be noted that in the present case the objector admits that the signature on the declaration, Exhibit 1, is the genuine signature of the petitioner.

For the abve reasons, Issue No. 1 is decided against the respondent and in favour of the petitioner.

The second issue is: "Does not an election petition lie against the order of the Returning Officer, Exhibit 2?"

Rule 42, clause (c), has been referred to by the respondent. It is, however, admitted

by him that the Electoral Rules are rules made under the Act referred to in rule 42, clause (*c*). In the present case the petitioner alleges that rule 11, clause (2) of the Electoral Rules, has not been properly complied with. It is admitted by the respondent that if Exhibit 1 were a valid declaration, its non-acceptance by the Returning Officer was a non-compliance with the rules. In the face of this admission, it is not possible for the respondent to press his argument in regard to this issue. We decide Issue No. 2 against the respondent and in favour of the petitioner.

The third issue deals with costs.

According to the respondent, the order of the Returning Officer, Exhibit 2, was passed by that Officer irrespective of the objection filed by the respondent, Exhibit 3. The respondent says that the Returning Officer held in his order that the signature on the declaration, Exhibit 1, could have been verified by the petitioner had he been present at the time before the Returning Officer. Because of his absence, the Returning Officer disallowed the declaration and set aside the nomination.

According to the respondent, the Returning Officer would have passed the declaration as valid if the petitioner had been present before him to verify his signature and, therefore, the respondent argues that the Returning Officer's orders, Exhibit 2, has nothing to do with his objection, Exhibit 3, and, therefore, he, the respondent, should not be burdened with costs even in case the present petition is decided against him.

We find that the contention of the respondent is not borne out by the facts. The respondent admitted, before issues were framed, that the order of the Returning Officer, Exhibit 2, was passed with reference to this application, Exhibit 3. He further admits that his arguments were heard by the Returning Officer before that Officer passed the order, Exhibit 2. He further admits that the decision referred to in the Returning Officer's order of October the 30th, Exhibit 4, refers to the decision of the same date, Exhibit 2. Exhibit 4 is as follows:—

"As by the the decision of the objection of M. Abdul Hakim the nomination of Mr. Shakir Ali has been declared invalid, leaving M. Abdul Hakim as the only candidate, I, therefore, according to D. O. No. 931-R/III—1 (5), declare M. Abdul Hakim to be duly elected." Exhibit 4 shows distinctly that the decision that Exhibit 1 was an invalid declaration was made on the objection of M. Abdul Hakim, respondent.

In the body of the order, Exhibit 2, it is said:—

"It has been urged and with some force that Mr. Shakir Ali might in case of malpractice wriggle out of his legal responsibility by denying this signature. It is possible, and though it seems to me that he would thereby become liable to prosecution for using a forged document as genuine, this is not an answer to the objection." It is clear that the respondent placed his arguments before the Returning Officer in support of his objection and the Returning Officer made his decision with reference to that objection. The proceedings were initiated by the objection of the respondent and not by the Returning Officer himself. We decide, therefore, this issue against the respondent and in favour of the petitioner.

We find that the declaration, Exhibit 1, was duly made and that the order of the Returning Officer, Exhibit 2, disallowing the declaration and proclaiming the nomination of the petitioner invalid was unjustified. We find that the declaration and the nomination were duly made. We find, therefore, that the election of M. Abdul Hakim is void.

The petition is decided in favour of the petitioner and against the respondent. The respondent will pay Rs. 200 as costs to the petitioner. Rupees 40 represents printing charges and the remainder legal advice and any other expenses.

The petitioner has filed a memo. of his costs (Exhibit 5), and swears to the accuracy of the details. The total comes to Rs. 447-6-0. Having regard to the points raised and the circumstances of the case, we consider Rs. 200 to be fair and reasonable costs payable to the petitoner by the respondent.

The Government promissory note for Rs. 1,000 received with the petition, which was deposited by the petitioner, is herewith returned.

Petition accepted.

GHASITA MAL v. EMPEROR.

LAHORE HIGH COURT.
CRIMINAL REVISION No. 959 OF 1920.
December 13, 1920.
Present:—Mr. Justice Wilberforce.
GHASITA MAL—ACCUSED—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 260—Summary trial—Large number of accused and witnesses—Procedure—Warrant, execution of, by person other than the one to whom it is addressed, legality of.

Where a large number of witnesses and accused are involved in a case, the case should not be tried summarily. [p. 850, col. 1.]

Where a warrant addressed to the bailiff of the Court was executed by a Naib Nazir and process-servers without any endorsement by the bailiff:

Held, that the service of the warrant was illegal. [p. 850, col. 1.]

Case reported by the Sessions Judge, Hissar with his No. 460-J., dated the 23rd June 1920.

FACTS.—In execution of a decree of the High Court of Calcutta a warrant for arrest of Mutsaddi Lal, one of the judgment-debtors, was issued by the Senior Subordinate Judge of Gurgaon. Ram Chand, Naib Nazir, and three process-servers arrested Mutsaddi Lal twice on the 12th July 1919 but he was rescued by his friends. Fifteen persons were challaned by the Police under section 225B, Indian Penal Code. The Magistrate tried the case summarily and convicted seven of the accused, sentencing three to a fine of Rs. 200 each or in default to four months' rigorous imprisonment and four to a fine of Rs. 100 each or in default to two months' imprisonment. Mohan Lal, of the first lot, and Ghasita Mal, Anant Ram and Kesri Mal, of the second lot, have filed applications for revision.

GROUNDS.—The number of accused was very large, being fifteen, and in all seventeen witnesses were examined. The trial lasted about two months. It was, therefore, not a fit case to be tried summarily *Dina Nath* v. *Emperor* (1).]

2. The first arrest was made at Cheddi Lal's shop at about 4 P. M. The second at about 10 P. M. at night on the Railway Station. Twelve men are said to have been concerned in the first occurrence and only five in the other. Of these latter Anant Ram and Banwari Lal were not concerned in the first occurrence. The two occurrences being separate transactions and the persons involved being not all the same the two cases could not be tried together. Joint trial under these circumstances was illegal (section 239, Criminal Procedure Code).

3. The warrant was addressed to the bailiff. The persons who tried to execute it were the Naib Nazir and process-servers. There was no endorsement on the back making it over to the Naib Nazir by name or to any of the bailiffs. It is questionable, therefore, if the Naib Nazir or the process-servers could legally execute it [*Muhammad Bakhsh* v. *Emperor* (2)] (paragraph 9 on page 124 of Rules and Orders of the Chief Court, Volume III).

4. The warrant was dated 6th August 1919. It was a clerical mistake for 6th July 1919, but as the date stood in the warrant it could not be executed on 12th July 1919.

5. The Magistrate sentenced three of the accused to four months' imprisonment in default of payment of fine. Section 262 (2) of the Criminal Procedure Code, read with section 33 of the same Code, shows that this part of the sentence was illegal.

6. The sentences of four months and two months in default of payment of fine were illegal in the case of all seven accused, because under section 65 the maximum limit of imprisonment in default of fine is one and half months for an offence under section 225 B.

For the above reasons it is submitted that the convictions and sentences should be set aside. If the objections mentioned in paragraphs 3 and 4 are valid, no fresh trial is necessary. But if it is considered that the warrant was not vitiated by the clerical mistakes mentioned and the Naib Nazir was competent to execute the warrant, then a fresh trial in the ordinary way may be ordered.

Fine has been realised.

Lala *Joti Sarup*, for the Petitioner.

ORDER.—In this case seven persons have been convicted by a Magistrate in his summary jurisdiction of offences under

(1) 18 Ind. Cas. 665; 35 A. 173 at p. 176; 11 A. L. J. 196; 14 Cr. L. J. 105.

(2) 16 P. R. 1904 Cr.; 1 Cr. L. J. 1091

GANGA SARAN *v.* EMPEROR.

section 225 B, Indian Penal Code, and have been sentenced some to fines of Rs. 200 and some to fines of Rs. 100 and the former to the illegal term of four months' imprisonment in default. The Sessions Judge has forwarded the proceedings under section 438, Criminal Procedure Code, with a recommendation that the convictions and sentences be set aside on account of many irregularities and illegalities.

In the first place, it is obvious that the case was not one which should have been tried summarily. The number of accused was large and the number of witnesses even greater. In the second place, two totally different offences were tried together. Thirdly, the warrant was addressed to "the bailiff of the Court", whoever that official may be, and was executed by a Naib Nazir and process servers without any endorsement by the bailiff. Such service of the warrant was illegal [see *Muhammad Bakhsh* v. *Emperor* (2)]. For all these reasons, I agree with the Sessions Judge that the convictions cannot be upheld.

I, therefore, accept the petitions and set aside the convictions and sentences of all the seven convicts and refrain from ordering a re-trial owing to the service of the warrant having been effected by persons not legally entitled to effect it.

Petitions accepted;
Convictions set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 551 OF 1920.

October 7, 1920.

Present :—Mr. Justice Gokul Prasad.

GANGA SARAN AND OTHERS—APPLICANTS

versus

EMPEROR, THROUGH *Pt.* BHAGWATI PRASAD—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), Ch XXI, provisions of, contravention of, effect of—Offence triable as warrant case, trial of, as summons case after commencement of trial, legality of.

Where an offence complained of is triable exclusively as a warrant case, and the trial has actually begun, and the statements of the complainant and some of his witnesses recorded, it is illegal to split the offence into two component parts, and to proceed to try it as a summons case. [p. 852, col. 2.]

A Magistrate when trying a warrant case is not justified in recording the statement of the accused immediately after the examination of the complainant and before he is cross-examined and the evidence for the prosecution recorded: such a procedure is not only prejudicial to the accused in his defence, it contravenes the provisions of Chapter XXI of the Criminal Procedure Code, and entirely vitiates the trial. [p. 852, col. 2.]

Criminal revision against the order of the Sessions Judge, Meerut, dated the 3rd of August 1920.

Messrs. *S. C. Mukerji* and *Kamuda Prasad*, for the Applicants.

Mr. *G. W. Dillon*, for the Opposite Party.

JUDGMENT.—This is an application to revise an order of conviction under sections 426, 447 and 352 of the Indian Penal Code. The sentence imposed is that of a fine of Rs. 51 against each of the applicants, and the applicants have been further bound in the sum of Rs. 500 each for a term of one year. It appears that Ganga Saran, accused, is the President of a Goshala Committee. Adjoining the Goshala premises there is a compound of Pandit Bhagwati Prasad the land of which is let out to certain tenants for building purposes. Pandit Bhagwati Prasad intends to build a grain market on that plot of land. In August 1919 Pandit Bhagwati Prasad wanted to build a compound wall. The building was opposed by the accused as the wall would interfere with their *abchak*. Because of this opposition, the wall was not built. On the 27th of October 1919 it seems that Bhagwati Prasad made a fresh attempt to build a compound wall. It is alleged that the masons came, built a part of the wall and then the six accused came there remonstated with Pandit Bhagwati Prasad and ultimately removed the bricks of the wall and put them in another place in the compound of Pandit Bhagwati Prasad. Pandit Bhagwati Prasad thereon lodged a complaint of mischief, criminal trespass and assault against the accused. As I have said above, they have all been convicted by the Magistrate under various sections. This conviction has been upheld on appeal. The applicants came up in revision and their contentions are,—

(1) that a single sentence for three separate offences is not warranted by law and is illegal;

(2) (*a*) that the dispute was really of a

purely civil nature, and, even if all the evidence for the prosecution were taken to be correct, the conviction under section 447 of the Indian Penal Code was bad inasmuch as all that the accused did was to go to assert a civil right and not to commit mischief. A civil suit has already been filed for the determination of the rights of the parties;

(2) (*b*) that Bhagwati Prasad had no right to institute a complaint under section 447 of the Indian Penal Code, because all the land had been let out to tenants on permanent leases. These leases are subsisting and, therefore, he was not entitled to possession.

The cases, *Gobind Prasad, In the matter of the petition of* (1), and *Kunji Lal* v. *Emperor* (2), are relied on in support of this proposition;

(3) that the order under section 106 of the Criminal Procedure Code was not justified;

(4) the complaint as filed was under sections 452, 147 and 427 of the Indian Penal Code. All these cases were warrant cases and the trial should have been in the manner prescribed for the trial of such cases and the trying Magistrate's action in trying the case as a summons case was illegal and has seriously prejudiced the accused;

(5) because of certain arbitration proceedings the complainant was prevented from proceeding against the applicants in the Criminal Courts.

The parties to these proceedings are respectable gentlemen of Meerut and it has taken the learned gentleman appearing on either side almost three days to argue the case and the case has been fought tooth and nail before me.

I shall take up the fourth point first. It appears that this complaint was filed on the 4th of November 1919 and the complainant was examined the same day and the 20th of November was fixed for the examination of witnesses in support of the complaint and the case was sent to the present Deputy Magistrate, Mr. Nathu Ram, for disposal. It appears that up to the 20th of November 1919 the complainant had not put in Court the necessary diet money, etc., for issue of notices to witnesses and the case was adjourned to the 2nd of December 1919 for disposal. On the 2nd of December 1919 some witnesses were examined and others were exempted and the Court adjourned the case for the inspection of the locality. The learned Deputy Magistrate inspected the locality on the 20th of December 1919 and, having been given to understand that there was a chance of compromise, he adjourned the case to the 5th of January 1920. On that date the case was again adjourned and the Court granted adjournments from time to time and, ultimately, on the 7th of April 1920, directed notices to be issued to the accused under sections 452, 147 and 427 of the Indian Penal Code, fixing the 19th of April 1920 provided the complainant put in the necessary *talbana* for the issue of summons. The case came on for hearing on the 19th of April 1920 in the presence of the complainant and of all the accused except Chaudhri Ganga Saran who was allowed to be represented by a Pleader. On that date the complainant was examined, the statements of the accused taken and certain witnesses on behalf of the prosecution were examined and then a curious order was passed to the effect that, as it appeared from the statements of the witnesses for the complainant that the offences committed were of summons cases, therefore, it is not necessary to frame charges, and as the complainant wants to produce further evidence, therefore, it is ordered that 30th April 1920 be fixed for the hearing of the case. It is not very easy to understand how a very experienced Magistrate like Mr. Nathu Ram should have committed this mistake. The complaint was of offences triable as warrant cases and the heading of the commencement of the judgment shows that the accused were being tried for those offences. The examination of the accused immediately following the examination of the complainant was not justified by the procedure laid down in Chapter XXI of the Code of Criminal Procedure. However, to proceed further, the case was again adjourned to the 22nd of May 1920 at the request of the complainant. On that date it was found that, out of the witnesses who had been summoned on behalf of the complainant, Pandit Nand Kishore, Inspector, Babu Ghasi Ram and Ghansham Das, Patwari, were examined and the case was fixed for the 1st of June to enable the accused to

(1) 2 A. 465 at p. 467; 1 Ind. Dec. (N. S.) 863.
(2) 21 Ind. Cas. 681; 12 A. L. J. 151; 14 Cr. L. J. 633.

cross-examine the witnesses for the prosecution and to produce the defence evidence. On that date an application for adjournment on behalf of the accused on the ground that their Counsel was engaged in some other Court was refused and as all the accused were not present an order was passed for warrants to issue against the absent accused. Later on, before the warrants could be issued, the accused appeared and cross-examined the witnesses for the prosecution. It will appear from the above *resume* of what actually happened that the whole procedure of the learned trying Magistrate was decidedly irregular if not absolutely illegal. Having commenced the trial of the case as a warrant case, regard being had to the nature of the offences complained of, the learned Magistrate was not justified in taking down the statements of the accused immediately after he had taken down the statement of the complainant who had not even been cross-examined till then. He ought to have proceeded in the regular way, heard out the evidence for the prosecution, allowed the accused to cross-examine, if they so chose, and then framed a charge whether of the offences about which the complaint had been made or of minor offences, if only those were proved, and then charged the accused of having committed such offences as, in the opinion of the Court, might have been proper. In that case the accused would have had, if they so wished, a further opportunity to re call and cross-examine the witnesses for the prosecution and show that they were not worthy of credit. All this opportunity of double cross-examination has been lost to the accused. They could not guess from the vague order of the Deputy Magistrate what offences they were called upon to answer and there can be no doubt that they have been seriously prejudiced in their defence. It has further been argued on behalf of the applicants that the examination of the accused before the whole evidence for the prosecution was before the Court prejudiced the defense case very seriously. Another point urged on behalf of the defence is that, although the learned Deputy Magistrate has convicted the accused under sections 447 and 352 of the Indian Penal Code, the conviction is really one under section 452 of the Indian Penal Code which could not have been tried as a summons case because the elements constituting an offence under section 447 *plus* the elements constituting an offence under section 352 of the Indian Penal Code go to make up the offence made punishable under section 452 of the Indian Penal Code. This procedure of splitting up an offence triable exclusively as a warrant case into two component parts of the said offence in order to enable a Magistrate to try it as a summons case is in my opinion, not only a mere irregularity but an illegality and a Magistrate is not justified in breaking up an offence into its component parts and trying it in a manner not warranted by law. In my opinion, the trial of this case is wholly vitiated by the above proceedings. The provisions of Chapter XXI of the Code of Criminal Procedure are mandatory and have to be followed. It is not the conviction under any particular section of the Indian Penal Code which decides the question whether a particular case is to be tried as a warrant case or as a summons case. It is the complaint and the notices issued to the accused and also the commencement of a case by a Magistrate under certain sections which decide the question whether it is to be tried as a warrant case or a summons case I am afraid that in the present case the mode of trial is vitiated because of the illegalities, that is to say, going in the teeth of the mandatory provisions of Chapter XXI of the Code of Criminal Procedure. The complaint, the summons first issued to the accused, the heading of the first sheet of the proceedings go to show that the trial was commenced under the sections which were purely triable as warrant cases. See in this connection *Empress* v. *Jadu* (3), *Queen-Empress* v. *Lalja Ram* (4) and *Subrahmania Ayyar* v. *King Emperor* (5). Under these circumstances, it is not necessary for me to enter into the other points raised in this revision. I, therefore, set aside the convictions and sentences. The order under section 106 of the Criminal Procedure Code falls with the setting aside of the conviction in the present case. Having regard to the fact that both the parties are respectable

(3) A. W. N. (1886) 260.
(4) A. W. N. (1888) 96.
(5) 25 M. 61 at p. 97; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 169.

residents and that a civil suit has already been instituted for the determination of the respective rights of the parties in the Civil Court, I do not think that any further proceedings should be taken in the Criminal Courts. I direct accordingly. The fine, if realized, will be refunded.

Conviction set aside.

LAHORE HIGH COURT.
CRIMINAL REVISION No. 1271 OF 1920.
December 18, 1920.
Present:—Mr. Justice Martineau.
Musammat AISHAN—COMPLAINANT—PETITIONER
versus
SHER MUHAMMAD—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance proceedings—Husband willing to keep wife in his house, whether ground for escaping liability.

Where in proceedings under section 488 of the Criminal Procedure Code it appears that the husband had turned his wife out of his house, he cannot escape liability for giving maintenance to her merely by saying in Court that he will keep her in his house, a promise which he might break as soon as he gets home.

Case reported by the Sessions Judge, Jullundur, with his No. 156-J. of 10th September 1920.

FACTS.—*Musammat* Aishan is the wife of Sher Muhammad. She brought this complaint under section 488, Criminal Procedure Code, for her maintenance The accused was summoned for 23rd April 1920. He came and gave his statement that he was willing to take the woman home. The Court then examined the complainant. She stated that she was willing to go, but should be allowed suitable maintenance and that the accused did not care to keep her and whenever she went to him he turned her out.

The lower Court without recording any further evidence dismissed the complaint.

GROUNDS.—The Magistrate has committed material irregularity in not recording the evidence of the parties. In a section 488-case the parties always raise

such pleas. The husband comes to Court and, to escape the order of maintenance, offers to take the woman home. The woman, to save appearances, offers to go if suitable maintenance, were awarded. If the complaints were dismissed merely on these pleas the object of the law would be forfeited. I think the lower Court should have taken evidence and decided on merits which party is telling the truth.

I, therefore, beg to refer the case to High Court recommending that the order of dismissal be set aside and the case remanded for proper enquiry and decision according to law.

Sheikh *Niaz Muhammad*, for the Petitoner.

ORDER.—There has been no inquiry in this case, no evidence having been taken although *Musammat* Aishan said she had evidence. Her allegation is that her husband turned her out of the house. If the allegation is correct, the husband cannot escape liability for giving maintenance to his wife merely by saying in Court that he will keep her in his house, a promise which he might break as soon as he got home. His wife distinctly stated before the Magistrate that she was willing to go to her husband's house only if he gave her maintenance. What has to be determined is whether the husband has neglected or refused to maintain his wife.

I set aside the Magistrate's order and direct him to pass a fresh order after proper inquiry.

Order set aside.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 122 B OF 1920.
May 13, 1920.
Present:—Mr. Justice Robinson.
JESMUDIN—COMPLAINANT
versus
ISADALLY—RESPONDENT.

Workman's Breach of Contract Act (XIII of 1859), s. 2—Proviso (a) to clause (1), scope of—Order directing performance—Failure to perform contract—Application for arrest—Limitation.

EMPEROR *v.* RAB NAWAZ.

Proviso (*a*) to clause (1) of section 2 of the Workman's Breach of Contract Act merely provides that an order directing re-payment of the advance or performance of the contract shall not be made unless the employer moves the Court within three months of the breach of the contract.

The proviso has no application to a case where a complainant has already obtained an order under section 2, sub-section (1), and is applying for an order of imprisonment under clause (2) for failure to obey the order under clause (1).

Reference made under section 438, Criminal Procedure Code, by the District Magistrate, Rangoon, for review of the order passed by the First Additional Magistrate, Rangoon.

JUDGMENT.—The respondent entered into a contract with complainant to work under him as a tailor. He received an advance of Rs. 140 and he says he was to work until he had discharged the advance by working it off. He took the money but did no work and complainant applied under Act XIII of 1859. Respondent appeared and admitted the facts and expressed his willingness to work off the advance. Thereupon an order was passed directing him to perform the contract. This was on the 29th April 1919.

He failed to do any work and on 25th June 1919 complainant applied for his arrest. A warrant was issued but was returned unexecuted and on the 15th July 1919 complainant asked that the case be closed for the present. This was because respondent could not be found.

On the 12th April 1920 complainant having discovered the whereabouts of the respondent applied for his arrest, and on the 19th April the Magistrate passed the following order: "The complaint is not maintainable under proviso (*a*) to section 2 (1) as it was not filed within three months from date of order passed in Criminal Miscellaneous No. 250 of 1919 of this Court. The date of the order was 29th April 1919. (2) Case is dismissed."

Act XIII of 1859 has been amended by Act XII of 1920 which came into force on 12th March 1920. Even assuming that its provisions would have to be applied to pending cases the order of the Magistrate is wrong. The Act, as amended, allows the employer to complain to a Magistrate and section 2, sub-section (1), allows the Magistrate to pass an order directing re-payment of the advance or performance of the contract. The proviso referred to enacts that no such order shall be made unless the employer moves the Court within three months of the breach of the contract.

In the present case complainant has already obtained an order under section 2, sub-section (1), and was not applying for such an order. He was applying under section 2 (2) for an order of imprisonment for failure to obey an order under sub section (1) and the proviso referred to does not apply to the case at all. He already possessed an order to perform and he wanted that order enforced by punishment. The order of 29th April 1919 was still in force and though the previous application for arrest had been infructuous that did not affect the original order to perform.

I, therefore, set aside the order of the Magistrate and return the case for him to continue it and pass orders according to law.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1260 OF 1920.

November 18, 1920.

Present:—Mr. Justice Martineau.

EMPEROR—PETITIONER

versus

RAB NAWAZ—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 562, applicability of—"Cheating," whether includes aggravated forms.

Section 562 of the Criminal Procedure Code applies only to a case of simple cheating falling under section 417, Indian Penal Code, and not to aggravated forms of cheating under sections 418 to 420, Indian Penal Code. [p. 855, col. 1.]

Case reported by the District Magistrate Mianwali, with his No. X of 1920.

FACTS.—The accused, a resident of Mianwali Tahsil, went to the house of the complainant in Bhakkar Tahsil on the evening of 8th November 1919, and remained there for the night. The next morning he requested the complainant to lend him his horse to ride on to Jandanwala. The complainant agreed and gave him the horse and also sent his man with

KRISHNARAO v. SITARAM.

him to bring the horse back. The accused went on horse back far from Jandanwala and never returned it as promised. He took the horse to Dera Ismail Khan District and sold it there for Rs. 30 and the saddle for Rs. 6. The accused absconded after the occurrence, but was arrested on 21st May 1920 in Multan City.

The accused, on conviction by Khan Bahadur Muhammad Zaffar Khan, exercising the powers of a Magistrate of the First Class in the Mianwali District, under section 420 of the Indian Penal Code, was directed that he be released on his executing a bond of Rs. 500 with one surety of the same amount for one year, and during such period to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour under section 562, Criminal Procedure Code.

GROUNDS.—Under the law, the sentence of section 562, Criminal Procedure Code, for an offence under section 420, Indian Penal Code is quite illegal. The word "cheating" mentioned in the same section can mean only simple cheating under section 417, Indian Penal Code, and cannot include the aggravated form of it under section 420, Indian Penal Code, *vide Crown* v. *Neki Ram* (1).

The files of the case are submitted herewith. The judgment of the lower Court being in vernacular is translated into English for the convenience of the Hon'ble Judges of the High Court.

Mr. *H. A. Herbert*, Government Advocate, for the Petitioner.

ORDER.—In this case Rab Nawaz pleaded guilty to an offence under section 420, Indian Penal Code. He had gone to the house of one Hak Nawaz and induced him to lend him a horse for riding to Jandanwala. He then took the horse to a place in the Dera Ismail Khan District and sold it and the saddle.

The Magistrate, instead of sentencing Rab Niwaz to imprisonment, has passed an order against him under section 562, Criminal Procedure Code. The order is illegal, as section 562 applies only to a case of simple cheating, falling under section 417, Indian Penal Code, and not to aggravated forms of cheating falling under sections 418 to 420. See *Crown* v. *Neki Ram* (1).

(1) 23 P. W. R. 1908 Cr.; 8 Cr. L. J. 455.

I set aside the order and in lieu thereof I sentence Rab Nawaz to six months' rigorous imprisonment and to a fine of Rs. 50, or to a further period of three months' rigorous imprisonment in default of payment.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 168 OF 1920.

August 24, 1920.

Present :—Mr. Hallifax, A. J. C.

KRISHNARAO RAMCHANDRA—

APPLICANT

versus

SITARAM SON OF DAJIBA PANDEY—

NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 195, 439, 476—Sanction to prosecute, when to be granted—Delay in making application or malice—Revision—High Court, interference by.

The main principle which should guide a Court in taking action under section 195 or section 476 of the Criminal Procedure Code is, that no prosecution should be allowed to be instituted unless there is a reasonable probability of conviction. The mere fact that there has been delay in applying for sanction, or that the applicant is actuated by malice or vindictiveness, is no ground for refusing to grant sanction, where there is a probability of securing a conviction. [p. 857, col. 2.]

Inasmuch as an order under section 195 is appealable, the High Court will not interfere in revision, but it will do so in respect of an order under section 476, if that order is shown to be perverse. [p. 856, col. 2.]

Revision against the order of the Additional District Judge, Nagpur, M. J. C. No. 32 of 1919, dated the 22nd January 1920.

Mr. *M. B. Niyogi*, for the Applicant.

Mr. *M. R. Bolde*, for the Non-Applicant.

ORDER.—As was explained in *Shioshankarpuri* v. *Emperor* (1), the main principle which should guide Courts in taking action under section 195 or section 476 of the Criminal Procedure Code is that no prosecution should be allowed or instituted unless there is a reasonable probability of conviction. This in fact might almost be said

(1) 27 Ind. Cas. 545; 10 N. L. R. 177; 16 Cr. L. J. 161.

to be the only matter that requires serious consideration in such a case. I can see no objection whatever to the prosecution being conducted by a person who is actuated by malice or vindictive feeling against the accused. Indeed, it is not impossible that such a feeling would result in the prosecution being more thorough than it might otherwise be. Nor can I see that delay in applying for sanction is any reason for refusing it, except that evidence is liable to weaken or disappear in the course of time. Here we have an application for sanction to prosecute one Sitaram for the production of two forged documents in a civil suit. With that slovenliness which, for some unknown reason, is very common in all matters connected with prosecutions for forgery and perjury, the productions of the two documents are treated as one offence though they are entirely distinct, and even in this Court neither the applicant nor his Pleader had at first any clear idea as to what evidence would be put forward in the case. Matters are, however, to some extent simplified by the admission that it would be impossible to prove one of the two documents, that known as Exhibit P-36, to be a forgery to the knowledge of the non-applicant. It purports to be a deed of gift executed in *Fasli* 1211 or A. D. 1801 and the only reason for supposing it not to be genuine is that there are holes in the paper and the writing avoids them. They may possibly prove it to be a forgery but cannot prove that the non-applicant knew that it was a forgery. It may have been forged at any time up to 100 years before he came into possession of it.

The case in regard to the document called Exhibit P-20 is much stronger. It was produced by Sitaram, the non-applicant, in his suit as a letter signed by the defendant in that suit, who is the applicant here. It is practically certain that it is a letter written by some one other than the applicant, Krishna Rao, on a piece of paper which was one of several similar pieces which he had signed both in English and Marathi when he was about to start on a pilgrimage, for the purpose of pasting them on the locks of his boxes. The badness of the handwriting, grammar and spelling, the double signatures and the exact resemblance of the paper to others actually used as labels, and the appearance of the contents of which the greater part is on the opposite side to the signatures with two lines squeezed in above the upper signature indicate fairly clearly that the paper is a forged document. That Sitaram produced it in his suit is also capable of easy proof. The question remains whether there is a reasonable probability of proving that he knew or must have known it to be forged. The facts indicating that are,—

(1) That if genuine, it would have given very great support indeed to his case and yet he failed to produce it for two years after the suit began.

(2) That the grammar, spelling and handwriting and the double signatures would make it clear to him, even if he had received it innocently that, it was not written by Krishna Rao.

(3) That the papers with the double signatures on them were left in the possession of his son-in-law, Govinda.

(4) That it is most unlikely that anybody else would commit the forgery and send the document to him in the way he alleges without his full knowledge.

As against the second of these considerations, we have the fact that he did produce the document in Court and maintained that it was genuine. This, at least, indicates that he thought it sufficiently like a genuine letter from Krishna Rao to be accepted by the Court, and might indicate that he did so accept it himself. Another point in his favour is that, his case was quite strong enough to succeed and did in fact succeed all through without the aid of this false document.

On the whole, however, I am of opinion that there is a reasonable probability of the conviction being had in respect of this document known as Exhibit P-20. The rulings in *Abdul Husen* v. *Emperor* (2) and *Shioshankarpuri* v. *Emperor* (1) are quoted as showing that this Court ought not to interfere with the decision of the lower Courts unless they can be shown to be perverse. These rul-

(2) 22 Ind Cas. 177; 9 N. L. R. 184; 15 Cr. L. J. 3

ings are in respect of orders passed under section 476 of the Criminal Procedure Code, and that the same considerations do not apply to an order made under section 195, is very clearly shown by the fact that an appeal is allowed against it. The refusal of the learned Additional District Judge to sanction the prosecution is based mainly on the presence of malice in the mind of the applicant, the delay in making the application and the improbability of securing a conviction in respect of the document known as Exhibit P-36. Malice and delay are no ground for refusing sanction as I have explained above, and the matter of Exhibit P-20 has never been properly considered, as the other documents was all along allowed to cloud the issues. I, therefore, sanction the prosecution of Sita Ram, son of Dajiba Pande Gurao, of Nagpur, by Krishna Rao, son of Ramchandra Naik, of Nagpur, under sections 465 and 471 or section 193 or section 196 of the Indian Penal Code in respect of his production in Civil Suit No. 28 of 1913 in the Court of the Senior Munsif of Nagpur on the 9th of February 1915 of the document known in that suit as Exhibit P-20. The costs incurred in connection with this application by the applicant in all three Courts will be paid by the non applicant. In this Court ten rupees will be allowed as Pleader's fee.

Application allowed.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1309 OF 1920.

December 16, 1920.

Present:—Mr. Justice Abdul Raoof.

MADAN MOHAN LAL—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Factories Act (XII of 1911), ss. 28, 29, 31, 41 (a) General Clauses Act (X of 1897), s. 21—Approval of system of working factory, whether can be cancelled—Appeal against order of cancellation—Prosecution during pendency of appeal, desirability of.

Where an Inspector of Factories approves a system of working a particular factory, he has power, under section 21 of the General Clauses Act, to cancel the approval. [p. 858, col. 2.]

Where, however, an appeal is pending from the order of cancellation, it is not desirable to institute a criminal prosecution in respect of the factory having been worked in contravention of the order of cancellation, during the pendency of the appeal. [p. 858, col. 2.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Delhi, dated the 2nd June 1920, affirming that of the Additional District Magistrate, Delhi, dated the 22nd April 1920.

Kanwar *Dalip Singh*, for the Petitioner.

Mr. *D. C. Ralli*, for the Government Advocate, for the Respondent.

JUDGMENT.—The petitioner is the Secretary of the Delhi Cloth and General Mills Company, Limited, Delhi. He has been convicted under section 41 (*a*) of the Indian Factories Act, XII of 1911, for having worked the factory against the provisions of sections 28, 29 and 31, and has been sentenced to a fine of Rs. 10. Against his conviction he applied for revision to the Sessions Court, but his application was rejected by the learned Sessions Judge. He has accordingly come up in revision to this Court. The facts which are material for the decision of this petition for revision are as follows:—

On the 12th August 1919 an application was made to the Inspector of Factories asking him to approve the working of the factory with a system of shifts. The Deputy Commissioner, as an Inspector of Factories, expressed his approval of the scheme proposed by a letter dated the 5th of September 1919. On the 25th of November 1919, however, the Deputy Commissioner wrote to the Manager of the Factory withdrawing or cancelling the approval of the 5th September 1919, with effect from December 1st 1919, suggesting that an application might be made for approving the system of shifts to the Inspector of Factories, Punjab, Delhi, etc., as he had returned to duty. The Company replied to the letter of the Deputy Commissioner taking exception to the order of revocation upon several grounds, one of which being that an approval once made could not be revoked. A similar letter was addressed to the Inspector of Factories, Punjab, on the 4th December 1919 by the Manager of the

RAGHUNANDAN KOERI *v.* EMPEROR.

Factory. After a good deal of correspondence the Inspector of Factories, Punjab, on the 17th December 1919, drew the attention of the occupier of the Delhi Cloth and General Mills Company, Limited, to the provisions of sections 28, 29 and 31 of the Indian Factories Act telling him that he was mistaken in thinking that the approval by the Deputy Commissioner could not be cancelled. He further drew the attention of the occupier to the provisions of section 21 of the General Clauses Act. In reply to the letter of the 3rd December 1919 the Deputy Commissioner of Delhi stated that his order cancelling the approval was quite legal and that if the Secretary of the Company was dissatisfied with it an appeal was open to him under section 50 of the Act. An appeal was accordingly preferred to the Chief Commissioner, Delhi, and exception was taken to the order of the 28th November 1919 and that of the 17th December 1919.

Two questions arise for the decision of this revision, namely :—

(*i*) Whether the approval of the 5th September 1919 could have legally been cancelled by the order of the 28th November 1919, and

(*ii*) whether pending the appeal the petitioner should have been convicted.

After considering the question carefully I am inclined to agree with the Court below that the Deputy Commissioner had power to rescind his order of the 5th September 1919 by his subsequent order, dated the 28th November 1919 according to section 21 of the General Clauses Act, which provides that:

"Where, by any Act of the Governor-General in Council or Regulation, a power to make orders, rules or bye laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any orders, rules or bye laws so made."

I, therefore, hold that the revocation, instead of being opposed to law, is permitted by section 21 of the General Clauses Act.

As regards the second question, I am clearly of opinion that, having regard to the fact that an appeal had been preferred at the suggestion of the Deputy Commissioner, the Magistrate would have acted more reasonably if he had held the proceedings before him in abeyance pending the decision of the appeal before the Local Government. Though I have not been able to find any direct authority for this proposition under the Factories Act, yet there are many cases to be found in various Law Reports laying down this rule with regard to sanction granted under section 195 of the Criminal Procedure Code in relation to perjury or forgery committed in a civil suit. In *Shri Nana Maharaj, In re* (1) a Division Bench of the Bombay High Court held that :

"Criminal proceedings for perjury or forgery arising out of a civil litigation should not, as a rule, go on during the pendency of the litigation."

In the case of *Mahant Kirpalban* v. *Musammat Ram Dei* (2), Karamat Hussain, J., held that :—

"It is highly undesirable that sanction should be granted while an appeal is pending to this Court."

The reasonableness of the rule laid down in the above cases is fully illustrated by what has happened in this case. The appeal has been allowed by the Local Government and the order approving the scheme for the working of the factory by a system of shifts has been restored. The ground for the prosecution of the petitioner has, therefore, ceased to exist. I accordingly set aside the conviction and order the refund of the fine if it has already been realised.

Conviction set aside.

(1) 16 B 729; 7 Ind. Dec. (N. S.) 965.
(2) 7 Ind. Cas. 260; 8 A. L. J. 647; 11 Cr. L. J. 445.

PATNA HIGH COURT.
DEATH REFERENCE No. 10 OF 1920.
CRIMINAL APPEAL No. 179 OF 1920.
September 13, 1920.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Sultan Ahmed.

RAGHUNANDAN KOERI—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Circumstantial evidence, value of—Quantum *of proof necessary for conviction.*

RAGHUNANDAN KOERI *v.* EMPEROR.

The fundamental rule by which circumstantial evidence is estimated, is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than that of his guilt. [p. 863, col. 1.]

Although it cannot be laid down as a proposition of law that *quantum* or value of evidence must depend upon the enormity of the crime, yet it is safer to follow the established rule that "the fouler the crime is the clearer and the plainer the proof ought to be." [p. 863, col. 1.]

Appeal against the order of conviction passed by the Officiating Sessions Judge, Saran, dated the 11th August 1920.

Mr. *D. N. Sircar*, for the Appellant.

Messrs. *S. A. A. Asghar* (Government-Advocate) and *Manohar Lall* (Assistant Government-Advocate), for the Crown.

JUDGMENT.

SULTAN AHMED, J.—The prisoner was charged under section 302 of the Indian Penal Code with the murder of one *Musammat* Bissundeyi, his younger brother's widow, also of her son, Ram Sakal, aged eight-nine years, on the 22nd April about midnight. He was also charged for having committed arson in the house where Bissundeyi was living on the same occasion. The trial was with the aid of two Assessors, one of whom was of opinion that the evidence did not prove the case against the accused on any of the counts, while the second Assessor was of opinion that the evidence supported both the charges of murder and arson against the prisoner. The learned Sessions Judge, agreeing with one of the Assessors and disagreeing with the other, convicted the accused under sections 302 and 436 of the Indian Penal Code and sentenced him to death. This sentence has now come up to this Court for confirmation under section 374 of the Criminal Procedure Code and the accused has also filed an appeal from jail.

The prosecution story is briefly as follows. The prisoner, who is a widower, become a *Sanyasi* some time ago, and used to pass his days as a *Sadhu*. On the death of his younger brother, Jeo Nandan, about six or seven years ago, the prisoner became a secularist again and began to live in his house jointly with his son, Sakaldeep, and his brother's widow, the deceased Bissundeyi, and her son, Ram Sakal. His elder brother's widow, *Musammat* Tetri, with her son used to live separately from them, but in the same house. As time went on, people began to suspect the prisoner of his having an intrigue with *Musammat* Bissundeyi and about $2\frac{1}{2}$ years ago his caste-men excommunicated him and his family. Sakaldeep, shortly before the occurrence, convened a *panchayati* for the revision of the order of excommunication passed by the *panches* in order to prepare the way for his marriage. The *panches* decided that Raghunandan, the prisoner, and the deceased woman, *Musammat* Bissundeyi, should be turned out of the house. This order of the *panches* was carried into effect at once, and both the prisoner and Bissundeyi left the house two or three days after, the woman came to see her young son, Ram Sakal, who seems to have been crying for his mother, and the caste-men allowed her to live in the house for the sake of the boy, but on the strict condition that she must abandon the accused. While the woman was living in the house, the prisoner used to go to visit her, but she used to reject his proposals and used to abuse him. On the evening of the night of the occurrence, Sakaldeep and Ram Sakal took their usual meal. Bissundeyi went to grind her *satoo*. Tetri also went to grind grains and the boy, Ram Sakal, went to his mother, Bissundeyi: Sakaldeep and Tetri's son slept in the *sehan* outside the house, keeping the *sudder* door of the house open for the absent inmates, Tetri and Bissundeyi. Bissundeyi is said to have returned to the house some time later and Tetri returned home shortly before midnight. When she tried to open the entrance door, she found that closed from inside. She called "Sakal, Sakal" but there was no reply. Sakaldeep, who was sleeping in the *sehan*, waked up on Tetri's call and asked Tetri not to bother but to sleep for the night in the outer *osara*. Tetri did so. After a while, Tetri was roused up by the sound of the latch (*killi*). She saw the prisoner coming out of the house by the entrance door and proceed west and then north. Sakaldeep also saw his father going away from south to north but did not see him come out of the house. He called out to him "Babu, Babu," but the accused did not listen to his call and went away northward. Immediately after this, Sakaldeep noticed

that the inner *osara* was on fire and shouted out "fire, fire." The neighbours came up and extinguished the fire, and, while the fire was being extinguished, it was found that the boy Ram Sakal was dead with his throat cut. Bissundeyi was also found lying dead in the adjoining *kothri*. Constable Ram Sagar came in immediately while the fire was being extinguished, and he saw the boy's corpse lying down. He then hastened to the nearest out-post. After this Santo Singh, *Jamadar* in charge of the out-post, came together with constables Ram Pach, Chedi Mian and Ram Sagar. The *Jamadar* then sent Ram Sagar with one Sheo Deni to the *Thana* to lodge the first information and he sent Chedi and Ram Pach with one Radhey Mahto to find out the prisoner, who was reported by the people there to be the murderer. The prisoner was found lying in the house of one Foujdar Ahir, where he had taken his lodging after having been turned out of the house under the orders of the *panches*. Then the first information was lodged at the *Thana* by Ram Sagar about 2 o'clock. Sheo Deni, who had accompanied Ram Sagar to the *Thana*, was also examined at the same time. The Sub-Inspector arrived at the place of occurrence at about 3-30 A. M. There he examined the *Jamadar*, Santo Singh, and the three constables and then examined Sakaldeep and Kabir, Manjoor Radhey and Deni. Kabal was examined at 8 o'clock the next morning and *Musammat* Tetri was examined on the 24th at 10 A. M. Santo Singh and the Sub-Inspector of Police, who visited the place of occurrence later, found blood marks on the floor and on the *osara* wall close to the *Khatia*. He also found a *garashee* smeared with fresh blood and some cloth soaked in blood in Bissundeyi's room. He also found some scratch marks on the accused person. The accused was wearing a *dhoti* and a *chadar* at the time of the arrest, which were subsequently sent to the Chemical Examiner for analysis and report. The accused was, on these facts, sent up for trial and convicted and sentenced, as I have stated above.

There is no eye-witness to the occurrence. The case rests entirely upon circumstantial evidence; and I now propose to consider in detail the evidence which has been adduced on behalf of the prosecution, and see if this evidence satisfactorily establishes the guilt of the accused.

The evidence mainly consists of (1) Tetri and Sakaldeep's statements.

(2) The evidence of prosecution witnesses Nos. 12, 14, 18 that the prisoner had been turned out of the house by the decision of the *punches* due to there having been an intrigue between them.

(3) The evidence to show that one evening the accused followed her, and being exasperated on account of her refusals to allow him to have anything to do with her, prepared to throw her into a well where she had gone to draw water.

(4) Scratches on his person found after his arrest by the Police.

It will be observed that if the statements of Tetri and Sakaldeep are not accepted the conviction of the accused, in spite of the other evidence, which I have summarised above, will be an impossibility.

The learned Government Advocate, however, has argued with great emphasis that the evidence of Tetri and Sakaldeep must be accepted. I, therefore, firstly proceed to consider the evidence of *Musammat* Tetri. Her evidence, in short, in her own language, so far as the occurrence is concerned, is as follows:—

"After taking my meal that evening I went to Ram Kissen's house to grind wheat as labourer. I fed my son, Ram Asray, and advised him to sleep on the *khatia*, which I had stretched for him in the outside, until I came back. I also told him that Sakaldeep, his cousin, will sleep by his side. Bissundeyi and her son were in the house when I left for Ram Kissen's house. I returned home that night at about 10 P. M. I found the *sudder darwaja* bolted from inside, I called out Ram Sakal. None responded from inside. I, therefore, asked Sakaldeep what to do. He said like this, "do not bother, sleep for this night in the *osara* lying to the east of the door." An hour after, I heard the sound of the unbolting of the door. I got up then I saw Raghunandan, the accused."

The first question that arises for consideration is, whether Tetri did, as a matter of fact, go out of the house that evening, and whether she, on her return, finding the door bolted from inside, slept outside in

the *osara* and then saw the accused come out of the house. It is remarkable that the prosecution have not examined Ram Kissen, in whose house she is said to have gone to grind the grains, and no explanation has been given why this important piece of evidence to corroborate Tetri has not been placed before the Court. It is next to be observed that when Ram Sagar and Santo Singh, the *Jamadar*, arrived at the place of the occurrence, Tetri was not found by them. If she had been there, it is difficult to conceive that Tetri would not have made the statement to them that she had seen the accused run out of the house. It is again remarkable that Sakaldeep, who was examined by the Police that night, does not mention of them, nor indeed does say even in the Court of the Committing Magistrate that Tetri was there and had seen the accused come out of the house. It is only reserved for Sakaldeep to say for the first time in the Court of Sessions that Tetri slept outside in the *osara*, not having gained entrance into the house, and that she saw the accused come out of that house. There is evidence, however, of prosecution witnesses Nos. 12, 14, 16, 18 and 20, who say in Court that they met Tetri immediately after the alarm was raised by Sakaldeep and that Tetri told them that she had seen the accused come out of the house and run from south to north. This evidence, however, is unworthy of credit, inasmuch as it appears from the evidence of the Sub Inspector, the Investigating Officer, that when he examined these witnesses on the night of the occurrence soon after, they did not state to him that Tetri had told them that she had seen the accused come out of the house and run towards the north. Under these circumstances, it is impossible to believe Tetri's story. The story that Tetri saw the accused coming out of the house, saw the light of day for the first time on the 24th, when she was examined by the Police. It is, therefore, impossible, under these circumstances, to accept her story, and her evidence must be rejected as extremely suspicious and unreliable.

I now proceed to consider the other evidence, that is, of Sakaldeep. His evidence is as follows:—

"While I went to sleep in the *schan* I shut the outer door, *i. e.*, *sudder darwaja*, but without chaining or bolting it. Tetri came before midnight. Tetri shouted out from outside, calling out Ram Sakal to open the *sudder darwaja*. None responded. The door was not opened. I woke up when she was shouting. She said to me that the door was not being opened. I told her to sleep at the door. She slept there. About one hour after this I saw my father coming from the south in haste. I did not see him coming out of the house. I called out "Babu, Babu." He did not respond. When I first saw him he was about 3 cubits south of me. He went about $2\frac{1}{2}$ cubits off from my *khatia* towards its west. The night was *andharia* but cloudless. I distinctly saw his face as it was star-lit night. I sat up as soon as I saw my father coming and passing by."

In cross-examination he said that,

"Tetri never slept before in the outer *osara*.....I had not had sound sleep after Tetri's *hulla*.....My half sleep was broken after the sound of father's footsteps..... ...I do not recollect whether I saw my father's face distinctly by the light of the stars".

To begin with, if the presence of Tetri is not believed, as I have held it cannot be believed, much of what Sakaldeep says must be discounted. If Tetri was not there at all, how would he be roused by any *hulla*? There is no doubt, however, that he mentioned to the witnesses, who came to the place of the occurrence after he raised the alarm that he had seen his father run from south to north. But considering that it was a dark night and that he was sleeping immediately before, I am not fully satisfied that he actully recognised the person who passed by. Even assuming that this evidence is accepted, I consider that it would not be safe to act upon this single circumstance to convict the accused. In this connection I may quote a passage from Best's Theory of Presumptive Proof, pages 58 and 59, reproduced in his Law of Evidence, paragraph 470:—

"In dealing with judicial evidence of all kinds ignorance dogmatises, science theorises, sense judges. The right application of presumptive, as of other species of evidence

depends on the intelligence, the honesty and the firmness of the tribunals. To convict, (at least, in the capital cases), on the strength of a single circumstance is always dangerous; and it has been justly observed, that where the criminative facts of a presumptive nature are more numerous most of the erroneous convictions which have taken place, have arisen from relying too much on general appearances, where no inchoate act approaching the crime, has been proved against the accused."

Is the fact that the accused ran from south to north a sufficient circumstantial evidence to prove the guilt of the accused? Evidence of previous disputes may prove motive, but, in my opinion, that evidence does not very much improve the circumstantial evidence given by Sakaldeep. Lord Coleridge, in his remarkable summing up to the Jury in the trial of Dickman, dealing with circumstantial evidence, observed as follows:—

"Now, circumstantial evidence varies infinitely in its strength in proportion to the character and variety, the cogency, the independence, one from another, of the circumstances. I think one might describe it as a network of facts cast round the accused man. That network may be a mere gossamer thread as light and unsubstantial as the very air itself. It may vanish at a touch. It may be that, as strong as it is in part, it leaves great gaps and holes through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its structure that no efforts on the part of the accused can break through. It may come to nothing. On the other hand, it may be absolutely convincing. If we find a variety of circumstances all pointing in the same direction convincing in proportion to the number and variety of those circumstances, and they are independent of one another although each separate piece of evidence as standing by itself may admit of an innocent interpretation, yet the cumulating effect of such evidence may be, I do not say that it is, overwhelming proof of guilt."

Here, far from being a variety of circumstances one independent of another, there is only this evidence that the accused was seen running from south to north. It has not even been suggested, much less proved, that the instrument with which the murder was committed and which was found in the room of Bissundeyi, belonged to the accused. Far more important than the flimsy evidence of Sakaldeep is the conclusive fact that the accused was found sleeping in his own house when he was arrested and the clothes that he was wearing, having been examined by the Chemical Examiner, were not found to have any blood marks. I will deal with this point once again later.

I now proceed to consider some of the other evidence in the case and see if they, in any way, furnish materials on which we, as reasonable and prudent men, could uphold the conviction of the accused. Evidence has been given to prove that the *Punches* had outcasted both the accused and Bissundeyi. There is no sufficient reason to doubt this evidence. There is also evidence to show that when the deceased Bissundeyi came to live in the house with her son, the accused wanted to continue his amorous visits. There is also some evidence, which may be accepted, that the woman did not encourage him in his visits. All this evidence may furnish some motive for the crime, though, in my opinion, this evidence does not prove adequate motive for the double murder. Evidence has also been given to prove that about 15 or 16 days before the occurrence the accused wanted to push the woman into a well. Details of this incident are not given and the evidence on the point is only of Kabir Imam, which is not quite clear. The prosecution also relied upon the scratches found on the person of the accused after his arrest, presumably to show that there was some struggle between him and the deceased woman Bissundeyi when she was attacked. The medical evidence shows that the injuries found on his person were four slight scratch marks on the thigh and waist. The Doctor says that they may have been caused by friction with hard substance or by nail. This evidence, however, is most inconclusive and does not, in the least, advance the case of the prosecution and any inference drawn from it is convincingly negatived by the fact that no blood marks were found on his person or on the clothes that he was wearing. If there had been a struggle, as we are asked to hold upon these scratches, surely there would

have been marks of blood found on his person and on his clothes. It has not even been suggested that there was time enough for the accused to change his clothes. Further, nothing incriminating was found where the accused was lying when he was arrested. Giving my very best and anxious consideration to the evidence in the case, I am of opinion that the case has not been satisfactorily established against the accused. The fundamental rule by which circumstantial evidence is estimated, is that in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis, other than that of his guilt; and, while I do not hold as a proposition of law that *quantum* or value of evidence must depend upon the enormity of crime, yet I am inclined to follow distinguished and eminent Judges like Sir Mathew Hale, Lord Cockburn, Lord Chancellor Nottingham and Mr. Baron Legge, who held that "the fouler the crime was the clearer and the plainer the proof ought to be."

There is no doubt that a double murder has been committed, but, as has been rightly pointed out by Baron Park in *Regina* v. *Tawell* (1), that justice never requires the sacrifice of a victim and an erroneous sentence "may produce incalculable and irreparable mischief and destroy all integrity of tribunals and introduce a train of social evils as the inevitable result."

In conclusion, I am distinctly of opinion, that the evidence of Sakaldeep that he saw his father run from south to north in the dark night, while he had just got up from sleep, is not such as inspires confidence, and upon which we should act to convict the accused. Further, I am of opinion that, even if that evidence is accepted, it is a circumstance which stands by itself uncorroborated and from which no inference that the accused committed the murder inside the house can be legally drawn. The present case is fully covered by the case given by Best in his "Law of Evidence," paragraph 301. He says:

> "*A. B.* is found murdered; and *C. D.*, a man of bad character, is thought to have had an interest in his death; this might give rise to a *conjecture* that he was the murderer and if, in addition to this, he had, a short time before the murder, been seen near the spot where the body was found, the feeling in favour of his guilt might amount to suspicion."

This, at the very highest, is a case of suspicion, and I would, therefore, acquit the accused of the charges of murder and arson, for which he has been convicted, and direct that he be released forthwith.

JWALA PRASAD, J.—I agree.

Appeal allowed; Conviction set aside.

(1) (1845) 2 C. & K. 309 *note*; 1 Woodall's Celebrated Trials 162; See Will's Circumstantial Evidence, 5th Ed. (1912), pp. 313-317.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 754 OF 1920.

December 1, 1920.

Present:—Mr. Justice Ryves.

MUHAMMAD SHER ALI KHAN—PETITIONERS

versus

GHASI RAM AND OTHERS—OPPOSITE PARTIES.

Penal Code (Act XLV of 1860), s. 499—Petition defamatory—Dismissal after inquiry—Defamation, action for, maintainability of—Witness, how far protected.

Nine persons presented a petition, the character of which was generally defamatory, to the District Magistrate complaining of various acts of oppression against the *mukhia* of a village. An inquiry was held and certain persons were examined as witnesses with the result that the petition was dismissed. The *mukhia* then filed a complaint under section 500, Penal Code, against sixteen persons, including those who had signed the petition, but the complaint was dismissed under section 202 of the Criminal Procedure Code on the ground that the parties complained against having made statements in answer to questions they could not be prosecuted:

Held, that the complaint being not only against such persons as were called and examined, but against

MUHAMMAD SHER ALI KHAN *v.* GHASI RAM.

all the signatories to the petition to the District Magistrate, the order dismissing the complaint could not be sustained.

A witness has no greater protection against a charge of defamation than any other person.

A witness in order to be protected from a statement *prima facie* defamatory made by him must bring himself within one or more Exceptions to section 499.

Criminal revision against the order of the District Magistrate, Bulandshahr, dated the 14th October 1920.

Mr. *J. M. Banerji*, for the Applicant.

Messrs. *M. L. Agarwala* and *A. P. Dube*, for the Opposite Parties.

JUDGMENT.—On the 8th of March 1920 nine persons put in a petition before the District Magistrate of Bulandshahr, in which they asserted that Sher Ali Khan, the *mukhia* of the village of Mangalpur, had been guilty of various acts of oppression and was of a character generally defamatory of him. That application was enquired into by a Tahsildar under the orders of the District Magistrate and in the course of enquiry certain persons were called as witnesses and gave their evidence on oath. The result of that enquiry was on the whole favourable to Sher Ali Khan with the result that he was not removed from the *mukhiaship* as obviously was desired by the petitioners. Sher Ali Khan asked for sanction to prosecute two of the witnesses for statements made by them which he said were deliberately false. That application was dismissed by both the Courts below and I have refused to interfere in it to-day. This case, however, is on a different matter. In this case Sher Ali Khan filed a complaint under section 500 of the Indian Penal Code against 16 men in the Court of a Magistrate of the First Class. That Magistrate proceeded under section 202 of the Criminal Procedure Code and examined Sher Ali Khan. Having done so, he passed the following order:—

"I have looked into the statements taken by the Tahsildar. They were recorded in connection with an enquiry about the *mukhia*. The enquiry was not public and I think no action can be taken against the persons making them. The public has no access to these statements. I cannot proceed against the persons accused under section 500 of the Indian Penal Code. I dismiss the complaint under section 203 of the Criminal Procedure Code." The learned Magistrate has quite overlooked the fact that the complaint is made not only against such persons as were called and examined before the Tahsildar but also against all the signatories of the original complaint against Sher Ali Khan and six other persons. On revision from this order the learned District Magistrate said:—

"I entirely agree with the decision of the lower Court. The statements complained of were made by parties summoned for examination by the Tahsildar and in answer to his questions. No case under section 500 can lie in respect of them. Application disallowed." Here, again, the learned District Magistrate has fallen into the same error. The offence of defamation is defined in section 499 of the Criminal Procedure Code. It has been held by this Court that a witness has no greater protection against a charge of defamation than any other person and that a witness in order to be protected from a statement *prima facie* defamatory made by him must bring himself within one or more Exceptions to section 499. I think both Courts below have misdirected themselves as to the precise matters that they should have enquired into. I, therefore, set aside the orders of the Courts below and send the record back to the Magistrate with directions to hold a proper enquiry under section 202 of the Criminal Procedure Code and, having regard to the provisions of section 499 and the exemptions thereto, to dispose of the complaint according to law. I have come to no sort of conclusion on the merits of the case.

Order set aside.

HIRA SINGH *v.* SHEIKH MOSAHEB.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 49 OF 1919.

December 9, 1920.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Ross.

HIRA SINGH—APPELLANT

versus

SHEIKH MOSAHEB AND OTHERS—RESPONDENTS.

Muhammadan Law—Dower—Gift in lieu of dower, nature of—Presumption—Widow in possession—Adverse possession.

There is no presumption that a gift made by a Muhammadan husband to his wife in lieu of dower is an absolute gift, or that in such a case the wife is only to remain in possession of the property so long as her claim is not satisfied out of the profits of the property. [p. 867, col. 1.]

Where, however, the widow is in possession to satisfy herself out of the proceeds of the property for arrears of dower, her position is that of a usufructuary mortgagee, and she cannot by any act of her own so alter the nature of her possession as to make the Statute of Limitation run against those who are entitled to the equity of redemption. [p. 867, col. 2.]

Letters Patent appeal against the judgment of Mr. Justice Das, dated the 8th May 1919, in Second Appeal No. 1167 of 1917, reversing a decree of the Subordinate Judge, First Court, Saran, dated the 14th August 1917, affirming a decree of the Munsif, Chapra, dated the 1st July 1916.

Messrs. *P. Dayal* and *H. Sahai*, for the Appellant.

Mr. *S. Sami*, for the Respondents.

JUDGMENT.

MILLER C. J.—This is an appeal from a decision of a learned Judge of this Court, under clause 10 of the Letters Patent.

The defendant No. 1, Ram Lagan Sab, is the appellant. The plaintiffs and the remaining defendants are the heirs of one Teg Ali who held during his lifetime the four *bighas* of land which forms the subject of the present suit. Sheikh Teg Ali died in the year 1886 and it is not now disputed that before his death he made over this property to his widow in lieu of dower. The question which formed the main dispute in the suit was, whether this was an absolute gift out and out, thereby discharging the liability for dower entirely, or whether it was, what there is reason to believe is more usual amongst Muhammadans, a mere putting the wife in possession for the purpose of satisfying herself for the arrears of her dower out of the proceeds of the property, in which case she would be entitled to remain in possession so long, and so long only, as the arrears of dower were not satisfied from the proceeds of the property.

The appellant, the defendant No. 1, in the year 1909, long after the death of Teg Ali, purchased from his widow the property in dispute. Subsequently, in 1913, a suit was decided in which one of the defendants (defendant No. 2) and the defendant No. 1, the present appellant, were parties in which it was found that *Musammat* Maniran, the widow of Teg Ali, had an absolute interest in the property in suit. The other parties to the present suit are, of course, not bound by anything which was decided in that case. Either in, or sometime before, the year 1915 *Musammat* Maniran died and in that year the present suit was instituted by the plaintiffs claiming possession jointly with the other defendants than the appellant of the property in question. The defence put forward by the appellant was that *Musammat* Maniran was the absolute owner of the property and, therefore, entitled to convey it to him as she did in the year 1909. Secondly, he pleaded that the suit was barred by limitation because, more than 12 years before the institution of the suit, namely, in the year 1895, *Musammat* Maniran had got her name recorded as *kashtkar* of the property in question in the Record of Rights and that that was an open assertion of title and from that moment her possession became hostile to the heirs or any body else claiming under Teg Ali.

When the matter came before the learned Munsif there was evidence by both parties as to what happened on the occasion when the property was, to use a neutral word, made over to *Musammat* Maniran, the plaintiffs contending that she was merely put in possession in order to satisfy the arrears due to her in respect of her dower, the defendants, on the other hand, endeavouring to make out that there had been an absolute gift. The learned Munsif considered, having regard to the fact that the *Musammat's* name had been recorded as the *kashtkar* in the Record of Rights, that the strong probabilities were that the defendants' case was the true one and he considered that the evidence adduced by the plaintiffs to prove that the disputed property was not given to Maniran absolutely was extremely inadequate and did not rebut

the presumption arising from the entry in the Record of Rights, and found that the disputed property belonged absolutely to Maniran and that the plaintiffs had no title.

On appeal the learned Subordinate Judge unfortunately made use of some expressions which have given rise to considerable difficulty in this appeal. He said, after dealing with the case put forward by the parties: "It is an admitted fact that Teg Ali died more than 30 years ago and it is common ground that he gave the land to his wife in lieu of dower before his death." If the learned Judge meant by that that it was common ground that there was an absolute gift to the wife then, clearly, that is not justified by the facts of the case; but he cannot have meant more than that it was common ground that the land was transferred into the control and possession of the wife because the next sentence goes on as follows: "The only question is whether Teg Ali gave the land absolutely to his wife or only allowed her to remain in possession until the dower was paid up." That really was the question in dispute between the parties. Then he goes on and says: "There is no evidence worth the name on either side to prove their respective allegations." By that the learned Judge, I think, clearly was referring to the oral evidence which was given by the parties relating to the incidents which took place shortly before Teg Ali's death. He then goes on: "The facts can be gleaned from the subsequent events only. Where a husband gives land to his wife during his lifetime in lieu of dower it is usually an absolute right that is given. The subsequent circumstances in the present case also point to the same conclusion." The learned Judge then dealt with the circumstances and came to the conclusion that the widow had an absolute right in the property even before her husband's death and, therefore, that the suit against the defendant No. 1 must fail.

When the matter came before the learned Judge of this Court on appeal from that decision much was made of the fact that the learned Subordinate Judge had stated that, where a husband gives land to his wife during his lifetime in lieu of dower, it is usually an absolute right that is given and it was argued that that could only mean, in the mind of the learned Judge, that where a wife had been put in possession of property in lieu of dower there was a presumption that the transaction was an absolute gift and not merely a putting of the wife in possession for the purpose of satisfying her dower out of the proceeds. There was clearly no evidence on the record to support that view of the learned Judge which, if it means anything, means that he thought there was a presumption in favour of a gift, and it was argued that his decision on the question of fact must have been considerably influenced by assuming that such a presumption in such a case arose, and, therefore, his judgment could not stand. It was contended, in addition, that so far from there being any such presumption the presumption was in fact the other way and a passage in Mr. Tyabji's well-known book on Muhammadan Law was referred to and is quoted in the judgment of the learned Judge of this Court from whose decision this appeal is brought. The passage appears at page 124 of the first edition of that book. It is says, "Where a Mussalman widow is in possession of property of her deceased husband in lieu of her dower:—

"(1) she is under the liability to account to the heirs of the deceased for the profits received by her; and

"(2) she is herself entitled to charge interest on the dower due to her and to set it off against the said profits."

The learned Judge having quoted that passage came to the conclusion that, in all cases where a Muhammadan widow is found in possession of property in lieu of dower after her husband's death, her position is that of a usufructuary mortgagee and that she is entitled to remain in possession merely as a mortgagee in order that her claim for dower might be satisfied out of the rents and profits and that she is in no case entitled to any larger interest. He came to the conclusion that, if her position was that of a mortgagee in possession, she was clearly not entitled to execute a conveyance in respect of the property in favour of the defendant No. 1, and that, having regard to what her actual position was, namely, that of a mortgagee in possession she could not acquire a title by adverse possession by having her name recorded as a *kashtkar* in the Record of Rights, and that no act on her part could bar the right of the heirs of Teg Ali to sue for possession of the property as against

the widow or her transferees on the ground that her claim for dower had been satisfied and that, therefore, they were entitled to the equity of redemption in the property. With great respect to the learned Judge, I think that he was not justified in assuming from the passage which he quoted from Mr. Tyabji's work on Muhammadan Law that in no case could an absolute gift of property be made to a Muhammadan wife in lieu of her dower. I can see no reason in law why the husband should not during his lifetime satisfy his liability to pay his wife's dower just as much out of real property as out of personal property, such as money. The dower can be paid off at any time during the joint lifetime of the husband and wife. It can certainly be paid in money, although it may not be usual to do so, and I can see no reason why a conveyance of landed property should not be made to the wife as an out and out transfer of onwership for the purpose of satisfying the dower. In fact, in another passage in the work of the learned author to which reference has already been made, at page 318 of the First Edition, it is clearly stated that a gift by a husband to a wife during his lifetime by way of payment of her dower is a gift for which there is a good consideration and may be treated as a *hiba-bil-iwaz*. In these circumstances, it seems to me, although I agree with the learned Judge of this Court that the decision of the Subordinate Judge cannot stand because he assumed a presumption to exist which, in my opinion, has no legal foundation, nevertheless, the matter is not concluded and ought to go back again to the Subordinate Judge for further consideration for him to determine upon the evidence already given and upon the surrounding circumstances of the case whether in fact the transaction which took place shortly before the death of Teg Ali was an out and out gift to his wife or was merely a transaction whereby she was put in possession of the property to satisfy herself for her arrears of dower out of the rents and profits of that property.

It was contended on behalf of the appellant that it was not necessary to send the case back because, in any view of the facts, he and his predecessor in-title, the widow, had acquired by adverse possession an absolute title to the property the adverse possession being evidenced by the fact that the Record of Rights recorded the widow as the *kashtkar* of the property. That point, of course, only arises upon the hypothesis that the widow was in possession to satisfy herself out of the proceeds for arrears of dower, in other words, that she was in possession as a usufructuary mortgagee because that is practically the position with regard to the property in such a case. It seems to be well settled, as the learned Judge has pointed out, that in such a case the act of the mortgagee cannot alter the nature of the possession as to make the Statute of Limitation run against those who are entitled to the equity of redemption. If that be so, and I see no reason to differ from the learned Judge on that part of the case, it follows that no question of limitation can arise in this case out of the facts which have been either proved or admitted. At the same time, these facts, namely, that the widow has been recorded in the Record of Rights as the *kashtkar* and the fact that nothing has been done by those who are now claiming to recover the property may have a material bearing on the mind of the learned Subordinate Judge when he comes to decide the real question in the case and he is entitled to take these facts into consideration in endeavouring to arrive at the truth. With these directions, I think that the case should be remanded to the Subordinate Judge to arrive at a conclusion of fact upon the main question in the case without giving any weight to the consideration which influenced him in the first instance where he found that in such a case as this it is usually an absolute right which is given. There is no such presumption that it is usually an absolute right and therefore, that matter must be left out of consideration by the Subordinate Judge and must not be allowed to influence his judgment in any way. The costs of this appeal and of the appeal to the learned Judge of this Court will abide the ultimate result of the suit.

ROSS, J.—I agree.

Case remanded.

BIDHUMUKHI DASI *v.* BHABA SUNDARI DASI.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1026 AND 1027 OF 1917.

June 30, 1920.

Present :—Justice Sir N. R. Chatterjea, Kt. and Mr. Justice Newbould.

IN No. 1026 OF 1917.

BIDHUMUKHI DASI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHABA SUNDARI DASI—PLAINTIFF, AND KALA KUTI BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No 1027 OF 1917.

UMESH CHANDRA SUR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHABA SUNDARI DASI—PLAINTIFF, AND KSHITISH CHANDRA CHATTERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 167—Mortgage of holding—Decree on mortgage, effect of—Subsequent sale of holding in execution of rent decree—Purchaser, position of.

B held a mortgage of an occupancy holding and on 4th February 1912 obtained a decree upon the mortgage, in execution of which he, on 19th November 1913, purchased the holding. On the 19th March 1912, however, the landlord, in execution of a decree for arrears of rent against the tenant, purchased the holding and obtained formal possession on 7th June 1912. On 18th May 1914 he brought the present suit for possession, and *B.* was subsequently joined as defendant, and after he had been so joined a notice was served upon him, under section 167 of the Bengal Tenancy Act, on the 5th May 1915:

Held, that, inasumch as the sale in execution of the mortgage-decree took place after the sale in execution of the rent-decree it had not the effect of extinguishing the mortgage encumbrance at the date of the sale in execution of the rent-decree and that at that date the mortgagee had a subsisting encumbrance: that the purchaser at the sale in execution of the rent-decree took subject to that encumbrance, and was, therefore, bound to annul the encumbrance within the time limited by section 167 of the Bengal Tenancy Act, and not having done so, the encumbrance still subsisted; but that his position was that of a purchaser of the equity of redemption, and as he was no party to the mortgage-decree or to the sale in execution of which *B.* purchased the mortgaged property, it was open to him to redeem the mortgage. [p. 871, col. 2; p. 872, col. 1.]

Appeals against the decrees of the Subordinate Judge, First Court, Jessore, dated the 10th of March 1917, reversing that of the Munsif, Second Court at Narail, dated the 30th of June 1915.

Babus *Surendra Chandra Sen* and *Hemendra Chandra Sen*, for the Appellants.

Babus *Gunada Charan Sen*, *Prashanta Bhusan Gupta* and *Sarat Chandra Dutta*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by an auction-purchaser of a holding, at a sale for arrears of rent to recover possession of the lands comprised in the holding, from the defendant who had subsequently purchased the same at a sale in execution of a decree upon a mortgage executed by the tenant.

It appears that the tenant had mortgaged the holding to the defendant, Bidhumukhi, in 1901. A suit was brought upon the mortgage in 1911 and was decreed by the Court of first instance on the 6th February 1912, and Bidhumukhi purchased the holding in execution of her mortgage-decree on the 19th November 1913.

In the meantime, the landlord obtained a decree for arrears of rent against the tenant, and in execution of that decree the holding was purchased by the decree-holder (the plaintiff) on 19th March 1912. He obtained formal delivery of possession on the 17th June 1912, and on the 31st August 1912, served notices under section 167 of the Bengal Tenancy Act upon the defendants (other than Bidhumukhi) who held the lands as under-*raiyats* under her.

On the 2nd April 1913, an application was made by Bidhumukhi for setting aside the sale, which, however, was dismissed on the 15th December 1913. The present suit for possession was instituted on the 18th May 1914 originally against the other defendants, and Bidhumukhi was subsequently joined as a defendant. A notice was served upon her under section 167 of the Bengal Tenancy Act on the 15th May 1915 after she had been joined as party to the suit.

The Court of first instance held that the incumbrance held by Bidhumukhi had not been annulled within one year from the date of plaintiff's knowledge of the incumbrance and accordingly dismissed the suit. On appeal the learned Subordinate Judge, relying upon the case of *Gopi Nath* v. *Kashi Nath* (1), held that the plaintiffs' purchase would prevail over that of the defendant and that the question of notice upon her did not, therefore, arise and accordingly decreed

(1) 1 Ind. Cas. 85; 13 C. W. N. 412; 9 C. L. J. 234.

the suit. The defendants have appealed to this Court.

Now, the plaintiff as the purchaser of the holding purchased it with power to annul all incumbrances. At the date of the sale, *viz*, on the 19th March 1912, the defendant Bidhumukhi had an incumbrance (a mortgage) on the holding. She had obtained a decree upon her mortgage on the 6th February 1912, but we do not think that the mortgage was extinguished by the decree passed upon it. It is true that in the case of *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (2) it was observed by Hill and Brett, JJ., that when a mortgagee of a tenure had enforced his lien and obtained a decree it would no longer remain an incumbrance on the tenure which could be avoided under the provisions of section 167 of the Bengal Tenancy Act. It appears, however, that three contentions were raised in that case, *viz.*, first, that the sale was not under the Bengal Tenancy Act; secondly, that the notice under section 167 was not legal, and the application for service of notice having been made more than one year after the date of the sale or the date on which the purchaser had first notice of the incumbrance, was barred by limitation, and thirdly, that after the applicant had sued on his mortgage and had obtained a decree the mortgage lien had been extinguished and had become a judgment debt which could not be annulled under the provisions of section 167. The learned Judges observed that it was not necessary to go at length into the first and third contentions, as they considered that the appeal must succeed on the ground of limitation, the application under section 167 of the Bengal Tenancy Act having been made more than one year after the date on which the purchaser had notice of the incumbrance. There is, however, the observation which runs as follows:—

"After, as in this case, the mortgagee had enforced his lien and obtained his decree, it seems difficult to hold that the decree would remain as an incumbrance on the tenure which could be avoided under the provisions of section 167 of the Tenancy Act." But if there was no incumbrance after a decree was obtained upon the mortgage, there was nothing to annul and no question of limitation of one year under section 167 could arise, and yet the case was decided upon the question of limitation. The observation quoted above, therefore, was inconsistent with the decision as, has been pointed out in the case of *Banbihari Kapur* v. *Khetra Pal Singh Roy* (3). The case of *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap* (2) was referred to by Harington and Brett, JJ., in *Gopi Nath* v. *Kashi Nath* (1), but the decision in the latter case turned upon the question of priorities which we will deal with later.

It is well established that a mortgage lien is not extinguished on the passing of a decree upon it. The security is not extinguished till the sale takes place in execution of the mortgage-decree and the sale proceeds are distributed in satisfaction of the mortgage-debt. See *Bibiian Bibi* v. *Sachi Bewah* (4), *Surjiram Marwari* v. *Barhamdeo Persad* (5), *Jog Narain Singh* v. *Badri Das* (6) and *Basant Kumar* v. *Khulna Loan Company* (7).

The learned Pleader for the respondent, however, contends that the security became extinguished when the sale took place in execution of the mortgage decree and there was no longer any incumbrance which the plaintiff was required to annul. In the case of *Banbihari Kapur* v. *Khetra Pal Singh Roy* (3), the learned Judges held that, where a mortgagee of a tenure gets a decree and purchases the mortgaged tenure at a sale in execution of his mortgage-decree, and the tenure is subsequently sold again in execution of a rent-decree against the original tenant, it is open to the mortgagor to fall back on his mortgage as a shield against the purchaser under the rent sale when that sale is not free from incumbrances. The learned Judges relied upon the case of *Bhawani Koer* v. *Mathura Prasad* (8).

In that case the mortgagee of certain shares in four out of seventy-one villages comprised in a revenue paying estate obtained a decree on his mortgage, and at the sale held in execution of the decree purchased the properties

(2) 29 C. 813.

(3) 13 Ind Cas. 735; 38 C. 923; 16 C. W. N. 259.
(4) 31 C. 883; 8 C. W. N. 694.
(5) 2 C. L. J. 202 at p. 214.
(6) 13 Ind. Cas. 144; 16 C. L. J. 156 at p. 159.
(7) 26 Ind. Cas. 197; 20 C. L. J. 1 at p. 8; 19 C. W. N. 1001.
(8) 7 C. L. J. 1 at p. 20.

mortgaged on the 19th March 1900. On the 20th March 1900 an instalment of Government revenue on the seventy one villages fell into arrears, and a share of the whole estate, including the four villages purchased by the mortgagee, was notified for sale. The purchaser did not pay the revenue, and on the 23rd April obtained a certificate confirming the sale held on the 19th March. On the 6th June 1900, the villages were sold for arrears of revenue, and the purchaser at that sale sued the purchaser at the mortgage sale for possession of the share purchased by the latter. The learned Judges, Brett and Mookerjee, JJ., were of opinion that, although the purchase at the mortgage sale was confirmed before the revenue sale, yet as it was confirmed after default and without any knowledge on the part of the purchaser at the mortgage sale that default had been made, the latter was entitled to rely upon his mortgage and use it as a shield for his protection against the purchaser at the revenue sale. It was accordingly held that the purchaser at the revenue sale purchased the share subject to the incumbrance under section 54 of Act XI of 1859. That decision, however, was set aside on appeal by the Judicial Committee : [See *Bhawani Kumar* v. *Mathura Prasad Singh* (9)]. Their Lordships held that the property mortgaged passed to the mortgagee on the 19th March 1900 when the sale took place, that he became the owner of the property and liable for the revenue which fell due after the date, and that he could not maintain as against himself or as against third parties unconnected with the mortgage transactions upon the property, the position that his mortgage still remained an incumbrance thereon.

In that case, however, the mortgage sale took place and the mortgagee became owner of the property before the revenue sale took place. His incumbrance upon the property had, therefore, become "extinct and lost in the mortgagee's overriding right when he became the complete owner of the lands." In the present case the sale in execution of the mortgage decree did not take place until after the sale in execution of the rent-decree. The defendant, therefore, had not become the owner of the mortgaged property at the date of the sale held in execution of the rent-decree. But reliance is placed upon certain observations of their Lordships which run as follows:—

"Furthermore, if the properties, which were the subject of sale, were liable to attachment for sums due from the lands as revenue, and falling into arrear subsequent to the actual date of sale, namely, the 19th March 1900, it was not within the legal right of the mortgagee on the one hand to claim as against the mortgagor that the ownership of the property had been transferred, and, at the same time, to claim against the Government, or in respect of third parties unconnected with either mortgagor or mortgagee, that the mortgagor had not transferred the rights of ownership to the mortgagee, but himself remained in the position of owner. For the mortgagee to be permitted to say to the mortgagor that the ownership had been transferred, and to say to an outsider, like the Collector of revenue, that the ownership had not been transferred, is a conclusion not supported by good sense and, in the opinion of their Lordships, they are not forced to it by any canon or rule of law," and again : "In their Lordships' opinion it is clearly unsafe to apply considerations as to the rights of prior and succeeding mortgagees to questions like the present. For, in the present case, no question arises as between a first and succeeding mortgagee, and no right or duty emerges with regard to the avoidance of an inequitable priority alleged to arise inferentially by acquisition of the estate." Their Lordships, however, in the next sentence observed: "On the 19th March 1900, the crucial date in question, there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such. In these circumstances, when the 29th March 1900 was reached, the property which fell then into arrear of revenue and became liable to subsequent sale was the property in fact and in law of no one but the purchaser, namely, the mortgagee."

The decision of the Judicial Committee was based upon the ground that the ownership of the property mortgaged had passed completely to the mortgagee before the

(9) 16 Ind. Cas. 210; 40 C. 89; 16 C. W.N. 985; 23 M. L. J.311; 12 M. L. T. 352; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P. C.).

arrears of revenue fell due and, consequently, before the sale which took place for those arrears; and the observations of their Lordships must be taken in connection with the facts of that case. In the present case, on the other hand, the mortgagee had a subsisting encumbrance at the date of the sale which was held in execution of the rent decree. The case of *Bhawani Kumar* v. *Mathura Prasad Singh* (9), therefore, is distinguishable from the present.

The lower Appellate Court relied upon the case of *Gopi Nath* v. *Kashi Nath* (1). In that case, it appears that after a mortgagee had obtained a decree for sale on his mortgage, the landlord of the *jote*, the subject of the mortgage, brought a suit for rent and sold the *jote* in execution of a decree obtained therein. Later on, the property was sold in execution of the mortgage-decree and purchased by the mortgagee who took possession. In a suit for possession brought by the purchaser at the rent sale after service of notice on the mortgagee under section 167 purporting to annul the mortgage, it was held by Harington and Brett, JJ., that the question was really one of priorities, and the purchaser at the rent sale had priority over the purchaser in execution of the mortgage-decree. Harington, J., observed that by section 65 of the Bengal Tenancy Act the arrears of rent are made a first charge on the holding, that the mortgagee of the holding when he sold the holding in execution of his mortgage decree was in the position of a second mortgagee, the property having been already sold in execution by the landlord, who was *qua* his decree for arrears of rent in a position very similar to that of a first mortgagee. Brett, J., also was of opinion that the purchaser in execution of a rent-decree has priority over the purchaser in execution of a mortgage-decree. The decision was followed by Brett and Sharf-uddin, JJ., in *Taibatannessa Chowdhurani* v. *Pravabati Dasi* (10).

No doubt, section 65 of the Bengal Tenancy Act lays down that "rent shall be a first charge." But the analogy does not go further than that. In the first place, in ordinary mortgage transactions, a prior mortgagee must make the puisne mortgagees parties to a suit on the mortgage in order that the sale held in execution of the decree might be binding upon them, but a mortgagee on a holding or tenure is not made a party to a suit for rent by the landlord, and he is not bound to do so, although the rent is a first charge; and the mortgagee cannot bring a suit for redemption or otherwise exercise his right of redemption after the rent sale, on the ground that he was not a party to the rent decree and was not bound by the sale. In the next place, the learned Judges in the two cases cited above do not appear to have considered the provision of Chapter XIV of the Bengal Tenancy Act in determining the rights of a purchaser at a sale for arrears of rent and those of a mortgagee, respectively. Section 159 provides that where a tenure or holding is sold in execution of a decree for arrears due in respect thereof the purchaser shall take subject to the interests defined in the Chapter as "protected interest", but with power to annul the interests defined in that Chapter as "incumbrances" provided (among other things) that the power to annul shall be exercisable only in the manner directed by the Chapter. Section 161 lays down that, for the purposes of Chapter XIV, the term "incumbrances", used with reference to a tenancy, means (among other things) any 'lien' created by the tenant on his tenure or holding, and section 167 prescribes that a purchaser desirous of annulling an incumbrance must present an application to the Collector within one year from the date of the sale or the date on which he first has notice of the incumbrance for service of notice on the incumbrancer. So that, notwithstanding that section 65 provides that "rent shall be a first charge" on a tenure or holding, the purchaser must take steps as laid down in section 167 for annulling the mortgage. If he does not do so within the time specified in section 167, the mortgage remains an incumbrance even though the purchaser at the rent sale may be in the position of a first mortgagee.

It is clear, therefore, that if there is a mortgage on the holding which is not annulled by the purchaser within the time limited by section 167, the tenure or holding continues to be liable for such mortgage and the analogy of first and subsequent in-

(10) 4 Ind. Cas. 750; 10 C. L. J. 640.

encumbrances will not avail the purchaser at the rent sale.

As stated above, the incumbrance held by Bidhumukhi (the mortgagee) subsisted at the date of the rent sale. The plaintiff as the purchaser at the rent sale took the property subject to that incumbrance. The fact that the mortgagee enforced her mortgage after the date of the rent sale could not affect the incumbrance subject to which the plaintiff purchased at the rent sale. The question whether the incumbrance was extinguished or was subsisting has to be considered, we think, with reference to the date of the rent sale. The plaintiff was, therefore, bound to annul that incumbrance within the time limited by section 167 of the Bengal Tenancy Act, and, not having done so, the incumbrance still subsists. We do not think, however, that the mortgagee (Bidhumukhi) can claim the right of owenership of the property (by virtue of her purchase) as against the plaintiff. The position of the plaintiff was that of a purchaser of the equity of redemption and he was no party to the mortgage-decree or the sale in execution of which the mortgaged property was purchased by Bidhumukhi. It is open, therefore, to the plaintiff to redeem the mortgage and we think that he may be allowed that relief in the present case. We accordingly direct that, upon the plaintiff's paying off Bidhumukhi, the amount for which the mortgaged propety was sold, within two months of the arrival of this order in the Court below the plaintiff will get possession of the property. The defendant will not be entitled to get any interest on the decretal amount and the plaintiffs will not be entitled to get any *wasilat*. The defendants other than Bidhumukhi claim title under her, and if the plaintiff gets possession against Bidhumukhi he will get possession against the other defendants also. If the said amount is not paid within the period specified above, the decree of the lower Appellate Court will be set aside and the plaintiffs' suit dismissed. The parties to bear their own costs in all the Courts. This order will govern the other Appeal No. 1027 of 1917

Order accordingly.

PATNA HIGH COURT.

CIVIL REVISION CASE No. 189 OF 1918.

November 15, 1920.

Present:—Mr. Justice Das and Mr. Justice Adami.

Babu KRISHNA LAL JHA—APPELLANT

versus

Babu MANDESWAR JHA—RESPONDENT.

Hindu Law—Joint family—Partition, suit for—Death of co-parcener after preliminary decree, effect of—Jurisdiction of Court passing final decree to consider effect of death on shares of other co-parceners.

Although, ordinarily, the rights of the parties to a suit ought to be determined as at the date of the institution of the suit, a suit for partition under the Hindu Law is treated as an exception, and, in order to save costs and to prevent multiplicity of proceedings, the Courts are entitled, and even bound, to take into consideration matters subsequent to the commencement of the suit. [p. 873, col. 1.]

In point of law, a partition action does not come to an end with the preliminary decree, but continues till the final decree is made, and the shares to be decreed to the parties must be those to which they are entitled on the date of the final decree. Therefore, where a co-parcener dies after the passing of the preliminary decree, the Court passing the final decree is competent to consider the effect of the death on the shares of the remaining co-parceners. [p. 873, col. 1.]

Civil revision from a decision of the Officiating District Judge, Darbhanga, dated the 7th June 1918.

Mr. *L. N. Singh*, for the Appellant.

Messrs. *S. C. Mitra* and *Murari Prasad* for the Respondent.

JUDGMENT.

DAS, J.—I have considered the matter very carefully and I am of opinion that the learned District Judge had complete jurisdiction to pass the order which we have been asked to revise in these proceedings. The point made before us is, that the learned District Judge has in effect amended the decree of this Court. It is true that the preliminary decree in the partition action was passed by this Court* and that this Court remitted the case to the Court below in order to enable that Court to make the distribution according to the directions contained in the decree of this Court. But I cannot regard the order passed by the learned District Judge as an order of amendment of the decree of the High Court. An event occurred after the passing of the preliminary decree, namely, the death of a co-parcener entitled

*See *Krishna Lal Jha* v. *Nandeshwar Jha*, 44 Ind. Cas. 146—[*Ed.*]

to a share on partition, which it was essentially necessary for the Court to take note of in making the distribution; and the order complained of was an order rendered necessary by an event which occurred subsequent to the preliminary decree. Although, ordinarily, the rights of the parties ought to be determined as at the date of the institution of the suit, a suit for partition under the Hindu Law is treated as an exception and, in order to save costs and to prevent multiplicity of proceedings, the Courts are entitled, and even bound, to take into consideration matters subsequent to the commencement of such a suit. I am of opinion, therefore, that the order of the learned District Judge cannot be regarded as an order of amendment of the decree, but that it was an order rendered necessary by an event which occurred subsequent to the preliminary decree.

It was next argued on behalf of the petitioners that the foundation of allotment is the preliminary decree, and that the only Court which can take note of subsequent events is the Court which passed the preliminary decree. I confess that this argument considerably impressed me at the time when it was advanced, but having considered the matter very fully, I have come to the conclusion that it does not deserve success. Much could be said in favour of the argument if the proceedings in connection with the final decree were proceedings in execution of the preliminary decree or if the shares to be decreed to the parties were those to which they were entitled on the date of the preliminary decree. But in point of law, the partition action does not come to an end with the preliminary decree, but continues till the final decree is made, and it has been held that the shares to be decreed to the parties must be those to which they are entitled on the date of the final decree. If proceedings in connection with the final decree be proceedings in the partition action, then the Court of the District Judge was the only Court which was in seisin of the partition proceedings. The High Court having passed the preliminary decree and remitted the case to the Court of the District Judge, ceased to exercise any dominion over the action; and I cannot think how the application which resulted in the order sought to be revised, which it must be remembered, was an application in the action, could possibly have been made to the High Court when the Court of the District Judge was in seisin of the action. In the next place, if the proposition be correct that the shares to be decreed to the parties must be those to which they are entitled on the date of the final decree, then it seems to me that the Court which has to pass the final decree is the only Court which can determine to what shares the parties are finally entitled. My only doubt is whether the order of the learned District Judge is not a decree within the meaning of section 2 (2) of the Code and as such appealable under the Code. But that question does not arise in this application which is an application to set aside the order of the learned District Judge on the ground that he had no jurisdiction to make it. I hold that he had complete jurisdiction to make the order, and must refuse this application with costs. Hearing fee two gold *mohurs*.

ADAMI, J.—I agree.

Application refused.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1224 OF 1917.

May 31, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Kanhaiya Lal.

BENI MADHO PRAGWAL—DEFENDANT—APPELLANT

versus

HIRA LAL—PLAINTIFF—RESPONDENT.

Injunction—Pragwal *using flag to indicate his presence to pilgrims—Use of similar flag by another* Pragwal *to deceive pilgrims—Suit to restrain latter, maintainability of.*

S, a Pragwal, carried on the business of ministering to the wants of pilgrims at the sacred confluence of the waters at Allahabad: he used a flag with a particular emblem as a means of identification for illiterate pilgrims that they would find him at the spot where the flag was fixed: on his death *B.* carried on the business as the agent and representative of the widow of the deceased: on her death plaintiff, the nearest reversioner, succeeded to the estate of *S.*, but he was obstructed in carrying on the business aforesaid by *B.* who also set up a similar flag in the neighbourhood of the plaintiff. Plaintiff brought the present suit to restrain *B.* from interfering with his business:

BENI MADHO *v.* HIRA LAL.

Held, that the right to which the plaintiff had succeeded was a heritable and transferable right, that he had a cause of action against *B* and was entitled to restrain him from interfering with his business by the use of a similar flag as the plaintiff's. [p. 875, col. 2.]

Second appeal against the decision of the District Judge, Allahabad, dated the 31st July 1917.

The Hon'ble Dr. *T. B. Sapru*, for the Appellant.

Kailas Nath Katju for The Hon'ble Pt. *Moti Lal Nehru*, for the Respondent.

JUDGMENT.—The parties to this litigation are Pragwals, that is to say, members of a certain class of priests, whose occupation it is to receive pilgrims at the sacred confluence of the waters at Allahabad and to assist them in the due performance of the ceremonies attendant on their bathing in these sacred waters, more particularly on the occasion of certain festivals generally revered. The findings of the Courts below are in substance as follows:—One Sri Krishen was a Pragwal carrying on this particular business. He used a flag with a certain emblem, which flag was fixed at the spot where at any particular time he had taken up his post on the river bank as a means of identification for the benefit of the illiterate pilgrims a sort of notice that if they came to the spot indicated by that flag they would find there Sri Kishen Pragwal, the descendant and successor by inheritance to the rights of a line of Pragwals with whom it had been customary for any particular pilgrim and his family for generations past to deal on the occasion of their visits to the sacred confluence. Sri Kishen died many years ago and his rights, whatever they were, passed to his widow *Musammat* Kesar. The defendant, Beni Madho, was a confidential servant or attendant of Sri Kishen and continued to serve the widow in the same capacity. His position was so far changed by the death of Sri Kishen that *Musammat* Kesar, being unable personally to minister to the wants of the pilgrims, he was in a position to undertake that duty; but according to the finding which we must accept in second appeal, he did so as her agent and representative. *Musammat* Kesar died in 1915 and the plaintiff, Hira Lal, is the nearest reversioner under Hindu Law to the estate of Sri Kishen, whatever that estate may be. The plaintiff claims the right to take over, if we may so express it, the business which had been carried on by Beni Madho as the agent of *Musammat* Kesar. He complains that his efforts to do so have been obstructed by the defendant. There has been a previous litigation, we may remark, in connection with an attempt made by *Musammat* Kesar to transfer certain houses to Beni Madho by way of gift. The essential fact upon which this suit is based is that, when the plaintiff takes his seat beside the waters in the neighbourhood of the confluence and sets up the flag which was used by Sri Kishen as his emblem, he finds the defendant Beni Madho also seated somewhere in the neighbourhood using a similar flag. There is a plea in the memorandum of appeal before us against the finding of the Courts below that the flag used by Beni Madho is a colourable imitation of that used by Hira Lal, but we must accept the clear finding of the lower Appellate Court on this point. We must take it that the flag set up by Beni Madho is calculated to mislead pilgrims into the belief that he, and not Hira Lal, is the successor and representative of Sri Kishen. The one substantial point which has been argued before us is, whether, upon these facts, the plaintiff has a cause of action against Beni Madho. The right in virtue of which the plaintiff brings this suit is one of a kind generally described by the expression '*birt jajmani*.' It would be easy to cite cases in which a right so described to receive offerings from pilgrims visiting a particular shrine has been recognised by the Courts in this Province and by this Court, as of the nature of property as being enforceable by suit, as being generally heritable and sometimes as being transferable. We have to consider what the particular right of *birt jajmani* means in connection with the ceremonial bathing at the confluence of the rivers at Allahabad. Obviously, no particular pilgrim can be compelled to seek the ministrations of any particular priest. It has been suggested also that no suit would lie by any particular priest against a pilgrim who had accepted his ministrations for the recovery of any particular fee. This latter argument, whether well founded or not, is of no practical consequence. As a matter of established custom, the pilgrims who accept the ministrations of a particular priest in connection with their ceremonial bathing do

pay him some remuneration for his services. Probably they would be too much afraid of the possibility of his calling down upon them the divine displeasure if they refused payment of whatever the customary fee may be. Now, it is beyond question, that is to say, it is apparent from the evidence on this record, it does not seem to have been seriously denied in the pleadings, and it would not be difficult to quote decisions of this Court which proceed on the assumption that particular pilgrims are in the habit of seeking out particular priests, or the descendants or representatives of some particular priest with whom they know that their family has dealt for generations. It may be that a pilgrim has greater faith in the due performance of all necessary ceremonies, and, therefore, in the religious benefit derivable from the ceremonial bathing, if he knows that it has been performed under the guidance and with the help of the prayers and ministrations of the representative of the priest with whom his family has been in the habit of dealing. The question then is, simply, whether the plaintiff is entitled to restrain Beni Madho from making use of an emblem, when such use in effect serves as a notice to the illiterate pilgrims that Beni Madho is the representative and successor of Sri Kishen, whereas such representative capacity belongs in law to the plaintiff, Hira Lal. The nearest case to the present, that of *Ganesh* v. *Babu Ram* (1) decided by a Bench of this Court of which one of us was a member, proceeds on the assumption that the *birt jajmani* right of Pragwals at the sacred confluence of the rivers at Allahabad is a right both heritable and enforceable at law. It is quite true that this point was not specifically argued in that case but the decision proceeds on the assumption that this was so. We have been referred to two other cases, one to be found in *Husain Ali* v. *Matukman* (2) and one in *Municipal Board of Cawnpore* v. *Lallu* (3), in which the question in issue was as to the right of certain priests to make use of a particular parcel of land to the exclusion of all other persons. In the former case the right was claimed as against a lessee of the Municipal Board of Benares and in the latter case as against the Municipal Board of Cawnpore. The decision of this Court in each case was that the plaintiff had failed to establish any right in the soil. No question arises in the present case as to the right of the plaintiff or of any other Pragwal to occupy any particular parcel of land. Indeed, as thus stated, the question could never arise in view of the notorious fact that the rivers are continually shifting their course, that the whole appearance of the sacred confluence may be altered and its locality shifted very considerably between one year and another. We are not concerned in this case with any question that may arise as to the relative rights of Pragwals to establish themselves nearer to the sacred confluence itself on any particular festival, or on any other occasion. Such a question can be dealt with if and when it arises. In the present case the question is, simply, whether the plaintiff has or has not a right to carry on a certain business in or about a particular locality, and whether the defendant has or has not given him a cause of action by unlawful interference with his conduct of that business. We think that these questions must be answered in the affirmative. This appeal, therefore, fails and we dismiss it with costs.

Appeal dismissed.

(1) 26 Ind. Cas. 427; 37 A. 72; 13 A. L. J. 9.
(2) 6 A. 89; A. W. N. (1883) 185; 3 Ind. Dec. (N S.) 593.
(3) 20 A. 200; A. W. N. (1898) 25; 9 Ind. Dec. (N. S.) 49.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 428 OF 1919.

August 9, 1920.

Present :—Mr. Justice Jwala Prasad.

NAND LAL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAMPHAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Road Cess Return—Bhaoli *land not mentioned*—*Rent, whether can be recovered.*

The fact that *bhaoli* is not mentioned with respect to any land in the Road Cess Return would not debar the landlord from claiming produce rent for the same. [p. 876, col. 1.]

NAND LAL SINGH v. RAMPHAL SINGH.

Appeal from a decision of the Sessions Judge, Muzafferpore.

Mr. *Ganesh Dutt Singh*, for the Appellants.

Mr. *H. N Prasad*, for the Respondents.

JUDGMENT.—This appeal arises out of a rent suit. There is no dispute as to the area comprised in the holding of the defendant, namely, 14 *bighas* odd. The plaintiff claimed cash rent at the rate of Rs. 51-12 6 with respect to 10 *bighas*, 6 *kathas*, 2 *dhurs* of the holding and *bhaoli*, *bataí* rate with respect to 4 *bighas* 6 *kathas*, 16 *dhurs*. The defendants' chief contention was that the entire holding was *nakdi* and that no portion of it was *bhaoli bataí*. The Courts below have concurrently overruled this contention and have given a decree to the plaintiff as claimed by him. The defendants have come to this Court in second appeal and dispute the correctness of the view taken by the Courts below.

The main contention of the learned Vakil on behalf of the appellants is, that the Courts below have not appreciated the documentary evidence filed on behalf of the defendants and have thereby vitiated the findings. The documents relied upon by the defendants are, (1) the Road Cess Return of 1902 (1309) Exhibit G, (2) plaint of a suit of 1904 (Exhibit 1), and (3) rent receipts for the years 1312 to 1318 (1905-1911). In the first of these documents, *i. e*, the Road Cess Return, the defendants' holding is shown to consist of 15 *bighas* odd with a rental of Rs. 55 odd. The contention is that section 20 of the Road Cess Act (IX of 1880) bars the right of the plaintiff to claim *bhaoli* rent with respect to a portion of the holding on the ground that the same was not entered in the Return. This contention is untenable. There is no provision in the Act for showing the *bhaoli* lands or the rent thereof in kind. Such lands have to be shown with the cash rent, ascertained upon the average of three years' share of the landlord in the produce of the land : *vide* section 14, read with section 4, of the Act. A bar under section 20 (*b*) does not apply to *bhaoli* lands. The fact that *bhaoli* is not mentioned with respect to any land in the Return would not, therefore, debar the landlord from claiming produce rent for the same. The form prescribed for the Return leads to the same conclusion. This view is supported by the authority of this Court in the case of *Upendra Lal Misra* v. *Moti Thakur* (1), the case precisely on the point. Therefore, that document is no evidence for the purposes contended for by Mr. G. D. Singh.

The next document is the plaint (Exhibit I) in the suit brought by the part proprietors of the estate against the defendants in 1904. No doubt, that plaint shows that the claim was made at a *nakli* rental and there is no mention of any portion of the land being *bhaoli*. We do not know what became of that suit. The written statement, the judgment and the decree have not been placed on the record. That document, at best, can only be a kind of admission by some of the proprietors of the estate.

The third class of document consists of rent receipts. The first Court suspected their genuineness. There is no precise finding of the lower Appellate Court on the point, nor has the finding of the Munsif been clearly displaced though there is a passage refuting the suggestion of the respondents that all the receipts were written by the same ink. These receipts are only of a few years back. Shortly after these receipts were granted, the estate passed to the plaintiff by sale. The subsequent conduct of the parties in connection with the land in dispute shows great suspicion as to the receipts and the contents of the plaint, and, at any rate depreciates their value. The plaintiff purchased the interest in the estate in the year 1319 and shortly after he instituted a suit for the realisation of rent from the defendants for the years 1318 to 1320, as back rents were also assigned to him. In that case, as is apparent from the decree, the claim was for *nakdi* rent at the rate of Rs. 51 with respect to 10 *bighas* only, as is claimed in the present case. The decree was made after contest as the judgment (Exhibit 3) shows, but no plea as to the entire holding being *nakdi* appears to have been raised in that case. The judgment may not operate as *res judicata*, but certainly is a piece of evidence under section 13 of the Evidence Act, as showing that the plaintiff

(1) 41 Ind. Cas. 61; 2 P. L. W. 35; 2 P. L. J. 617; (1918) Pat. 166.

asserted his right to *nakdi* only in respect of a portion of the holding. The Court below was right in using the judgment as corroborative of the entry in the Survey Record of Rights. That record clearly shows Plot No. 169, with the area 3.79 acres, equal to 4 *bighas*. The Record of Rights is in favour of the plaintiffs. The defendants have to rebut the presumption of its correctness. The Court below was perfectly justified in holding that the defendants failed to do so when the Record of Rights finds great support from an inter party decree of a more recent date than any of the defendants' documents. There is no error in law in this case and the judgment of the Court below must therefore, be upheld.

Mr. Ganesh Dutt Singh also disputed the amount of the decree passed by the Courts below for the *bhaoli* rent. This point does not appear to have been urged before the learned District Judge and it is not open to urge it in this Court.

The result is that the appeal is dismissed with costs.

The learned Vakil on behalf of the plaintiff filed a cross-objection in respect of the damages disallowed by the Courts below. I, however, agree with the reasons given by the learned Sessions Judge for disallowing the damages. The cross objection also is, therefore, disallowed.

Appeal dismissed.

S. N. Dutt
Advocate High Court
Jammu & Kashmir
Srinagar.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 303 OF 1920.

December 6, 1920.

Present:—Mr. Justice Broadway.

THE FIRM SURJAN MAL-KISHEN CHAND, THROUGH KISHEN CHAND—DEFENDANT—APPELLANT

versus

THE FIRM GIAN CHAND-CHIRANJI LAL, THROUGH GIAN CHAND—PLAINTIFF—RESPONDENT.

Sale of goods—Goods ordered despatched to buyer—Refusal to take delivery—Suit to recover price, whether maintainable.

In a case where damages are claimed for breach of a contract they become due on the date when the contract is broken, and must be calculated with reference to the rates prevailing on that date, but where the suit is for the recovery of the price of goods sold, this consideration does not apply. Where ascertained goods are sold and are despatched to the buyer, but the latter refuses to take delivery of the goods, the seller is entitled to sue him for the price of the goods. [p. 879, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Sialkot, dated the 3rd November 1919, affirming that of the Subordinate Judge, Second Class, Sialkot, dated the 25th June 1919.

Bakhshi *Tek Chand*, for the Appellant.

Dr. *Gokal Chand Narang*, for the Respondent.

JUDGMENT.—The firm of Gian Chand-Charanji Lal of Sialkot instituted the case giving rise to this appeal against the firm of Surjan Mal-Kishen Chand of Lahore and one Gulab Rai, agent of the defendant firm. The plaintiff firm claimed recovery from the defendant firm of a sum of Rs. 685. It was alleged that on the 1st October 1918 Gulab Rai, as agent of the firm of Surjan Mal-Kishen Chand, purchased from the plaintiff firm four bales of Sawadeshi Yarn No. 5 at the rate of Rs. 8-8-0 a bundle there being 40 bundles in each bale. This purchase was made at Sialkot and it was agreed that, as soon as it was possible, the yarn should be sent by rail to Ghakkar, where the defendant firm has a factory, and the railway receipt for the said yarn was to be sent to the defendant firm at Lahore through the Punjab National Bank. It is said that on the 3rd October 1918 the plaintiff firm despatched the yarn to Ghakkar and sent the railway receipt to the Punjab National Bank at Lahore for delivery to the defendant firm on payment of Rs. 1,361 as the price of the yarn. On the 4th October 1918 the defendant firm was asked to take the railway receipt from the Punjab National Bank on payment of Rs. 1361 but the defendant firm refused to pay the money and take the railway receipt. This fact was notified to the plaintiff firm by the Bank and two further efforts were made by the plaintiff firm to induce the defendant firm to take the railway receipt but both efforts were in vain. Notice was also given by the plaintiff firm calling on the defendant firm to take delivery. Finally, as the defendants had not taken delivery

of the railway receipt, the plaintiff firm sold the goods on the 21st November 1918 at the rate of Rs. 4-8-0 per bundle and thus realised Rs. 720. The plaintiff firm, therefore, brought this suit for the difference Rs. 641, *plus* Rs. 44, made up as follows : —

	Rs.	A.	P.
On account of railway freight ...	5	14	0
Bank charges ...	4	2	0
Demurrage ...	10	0	0
On account of interest from 1st October 1918 to 24th November 1918 ...	24	0	0
thus, making a total of	685	0	0

The defendant firm denied that Gulab Rai was ever their agent and that any purchase had been made by him on their behalf, and alleged that they had refused to take delivery of the railway receipt because of the fact that Gulab Rai was not their agent. The Trial Court held that Gulab Rai had been proved to be the agent of the defendant firm and that he had made the purchase as alleged by the plaintiff firm. Further, it was found that the goods had been despatched in accordance with the arrangement arrived at and that the defendant firm had no right to refuse the railway receip'. A decree was passed for Rs. 672-8-0 in favour of the plaintiff firm against the defendant firm, the interest being reduced to 6 per cent. per annum. The defendant firm then preferred an appeal to the District Judge who, however, dismissed it and the defendant firm have come up on second appeal to this Court through Bakhshi Tek Chand and I have heard Dr. G. C. Narang on behalf of the plaintiff firm, respondent.

Mr. Tek Chand contended that his clients were not liable in any way as it had not been proved that the price of the yarn on the 4th October had depreciated, and he further contended that the date for the purposes of calculating damages, if any, could only be the date on which the contract was broken, *i.e.*, when his clients refused to take delivery of the railway receipt, which was on the 4th of October. He pointed out that subsequent negotiations made no difference to the question of time at which the contract was broken. In this connection he cited section 120 of the Contract Act and Halsbury's Laws of England, Volume XXV, page 268, paragraph 467. No doubt, in a case where damages are claimed for the breach of contract they become due on the date when the contract is broken, and in the present case it seems to me that the contract was broken on the 4th of October when the defendants refused to take delivery of the railway receipt. The learned Vakil then contended that section 107 of the Contract Act had no bearing on the present case, inasmuch as that section requires that before a re-sale is effected notice should be given to the buyer of the intention to sell. Dr. Gokal Chand Narang objected to the point being raised in the Court inasmuch as the want of notice of intention to sell was not pleaded in the Courts below. *Jowala Singh* v. *Kala Singh* (1), *Allah Din* v. *Fateh Din* (2) and *Radha Shyam Basak* v. *Secretary of State for India* (3) relied on by Mr. Tek Chand are, however, in point and as the matter is one which is patent on the record, I think this point can and ought to be taken into consideration even at this stage.

Next Mr. Tek Chand contended that before section 107 of the Contract Act could be invoked it was necessary that the property in the goods should have passed to the vendee, and that in the present case the goods being unascertained such property had not passed to his clients and in this connection he referred me to section 82 of the Contract Act. On this point Dr. Gokal Chand Narang contended that the goods were ascertained. A large amount of yarn was lying in the plaintiff's godown of the same description as sold to the defendant firm under the contract, it was left to the plaintiffs to appropriate four bales and despatch them to Ghakkar. This appropriation was made by the plaintiff firm on the 3rd October when they despatched the goods by rail to Ghakkar. Section 84 of the Contract Act, therefore, he contended, was applicable and the goods became ascertained on the 3rd of October 1918. *Yule & Co.* v. *Mahomed Hossain* (4)

(1) 22 P. R. 1898.
(2) 45 Ind. Cas. 101; 31 P. R. 1918; 54 P. W. R. 1918; 27 P. L. R. 1918.
(3) 34 Ind. Cas. 30; 44 C. 16; 23 C. L. J. 547.
(4) 24 C. 124; 1 C. W. N. 71; 12 Ind. Dec. (N. S.) 748.

and *Jamal* v. *Mcolla Dawood, Sons & Co.* (5) cited by Mr. Tek Chand are not, in my opinior, against Dr. Gokal Chand's contention which I consider has force. In *Yule & Co.* v. *Mahomed Hossain* (4) the goods had to be tendered to the buyers on appropriation. This was done and the buyers refused delivery. In the present case the appropriation of the four bales was followed by delivery to the railway for conveyance to Ghakkar and the goods thus became ascertained. In *Jamal* v. *Moolla Dawood, Sons & Co.*, (5) the contract referred to shares and the delivery of these shares could not be made without certain acts being done which were not done. I think, therefore, that in the present case it must be held that the goods were ascertained.

If the suit is to be regarded as one for damages, the date on which the damages are to be calculated must, I think, be the 4th October 1918 as the plaintiffs were not entitled to extend the time. In this view I am supported by *Muthaya Manigaran* v. *Lakku Reddiar* (6) Dr. Gokal Chand Narang, however, contended that the suit was not a suit for damages but for the price of goods supplied and not paid for, and an examination of the plaint supports this contention for nowhere is the claim for damages, as such, specified. On the other hand, the facts are stated as given above. The goods were purchased by the defendant firm through their agent Gulab Rai.

Briefly put, Dr. Gokal Chand states his case as under :—

We sold certain goods to the defendants, which if not ascertained at the precise moment of the sale, became subsequently ascertained by virtue of section 84 of the Contract Act, and that delivery of these goods was made to the agent of the defendant firm, the agent being the railway, and that, therefore, they had the lien of an unpaid vendor on the goods within the meaning of section 95 of the Contract Act.

As I have said, the claim is one for the balance of the price of goods. The goods I consider had been ascertained within the meaning of the term as used in section 84 of the Contract Act. It is a little difficult, however, to hold that the delivery to the railway was a delivery on behalf of the defendant firm. It was a delivery on behalf of the consignee; in this case, admittedly, the consignee is the plaintiff firm itself. The railway receipt issued by the Railway Department was one in the name of the plaintiff firm and this railway receipt was endorsed in favour of the defendant firm and then despatched to the Bank at Lahore to be made over to the defendant firm against a payment of Rs. 1,361. Whether section 95 of the Contract Act applies or not, Dr. Narang contended that finding the goods in their possession the plaintiffs were perfectly justified in selling the goods and suing for any deficit that might have arisen from the sale. The matter is not free from doubt, but it seems to me that there is some force in this contention. Ascertained goods had been sold; they had been despatched to Ghakkar, where the defendant firm carries on business, and the goods could have been taken over by defendant firm by receiving the railway receipt from the Bank at Lahore. This they failed to do and, therefore the contract being a completed one the plaintiff firm would have been entitled to sue for the money due, *viz.*, Rs. 1,361. As, however, the goods were still under their control they were, I think, entitled to sell the same and, giving credit for any sum realised, to sue for the balance which is what has been done. In this view of the case, the 4th October 1918 is a date which has no importance as the sale has been held to have been made within a reasonable time, which is a question of fact, *vide* Pollock, page 421.

In these circumstances, the decision of the Courts below appears to be correct and I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(5) 31 Ind. Cas. 949; 43 C. 493; 20 C. W. N. 105; 30 M. L. J. 73; 14 A. L. J. 89; 19 M. L. T. 80; 3 L. W. 181; 23 C. L. J. 137; (1916) 1 M. W. N. 70; 18 Bom. L. R. 315; 9 Bur. L. T. 8; 43 I. A. 6 (P. C.).

(6) 14 Ind. Cas. 255; 37 M. 412; 11 M. L. T. 301; (1912) M. W. N. 436; 22 M. L. J. 413.

RAJA OF RAMNAD *v.* VELUSAMI TEVAR.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 13, 1920.

Present :—Lord Dunedin, Lord Moulton and Mr. Ameer Ali.

Raja RAJESWARA SETHUPATI AVERGAL, RAJA OF RAMNAD —APPELLANT

versus

VELUSAMI TEVAR AND OTHERS— RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 11—Res judicata—*Assignment of decree—Leave to assignee to execute decree, whether involves decision that execution is not barred by limitation.*

The appellant as assignee of a decree applied to be brought on the record as such, and to have the decree executed against the respondents. The latter resisted the application on the ground (*inter alia*) that execution was barred by limitation. The application was granted, but the question of limitation was not expressly dealt with. Subsquently, on appellant proceeding to execute the decree, the plea of limitation was again raised and the Court gave effect to it :

Held, that the order allowing appellant to execute the decree involved legally the rejection of the plea that execution was barred by limitation and that such plea could not be raised in subsequent preceedings. [p. 881, col. 2.]

Appeal from a decree of the Madras High Court (Mr. Justice Oldfield and Mr. Justice Bakewell), dated the 7th March 1918, affirming a judgment of the Subordinate Judge, Ramnad.

FACTS of the case are stated in their Lordships' judgment. The judgment of the Subordinate Judge dismissed an application for attachment made by appellant on March 2nd, 1916. The respondents pleaded limitation, to which appellant re-joined that the order of December 13th, 1915, was an adjudication that there was no legal impediment to execution. The Subordinate Judge held that the question of limitation had not arisen in the previous application, and was not *res judicata*. He allowed the plea and his decision was affirmed in appeal by Oldfield and Bakewell, JJ., who observed as follows:—

"In that order (*viz.*, the order of 13th December 1915) the lower Court no doubt said, 'The transfer of the decree in favour of petitioner is recognised and petitioner is allowed to execute the decree.' But we agree with the lower Court that the last eight words cannot be read as an adjudication on all respondents' objections to his doing so, including that regarding limitation which they had undoubtedly made. Firstly, these words are used in connection with the reference to recognition and there is nothing regarding limitation either before or after them, although the argument on it deserved at least mention. Secondly, the conclusion of the order is not the grant of execution as prayed, but a statement that petitioner may put in a fresh petition ; and there is no valid reason for assuming that only the identity of the property to be attached as assets of the deceased judgment-debtor was to be considered when he did so".

Messrs. *DeGruyther, K. C*, and *Kenworthy Brown*, for the Appellant, submitted that the question of limitation was *res judicata* having regard to the order of December 13th, 1915. The matter of limitation was directly in issue on the former application, and the question was in fact distinctly raised. Reference was made to the Code of Civil Procedure, Act V of 1908, section 11 and to *Mungel Pershad Dichit* v. *Grija Kant Lahiri* (1), *Krishna Behari Roy* v. *Bunwari Lall Roy* (2), *Ram Kirpal* v. *Rup Kuari* (3), *Murlidhar Shukal* v. *Narsingh Das* (4).

The respondents did not appear.

JUDGMENT.

LORD MOULTON.—In this appeal the appellant is the assignee of a decree against the defendants (some of whom are minors and are represented by their guardian) which was passed on the 26th September 1907. The amount of the decree was Rs. 35,063 and interest. The decree was in favour of the plaintiffs in the suit and went on to order that the plaintiffs should at once draw out the money in Court, which was a sum of about Rs. 3,000, and that the first and second defendants should re pay the balance within three months with interest and costs, and in default of such payment that the plaintiffs should recover the same by the sale of the entire cowle right

(1) 8 I. A. 123; 8 C. 51 (P. C.); 11 C. L. R. 113; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32.

(2) 2 I. A. 283; 1 C. 144 P. C.); 25 W. R. 1; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213; 1 Ind. Dec. (N. S.) 93.

(3) 11 I. A. 37; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718.

(4) 10 Ind. Cas. 359; 17 C. W. N. 113; 15 C. L. J. 453.

possessed by them including the interest, if any, of the third defendant also, and if the sale-proceeds were not sufficient for the purpose, the plaintiff should recover the deficiency from the first and second defendants.

The judgment-debtors made no payment and accordingly in January 1909, the decree-holder put in his application for execution by sale and realized Rs. 27,000, and in December, 1909 the sale was confirmed and possession delivered. An appeal was brought by the judgment-debtors to the High Court, but this was dismissed on the 8th April 1911.

By the actual sale of the village, the further amount recoverable from the first and second defendants under the decree became definitely ascertained, and, on the 9th March 1914, the then plaintiffs proceeded with the execution of the decree.

While these proceedings were in progress, the present appellant purchased the decree from the then plaintiffs, and, on the 20th November 1914, made his application to be brought on to the record as assignee of the decree, and to have the decree executed. This was resisted by the present respondents or their predecessors in title on several grounds. They put the present appellant to the proof of his assignment, they alleged that the right to execute the decree was barred by limitation, and they raised questions as to the liability of certain of the properties to attachment.

The matter came on for hearing before the Subordinate Judge, who delivered judgment thereon on the 13th December 1915. The material portion of his judgment reads as follows:—

"The transfer of the decree in favour of the petitioner is recognized and petitioner allowed to execute the decree . . . petitioner may file a fresh application for attachment."

One of the defendants applied for a review of this decision on the ground that the application was barred by limitation. On the 24th August 1916, judgment was given dismissing this petition. The actual ground of dismissal was that it was out of time, but the order made by the Court is of importance in that the learned Judge points out that the order of the 13th December, 1915, above referred to, does not reserve any question of limitation for future determination. It is clear, therefore, not only that the issue of the execution of the decree being barred by limitation was in fact before the Court (as is shown also by the pleadings) on that occasion, but that the Judge at the time was aware of it, and that his decision included (as legally must have been the case) the rejection of this plea.

The present appellant proceeded to obtain the attachment of such properties of the respondents as were available to him in execution, and during the year 1916 various claims to the property were put forward by him and adjudicated upon by the Subordinate Judge, and, finally, the matter came before the Subordinate Judge and he dealt with it by an order on the 31st March 1917.

In these final proceedings he permitted the defendants to raise again the plea that the above order of December 1915 did not preclude the defendants from raising the plea that the defendants were barred by limitation. Their Lordships are of opinion that it was not open to the learned Judge to admit this plea. The order of the 13th December 1915 is a positive order that the present respondent should be allowed to execute the decree. To that order the plea of limitation, if pleaded, would, according to the respondents' case, have been a complete answer, and, therefore, it must be taken that a decision was given against the respondents on the plea No appeal was brought against that order, and, therefore, it stands as binding between the parties. Their Lordships are of opinion that it is not necessary for them to decide whether or not the plea would have succeeded. It was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so if they proposed to rely on it, and, moreover, it was in fact brought forward and decided upon. No appeal was brought from the order then made, and, therefore, it was not competent for the Subordinate Judge to admit the plea on subsequent proceedings, or to consider it in his order of the 31st March 1917, and the same remark applies to the judgment of the High Court on the 17th March 1918 from which this appeal is brought.

Their Lordships are, therefore of opinion

that the order of the Subordinate Judge of the 31st March 1917, and of the High Court of the 7th March 1918, should be set aside, and that the prayer of the appellant for the recovery of the decree amount by attachment and sale of the defendants' immoveable properties referred to in the application should be granted, and that the appellant should receive from the respondents his costs in the Court below and of this appeal, and they will humbly advise His Majesty accordingly.

Order set aside.

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

CALCUTTA HIGH COURT.
TESTAMENTARY SUIT No. 12 OF 1918.
November 11, 1919.
Present :—Mr. Justice Ghose.
In the goods of SOURABMONI DASSI, DECEASED.
BENODE BEHARY AUDHIKARY—APPLICANT
versus
SHASHI BHUSAN BHUR AND OTHERS—CAVEATORS.

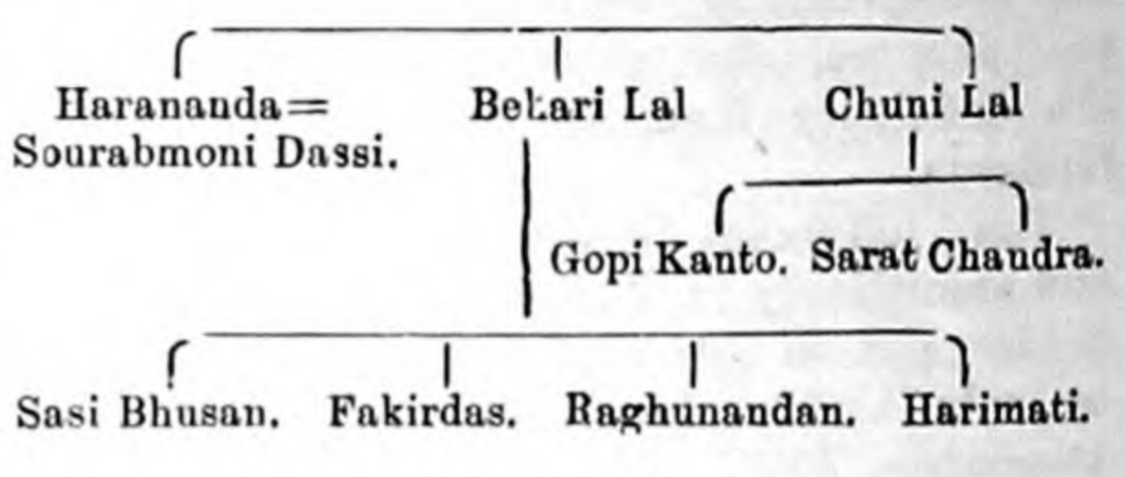
Marriage by Kantibadal *form, whether valid among* Vaishnabs.

Among *Vaishnabs* a marriage by what is known as the *Kantibadal* ceremony is valid [p. 883, col. 1.]

Mr. *I. B. Sen* (with him Mr. *S. K. Roy*), for the Applicant.

Mr. *H. D. Bose* (with him Messrs. *M. R. Mehta* and *A. K. Deb*), for the Caveators.

JUDGMENT.—This is an application by one Benode Behary Audhikary for grant of Letters of Administration in respect of the property and credits of one Sourabmoni Dassi who is said to have died on the 3rd June 1908. The application is based upon the allegation that the applicant was the husband of the deceased, having married her about 15 or 16 years ago in the *Kanti* form prevalent amongst *Vaishnabs*. The application is opposed by five persons whose names are Shashi Bhushan Bhur, Sarat Chander Bhur, Gopi Kant Bhur, Fakirdas Bhur and Raghunandan Bhur. Their relationship to the deceased will be apparent from the following genealogical table :—



It appears that the deceased was, before her alleged marriage with the applicant, the widow of one Harananda Bhur who died some time in 1898. After the death of Harananda she instituted a suit in this Court, being Suit No. 799 of 1899, against her husband's relations for partition and accounts. As a result of that suit she obtained, among other property, a sum of Rs. 8,000 for her absolute use ; with a portion of this money she is said to have purchased premises No. 162 Musjid Bari Street in the Town of Calcutta. The applicant alleges that he came to know her shortly before or about the time of the suit referred to above and that he looked after her interests in the course of that litigation. He says that he belongs to the *Baul* sect of the *Vaishnabs* and that, shortly before he married the deceased in the *Kanti* form prevalent among *Vaishnabs*, the deceased had become a *Vaishnab*, and that the marriage in question took place in the presence of a large number of people. Among the people who were present at the marriage, he has examined before me two persons, namely, Natober Goswami and Ram Kumar Chatterjee. The following issues were settled between the parties :—

1. Whether the marriage of the applicant with the deceased in the *Kanti* form took place as alleged by the applicant ?
2. If the marriage did, in fact, take place, whether the applicant is entitled to Letters of Administration ?

The applicant has given evidence before me, and in support of his case he has examined the persons whose names I have mentioned, Natober Goswami and Ram Kumar Chatterjee. The defendants have not examined any witnesses save and except their Solicitor, Babu Ganendra Nath Dutt. I have carefully examined the evidence adduced before me and I have come to the conclusion that, having regard to the mode of life apparently led by

the deceased after the death of Harananda Bhur, there is nothing inherently improbable in the story told by the applicant and his witnesses. Indeed, on the question before me, namely, as to whether or not the marriage referred to by the applicant took place the evidence is all one sided and it is not necessary to discuss the evidence in detail. Although it is perfectly true that in the petition filed in this Court for grant of Probate to the Will of the deceased propounded by the applicant in 1909, it was not stated that the applicant had married the deceased in the *Kanti* form, he did mention the fact of such marriage in the course of his deposition in the Probate proceedings. I am satisfied on the evidence that both the deceased and the applicant were *Vaishnabs* and that the applicant had been married to the deceased by what is known as the *Kantibadal* ceremony. Such a marriage is undoubtedly valid among *Vaishnabs* (See Bannerjee's Marriage and Stridhan, page 269 and Risley's Tribes and Castes of India, Volum II, page 341). There is no reason why the testimony of the applicant should not be accepted, and, although it is particularly necessary in these cases to scrutinise the evidence of the applicant and his witnesses minutely, I think, on the whole, the applicant must be held to have discharged the onus that lay on him. I, therefore, answer the first issue in favour of the applicant, and, that being so, the second issue must also be answered in favour of the applicant. I direct, therefore, that Letters of Administration of the property and credits of the deceased be granted to the applicant. The caveat will be discharged and the caveators will pay the costs of the applicant on Scale No. II.

Order accordingly.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 192 OF 1920.
November 15, 1920.
Present :—Mr. Justice Das and
Mr. Justice Adami.
NENA OJHA AND OTHERS—
APPELLANTS
versus
SARBHOO DUTT OJHA AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of proceedings—Registrar, whether has jurisdiction to stay proceedings—Inherent power of Court, when to be exercised.

Proceedings held in pursuance of a preliminary decree are proceedings in the suit and not in execution. [p. 884, col. 1.]

The Registrar of the Patna High Court has power to receive and dispose of applications under Order XLI, rule 5 of the Civil Procedure Code, but the only application and the only order contemplated by that rule are an application and an order for stay of execution. The Registrar, therefore, has no power to direct a stay of proceedings in a suit pending the disposal of an appeal. [p. 884, col. 1.]

An Appellate Court has jurisdiction to order stay of proceedings pending the disposal of an appeal, but it does so, not by virtue of statutory power under Order XLI, rule 5, but in the exercise of its inherent power for the ends of justice. [p. 884, col. 1.]

If the proceedings are bound to be protracted, and the expense involved in the taking of accounts is likely to be great, the Appellate Court will exercise a proper discretion in staying proceedings: otherwise, in the event of the decree being reversed on appeal, such expense would be wholly thrown away. If the proceedings, however, are not likely to be of any length, as, for instance, proceedings to ascertain the market value of certain stocks and shares there is no object to be gained by stay of proceedings, and the Appellate Court will refuse to stay proceedings. [p. 884, col. 2.]

Appeal from an order of the Registrar of the Patna High Court, under Order XLI, rule 5.

Mr. *S. C. Mittra*, for the Appellants.

Mr. *Parmeshwardyal* for Mr. *L. N. Singh*, for the Respondents.

ORDER.—This is an appeal from the order of the Registrar of this Court disposing of an application under Order XLI rule 5 of the Code. It is unnecessary to deal with the facts of the case, but it will be useful to remember that the appeal has arisen out of a suit for partition between two brothers, and that the main question between the parties is, whether they are entitled to the joint family properties in equal shares, as the plaintiff asserts, or whether the defendant's share in the joint family properties is twelve annas, as the defendant asserts. The defendant relies upon an *ekrarnamah* executed by the plaintiff in his favour in support of his case, and there can be no doubt that, whether he succeeds or not, he has a case to present to this Court. The learned Subordinate Judge has found that they are entitled to equal shares in the joint family properties, and as each of them has been in separate possession of distinct portions of the joint family properties, he has directed mutual accounts to be taken as from the year 1313 on the footing

that they are entitled to the joint family properties in equal shares. The defendant has appealed, and he applied before the Registrar for stay of proceedings pending the disposal of the appeal.

We ought to state at once that the Registrar had no jurisdiction to deal with an application for stay of proceedings. No doubt, the appellant purported to make the application under Order XLI, rule 5, and described his application as an application for stay of execution of the decree and of further proceedings in the suit. But it is obvious that, until the final decree is passed in the action, there is no decree to execute and that the proceedings held in pursuance of a preliminary decree are proceedings in the suit and not in execution. Under the rules of this Court, the Registrar has power, amongst other things, "to receive and dispose of an application under Order XLI, rules 5, 6 and 10" (Chapter II, rule 13, sub-rule 9). No doubt, Order XLI, rule 5 is headed "Stay of proceedings and of execution;" but that is inevitable, because in the first paragraph of the rule, the Legislature is laying down the broad proposition that "an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order." It will be noticed that, not only is express power given in the first paragraph of the rule to the Appellate Court for sufficient cause to order stay of execution of a decree, but the limits of the power are clearly recognized and carefully guarded in the third paragraph of the rule. But the rule, though it recognizes and preserves the inherent power of the Appellate Court to order stay of proceedings, has not given an express power to the Appellate Court to order stay of proceedings under a decree. The only application contemplated by Order XLI, rule 5 is an application for stay of execution and the only order contemplated by Order XLI, rule 5, is an order for stay of execution. The Court has, of course, complete jurisdiction to order stay of proceedings pending the disposal of an appeal, but it does so, not by virtue of statutory power under Order XLI, rule 5, but in the exercise of its inherent power for the ends of justice. As the exercise of this power has not been delegated to the Registrar, I am of opinion that the Registrar had no jurisdiction to deal with this application.

As, however, the question has been argued before us, and all the materials are in the record to enable us to form our opinion, we think it right to deal with the application as an original application made to this Court. And the first question is, ought the proceedings under the decree to be stayed pending the disposal of the appeal? The policy of the Legislature, as expressed in Order XLI, rule 5, is, that the proceedings under a decree ought not to be stayed, but the same rule recognizes the inherent power of the Appellate Court to order stay of proceedings. Now, what are the limits of the exercise of the discretion vested in the Appellate Court? Now, it seems to me that if no object is to be gained by stay of proceedings, the proceedings ought not to be stayed, even though the decree may be reversed on appeal. But if the proceedings are bound to be protracted, and the expense involved in the taking of accounts is likely to be great, the Appellate Court will exercise a proper discretion in staying proceedings; otherwise, in the event of the decree being reversed on appeal, such expense would be wholly thrown away. If the proceedings, however, are not likely to be of any length, as, for instance, proceedings to ascertain the market-value of certain stocks and shares there is no object to be gained by stay of proceedings, and the Appellate Court will refuse to stay proceedings. The question which the Appellate Court must put to itself in each case is, are the proceedings likely to be protracted and the expense great? If the answer is in the affirmative, there ought to be stay of proceedings; if, in the negative, there ought not to be. I may refer to *Shaw* v. *Holland* (1) as authority for the principle which I have enunciated, upon which the English Courts invariably act.

In the case before us the defendant has been directed to render accounts of the twelve-anna share of the joint family properties of which he has admittedly been in possession as from 1313. His case is that there was a private partition between the plaintiff on the one hand and the

(1) (1900) 2 Ch. 305 at p. 313; 69 L. J. Ch. 621; 82 L. T. 782; 7 Manson 409; 48 W. R. 681.

defendant and his two deceased brothers on the other hand, as a result of which, four-annas share of the properties went to the plaintiff, and twelve-annas share of the properties went to the defendant and his two deceased brothers jointly, and that the shares to which his deceased brothers would be entitled have devolved on him by survivorship on the death of these brothers. It is obvious that the proceedings in taking the accounts from 1313 are bound to be protracted, and much expense would be unnecessarily thrown away if the decree is reversed by this Court. Acting on the principle which I have ventured to deduce from the English cases, I think that the proceedings ought to be stayed in this case, and we order accordingly.

Next comes the question of the terms which we ought to impose on the appellants as a condition for stay. One inevitable result of the stay order will be that no final decree can be passed until the appeal pending in this Court is disposed of, and that there will be no decree to execute for a long time to come. Meanwhile, the appellant will continue to enjoy the rents, issues and profits of the twelve-annas share of the joint family properties, although under the decree he has only eight annas share therein. It is obvious that the interest of the respondents under the decree ought to be protected in some way.

I am of opinion that the learned Registrar erred in calling upon the appellant to furnish security for the value of his share. It seems to us that land is its own security and that the appellant ought not to be called upon to give security for the value of the land. He ought, however, to be called upon to give security for the income of the disputed share that is likely to come into his hand from the date of the decree to the date of the disposal of the appeal by this Court. Now, the disputed share in this case is four-annas, for, as to the remaining eight-annas his title has been declared. As to the period from the date of the decree up to the date of the disposal of the appeal, I think that, as a matter of practice, we ought to fix it at two years, leaving it open to the decree-holder to move this Court, if the appeal is not disposed of within two years.

The order which we make in this case is that, upon the applicant giving security to the satisfaction of the lower Court for two years' income for four-annas out of twelve-annas share of the joint family properties in his hands and for the full value of the moveable properties in his hands, there will be an order for stay of proceedings in this case.

Let this order be brought to the notice of the learned Registrar.

Order accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1165 OF 1920.

December 3, 1920.

Present :—Mr. Justice Broadway.

SARJU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BUDHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact—Suit, whether collusive and fraudulent—High Court, interference by.

A High Court is not entitled, in second appeal, to go behind the findings of fact arrived at by the District Judge which do not result from the misconstruction of a document or the misapplication of law or procedure. [p. 886, col. 2.]

Where the question is whether a suit is collusive, the High Court is bound by the finding arrived at by the first Appellate Court on that point. [p. 886, col. 2.]

Second appeal from the decree of the District Judge, Hissar, dated the 1st March 1920, reversing that of the Subordinate Judge, Second Class, Hissar, dated the 7th August 1919.

Mr. *D. C. Ralli*, for Mr. *Manohar Lal* for the Appellants.

Bakhshi *Tek Chand*, for Respondent No. 1, and Lala *Jagan Nath*, for Respondent No. 3.

JUDGMENT.—On the 8th October 1918 one Basal, son of Amin Chand, of Bhiwani Lohar, sold 9 *bighas*, 3 *biswas* of land to one Maru Singh for Rs. 1,200 and executed a deed of sale in his favour.

Sarju and Sispal thereupon instituted a suit claiming that they had a right to pre-empt this land. About three months after the institution of this suit, Budha, son of Basal, the vendor, instituted a second suit claiming that he was entitled to the land by pre-emption and that his claims to pre-empt were superior to those of Sarju

and Sispal. The Trial Court held that the suit instituted by Budha was a collusive one and intended to benefit one Dwarka Das, and Budha's suit was accordingly dismissed while that of Sarju and Sispal was decreed. Budha thereupon appealed in his own case as also in the case decided in favour of Sarju and Sispal, while Maru Singh, the vendee, also appealed in the latter case. The learned District Judge dismissed the appeal by Maru Singh but accepted the appeals by Budha and granted him a decree. Against this decree Sarju and Sispal have preferred a second appeal to this Court, and on their behalf I have heard Mr. Ralli, while Mr. Tek Chand has addressed me on behalf of Budha. Lala Jagan Nath who appeared for Maru Singh, respondent, adopted Mr. Tek Chand's arguments.

In coming to the conclusion that the suit by Budha was a collusive one and for the benefit of Dwarka Das, the Trial Court was influenced by seven considerations :

(1) That Budha was the son of the vendor and was living with him and that he knew of the sale but did not bring his suit till Sarju and Sispal had filed theirs.

(2) That two witnesses alleged that Budha was present at the time of the sale and consented to it.

(3) That Budha had produced three Mahajans as his witnesses.

(4) That Budha held no land in his own name.

(5) That Budha had not sufficient money to institute the suit and that his father had raised the money from one Dwarka Das.

(6) That a letter was written by Dwarka Das to a third person in which Dwarka Das expressed himself as the owner of the land in suit; and

(7) That the original deed of sale was attested by a *munim* of Dwarka Das.

Now, these are questions of fact and each one of them was considered in detail as well as collectively by the learned District Judge who came to the conclusion that, although they might create a suspicion and a strong suspicion of collusion, they did not amount to proof, and did not warrant the finding arrived at by the first Court. He held specifically that the mere fact that a pre-emptor was instigated to bring his claim by another who supplied him with the necessary funds was not sufficient to show that the pre emptor was acting *benami* and did not debar him from suing. Further he held that Budha had not given his consent to the sale and that it had not been proved that he was suing for the benefit of Dwarka Das. Mr. Ralli referred me to *Brij Nath* v. *Jita* (1) where Bullock, J, held that a pre emptive right was a personal one exercisable only by the pre-emptor for his own benefit and that the pre-emptor's suit must fail if it be established that, in suing, he was seeking the benefit of it not for himself but for another; and on the authority of this it was contended that the conclusion arrived at on the facts found by the learned District Judge were wrong and that these conclusions could be examined in second appeal on the authority of *Ramgopal* v. *Shamskhaton* (2). Their Lordships of the Privy Council in that case held at page 99 that the soundness of the conclusions from findings of fact was a matter of law. As against this, however, my attention was drawn by Mr Tek Chand to *Midnapur Zemindary Co. Ltd.* v. *Uma Charan Mondal* (3), in which case their Lordships of the Privy Council held that a High Court was not entitled to go behind the findings of fact by the District Judge which did not result from the misconstruction of a document or the misapplication of law or procedure. In that case the question was whether a certain transaction was collusive and fraudulent and it was held by the Judicial Committee that the High Court was bound by the finding arrived at by the first Appellate Court on that point. It seems to me, therefore that in the present case, even assuming that I should be justified in coming to a different conclusion from that arrived at by the learned District Judge on the facts found, I am precluded from examining them in detail by the dictum of the Judicial Committee in *Midnapur Zemindary Co., Ltd.* v. *Uma Charan Mondal* (3), it having been definitely held in the present case that the suit by Budha

(1) 139 P. R. 1894.

(2) 20 C. 93 at p. 99; 19 I. A. 228; 6 Sar P. C. J. 247 17 Ind. Jur. 88; 10 Ind Dec (N. s.) 63 (P. C.).

(3) 62 Ind. Cas. 497; 47 M. L. J. 199; 17 A. L. J. 100; (1919) M. W. N. 817; 26 M. L. T. 489; 24 C. W. 201; 22 Bom. L. R. 7; 11 L. W. 371; 2 U. P. L. R. (P. C.) 5 (P. C.).

was not a collusive one. Farther, it seems to me that *Brij Nath* v. *Jita* (1) scarcely represents the true state of the law on this point, for in *Mahmud Bakhsh* v *Hassan Bakhsh* (4) and *Sheru* v. *Jawahir Singh* (5) a somewhat opposite view was taken, while in *Neki* v. *Ohajju Ram* (6) the finding of Bullock, J., was held to be an *obiter dictum* and was disagreed with. It having been found that Budha did not give his consent to the sale, and that he was not suing for

Dwarka Das, this appeal must fail and is dismissed with costs.

Appeal dismissed.

(4) 11 Ind. Cas. 708; 7 P. R. 1912; 239 P. L R. 1911; 135 P. W. R 1911.

(5) 13 Ind. Cas. 662; 58 P. R. 1912; 240 P. W. R. 1912.

(6) 48 Ind. Cas. 137; 111 P. W. R. 1918.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 569 OF 1919.

August 5, 1920.

Present :—Mr. Justice Jwala Prasad.

BISWESWAR RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

PALTU RAM KAHAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 33—Restitution of conjugal rights, decree for—Form of decree.

Where a suit for restitution of conjugal rights is decreed not only against the plaintiff's wife but also against other defendants in the suit who are proved to have prevented the wife from going to the husband, the decree should not direct that the husband is entitled to recover possession of the wife, but, after declaring the husband's right, should add a direction that the defendants other than the wife do refrain from preventing the plaintiff's wife from returning to him. [p. 889, col. 1.]

Appeal from a decision of the District Judge, Manbhum.

Mr. *Abani Bhushan Mukherjee*, for the Appellants.

Mr. *Sishir Kumar Mitra*, for the Respondent.

JUDGMENT.—The suit was first decreed *ex parte* and upon the application of the defendants was restored and re-heard.

The plaintiff adduced both oral and documentary evidence. The defendants failed to do so, and the suit was, therefore, decided upon the evidence of the plaintiff and was decreed in his favour by the Courts below.

The first ground taken against the decision of the lower Appellate Court is, that it did not consider the evidence offered by the plaintiff but simply devoted its attention to the failure of the defendants to prove their case.

It, however, appears from the judgment of the Court below that the principal point urged before it was, that the defendants were not given an opportunity to prove their case and their application dated the 30th October 1918, for time and for issuing a warrant on their witnesses should have been granted by the Munsif. The learned Judge conclusively proved from the proceedings on the record from the beginning that the defendants were dilatory both before the suit was decreed *ex parte* and also after it was restored and re-heard, and that the Munsif was right in not showing any more indulgence to them. This point is now abandoned in this Court, and if it were seriously urged it would not have been difficult to show that the decision of the District Judge on that point was perfectly correct. No doubt, in the memorandum of grounds of appeal before that Court the findings of the Munsif on all the issues were attacked. This, however, did not by itself entitle the appellant to have all those points dealt with and disposed of by the lower Appellate Court unless the grounds urged in the memorandum of appeal were actually pressed before the Court at the time of the hearing, and the fact that they were pressed must, in the first place, have appeared from the judgment of the lower Appellate Court, or it must have been satisfactorily proved that, though pressed, the Judge ignored them. The latter ground has to be substantiated by clear proof in the shape of an affidavit either by the Pleader in the Court below or by some other person in whom the Court might place confidence in a matter like this. Mr. Mukherjee for the appellant frankly admits that he has no instruction on the point as to whether the points were actually urged before the lower

Appellate Court or not. In the circumstances, the Court was perfectly right, after disposing of the only points urged before it, to affirm the decree of the Court of first instance, for the onus of proof that the decree was wrong was upon the appellants.

It is then contended that the decree of the first Court is not in accordance with law, inasmuch as it has not given its decisions separately upon the issues framed in the case. The Munsif clearly says that the defendants produced no proof in supprot of their case and that the plaintiff satisfactorily proved his claim by the evidence of his witnesses. He also referred to the written statement of the defendants in a Small Cause Court Suit No. 117 of 1914 in which the marriage of the plaintiff with defendant No. 3 was admitted. It is not denied that there was evidence on the record on all the issues involving in the case, and hence the learned Vakil is not in a position to dispute the correctness of the decision of the Munsif and when the Munsif says that, "I decide these issues in plaintiff's favour and decree the suit" he clearly had his attention upon the issues framed in the case and the evidence adduced by the plaintiff. I have looked into that evidence and the plaintiff has proved *in toto* the allegations made in the plaint upon which the suit was founded. The onus of proving Issues Nos. 3 and 4 as to the marriage between the plaintiff and the defendant No. 3 and as to the relationship of husband and wife subsisting between them, was upon him. The plaintiff, the priest who performed the marriage, and the other persons also who took part in the ceremony of the marriage, were examined in this case. It was further proved that the relationship continued. The plaintiff, therefore, discharged the onus upon him of proving the aforesaid issues. The onus of Issues Nos. 2 and 3 relating to the defect of party and as to the suit having been barred by lapse of time, was obviously upon the defendant, but, as observed above, he failed to adduce any evidence to substantiate them. *Prima facie*, upon the pleadings and upon the evidence in the case, the plaintiff's claim was within time. The cause of action arose on the 16th April 1917 and the suit was instituted on the 21st April, only four days after. Therefore it was for the defendants to prove that the suit was barred by time and they failed to do so.

There was, therefore, ample evidence upon the record to support the decision of the Munsif and in a case decided *ex parte* he could not do more than what he has done in the case, holding clearly that the plaintiff's case was satisfactorily proved and the defendants failed to prove the case set up by them. There is, therefore, no defect either in law or in the procedure in the disposal of the case by the Munsif.

The last straw in the argument of the learned Vakil for the appellants is that the decree framed in this case is not in accordance with law. The plaintiff prayed for the restitution of conjugal rights and for a decree to recover possession of his wife, defendant No. 3, from her parents, defendants Nos. 1 and 2. The decree declares the conjugal rights of the plaintiff and directs the plaintiff to be entitled to recover possession of his wife, defendant No. 3, and orders her parents, defendants Nos. 1, and 2, to send defendant No. 3 to the plaintiff. Reliance has been placed upon the case of *Koobur Khansama* v. *Jan Khansama* (1) and *Chotun Bebee* v. *Ameer Chund* (2). In those cases the decrees passed were for possession of the "person of the wife" and it was held that such a decree was objectionable, for a wife cannot be looked upon as property and the decree was varied and a modified decree was prepared in the following terms: "That it be declared, that the plaintiff husband is entitled to conjugal rights and the wife defendant be ordered to return to his protection." Cases of this kind are very few, as observed in the aforesaid case in *Chotun Bebee* v. *Ameer Chund* (2), and Seton-Karr, J., in that judgment very rightly observed that the case is one of nicety and difficulty, and there was nothing to show that section 200 (now Order XXI, rule 33) of the Code of Civil Procedure did not empower the husband to take possession of his wife. The plaintiff in this case claimed relief against the parents of his wife, defendants Nos. 1 and 2, as having actually prevented him from taking his wife to his house

(1) 5 W. R. 467.
(2) 6 W. R. 105; 1 Ind Jur. (N. S.) 317.

and also proved it by his evidence in Court. The written statements of the defendants clearly show that the parents are instrumental in the plaintiff's way of exercising his conjugal rights. The decree, therefore, had directed them to send back the wife to the plaintiff husband as prayed for by the latter. As a positive direction that may not be an accurate and proper direction in a decree of this kind, but certainly they can be properly directed to refrain from preventing the plaintiff's wife to return to her husband. This was the form of decree prepared in the case of *Ajnasi Kuar* v. *Suraj Prasad* (3). This direction appears to me to be necessary in order to enable the plaintiff to execute the decree properly under Order XXI, rule 33, and to effectively obtain the benefit of the decree for the restitution of his conjugal rights.

Therefore, taking into consideration all the aforesaid authorities and Order XXI, rule 33, I would, instead of the decree of the Court below, substitute a decree in the terms recommended in the aforesaid cases of the Weekly Reporters and the Allahabad High Court and add to it a direction "that the defendants Nos. 1 and 2 do refrain from preventing the plaintiff's wife, defendant No. 3, from returning to him."

The appeal is accordingly dismissed with costs, the decree being modified as indicated above.

Appeal dismissed.

(3) 1 A. 501; 1 Ind. Dec. (N. S) 345

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 388 OF 1919.

April 27, 1920.

Present:—Mr. Justice Seshagiri Aiyar.

A. S. VAITHIALINGHA CHETTY—COUNTER PETITIONER—PETITIONER

versus

KULLAPPA NAICKEN—PETITIONER—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 124, 131—Sale for arrears of rent, application to set aside—Notice to auction-purchaser whether necessary—Auction-purchaser, right of, to be heard.

The purchaser at an auction sale held for arrears of rent has a right to notice of an application by the defaulting *ryot* to set aside the sale and is entitled to be heard before an order to his prejudice is passed. [p. 890, col. 1.]

Petition under section 115 of the Civil Procedure Code and section 107 of the Government of India Act, 1915, praying the High Court to revise the order of the Court of the Collector, South Arcot, dated the 1st November 1919, D. Dis. No. 3081 Cor. of 1918, on petition, dated the 12th September 1918, preferred against the order of the Court of the Revenue Divisional Officer, Cuddalore, dated the 1st May 1918, on petition dated the 19th November 1917.

FACTS appear from the judgment.

Mr. *S. Rangaswami Aiyangar*, for the Petitioner.—The petitioner, as the purchaser at the auction sale, has a very substantial interest in the matter of setting aside the sale. He is entitled to show that the applicant had not complied with the requirements of section 133 of the Madras Estates Land Act and was not entitled to relief. The lower Courts erred in refusing him audience on the ground that there was no specific section in the Act providing for the issue of notice to the auction-purchaser. On general principles of equity and natural justice he is entitled to be heard.

Mr. *N. K. Mohanrangam Pillai*, for the Respondent, relied on the absence of a provision in the Act rendering it compulsory that notice should be issued to the auction-purchaser. If the Court was satisfied that the defaulting *ryot* had complied with the requirements of section 131 it could cancel the sale.

JUDGMENT.—Both the Collector and the Divisional Officer are wrong in saying that the petitioner herein was not entitled to be heard. He became the purchaser at an auction sale for arrears of rent. *Prima facie* he is entitled to hold the property as his and to demand the issue of the certificate under section 124 in his favour unless the defaulting *ryot* had strictly complied with the requirements of section 131 of the Estates Land Act which enables him, on obeying these conditions, to move for setting aside the sale.

It is conceded that when the application

for setting aside the sale was made no notice was given to the auction-purchaser. The Divisional Officer says that there is no section providing for giving notice to the purchaser. The Collector says that he has no *locus standi*. I am unable to agree with either of them. It is a primary rule of jurisprudence that every body whose interests are affected should be given notice before an order to his prejudice is passed. The petitioner who has purchased the property at a valid sale has certainly a *locus standi*. The fact that no provision is specially made for giving notice may be due to the view of the Legislature that Courts, in setting aside a sale, would have recourse to the principles of natural justice, which demand that before a man's property is taken away from him he should be heard. If he had notice, he could show that the conditions laid down in section 131 have not been complied with. No one has more right to a hearing on this question than the purchaser. Under these circumstances, I am unable to agree with the conclusion come to by both the lower Courts. I express no opinion upon the contention raised before me that the requirements of section 131 have not been complied with. It would be for the Divisional Officer, after giving notice to the auction purchaser, to decide, whether in making the deposit, the defaulting *ryot* has complied with all the requirements of the law.

The decisions of both the lower Courts are reversed and the case remanded to the Divisional Officer for disposal in the light of the above observations. Costs will abide.

M.C.P.

Petition allowed;
Case remanded.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 734 OF 1918.

July 27, 1920.

Present:—Mr. Justice Jwala Prasad.

JWALA PRASAD—PLAINTIFF—APPELLANT

versus

KOPEYA MUNDA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 2, 4—Death of one of several defendants—Legal representatives not brought on record—Joint tenants—Defendants jointly and severally liable—Suit, whether abates.

Where the defendants in a suit are jointly and severally liable to the plaintiff, the suit does not abate merely because one of the defendants has died and his legal representatives have not been brought upon the record. [p. 891, col. 2.]

Joint holders of land are jointly and severally liable to the landlord for the rent of the holding. [p. 891, col. 1.]

Appeal from a decision of the Judicial Commissioner, Ranchi, dated the 11th March 1918, reversing that of the Munsif, dated the 3rd January 1917.

Messrs. *Kulwant Sahai* and Rai *Gurusaran Prasad*, for the Appellant.

Mr. *S. N. Palit*, for the Respondents.

JUDGMENT.—This appeal arises out of the decision of the Judicial Commissioner of Ranchi, dated the 11th March 1918, reversing that of the Munsif, dated the 3rd January 1917.

The plaintiff is the appellant. He instituted the suit for a declaration that he was entitled to the rent of Kusum trees in possession of the defendants at the rate of Rs. 2 per tree. The claim was with respect to 40 trees said to be standing on the *majruha* and the *gair majruha* lands. The *Khata* number, plot number and the numbers of the trees were specified in Schedule A to the plaint.

The defendants stated in their written statement that they were in possession of the trees from time immemorial and that they do not pay rent for the same. They took a number of other pleas which have all been set at rest by the decision of the Munsif and have not since arisen.

Upon the pleas, two issues were framed by the Munsif: "(1) Is there any custom of paying rent for Kusum lac bearing trees? (Issue No. 9) and (2) Has the plaintiff

any right to claim rent for the disputed trees?" (Issue No. 10).

The Munsif decided both the issues in favour of the plaintiff. He based his decision upon the village note (Exhibit 3) in the Survey Record of Rights and the other evidence on the record.

The learned Judicial Commissioner set aside the decision of the Munsif and dismissed the suit. As to point No. 2, (Issue No. 10) he accepted the case of the defendants that the trees were part and parcel of the original holdings and that the rent of the holdings covered that for the trees. He has based his decision upon the judgment of the Subordinate Judge, dated the 8th July 1912, (Exhibit B) in a previous suit brought by the defendant to have the *ex parte* rent decrees and sales of their holdings in execution thereof set aside. That judgment does not and could not decide as to whether any rent was payable for the trees or not. It was not an issue between the parties in that case. As to point No. 1 (Issue No. 9) the learned Judicial Commissioner has not referred to any other evidence in support of his finding. He has not displaced the finding of the Munsif as to the custom of paying rent for lac bearing trees. His judgment is incomplete and does not dispose of the appeal before him. It is too meagre for a judgment of a first Appellate Court reversing that of a Trial Court and must be set aside.

It may be noted that the learned Vakil on behalf of the appellant has referred to the evidence of defendant Kopeya Munda to show that he admitted that only 17 trees appertained to the holding and that the remaining trees were on the *gair majruha* of the plaintiff with which the defendants had no concern. This is a question of evidence which should have been dealt with by the lower Appellate Court.

The learned Vakil on behalf of the respondents urged that the present appeal abated on account of the death of Kopeya Munda, respondent No. 1, who died more than six months ago and no substitution was made in his place. No doubt, the appeal abated so far as Kopeya Munda is concerned, but as Kopeya Munda and Mangal Munda, the other defendant, were joint holders of the lands in suit they were both jointly and severally liable for the claim of the plaintiff, and the death of one of them would not affect the claim of the plaintiff as against the other upon the principle of section 43 of the Contract Act. The principle was applied in the case of *Joy Gobind Laha* v. *Monmotha Nath Banerji* (1) and *Beradar Singh* v. *Bacha Mahto* (*Raghunandan Mahton*) (2). In my opinion, after the death of one of the joint tenants, the landlord is entitled to proceed against the surviving recorded tenant and his suit cannot be dismissed simply because he does not bring the heirs of the other tenants on the record. I do not decide in this case as to whether the decree in such a case will be a rent decree or a money decree.

The case is accordingly remanded to the Judicial Commissioner for re-hearing the appeal and disposing of it in accordance with law. The costs will abide the result.

Case remanded.

(1) 33 C. 580.
(2) 54 Ind. Cas. 39; 1 P. L. T. 55; (1920) Pat. 9; 5 P. L. J. 32; 2 U. P. L. R. (Pat.) 4.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 788 OF 1920.

December 2, 1920.

Present:—Mr. Justice Wilberforce.

MAHMUD AND OTHERS—DEFENDANTS—APPELLANTS

versus

UDE BHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 142—Suit for possession of waste land—Defendant in adverse possession—Limitation applicable—Burden of proof.

The proposition that in the case of waste land possession follows title and that in suits for such land it is for the defendant to prove adverse possession, does not apply to cases where the land, according to the plaintiff's own statement, has been occupied adversely by the defendant [p 892, col. 2.]

Plaintiff sued for possession of ten *marlas* of waste land of which it was alleged the defendant had taken unlawful possession three years before the suit:

MAHMUD v. UDE BHAN.

Held, that Article 142 of Schedule I to the Limitation Act was applicable to the case, and that the initial onus was on the plaintiff to prove what he asserted, *viz*, that the defendant had been in adverse possession for only three years. [p. 892, col. 2.]

Second appeal from the decree of the Additional Judge, Muzaffargah, at Dera Ghazi Khan, dated the 29th January 1920, reversing that of the Munsif, First Class, Leiah, District Muzaffargarh, dated the 27th February 1919.

Mr. *Abdul Rashid*, for the Appellant.

Lala *Hargopal*, for the Respondents.

JUDGMENT.—In this case the plaintiffs sued for possession of ten *marlas* of land of which the defendants had taken unlawful possession three years before the suit. The land is waste and lies between the houses of the parties and defendant No. 1 has put up an oven on a portion of it. The defendants pleaded adverse possession for the last 22 years. The first Court held that the plaintiffs had not proved their possession and dispossession within 12 years, and that defendants had proved adverse possession. The judgment of the lower Appellate Court is heard to summarise. The learned Judge apparently considered that the defendants had only proved possession over $1\frac{1}{2}$ *marlas* of land and that as, *prima facie*, possession follows title and as the plaintiffs had proved their title, it was for the defendants to prove adverse possession and that they had failed to do so. He accordingly decreed the suit, and the defendants have preferred a second appeal to this Court.

The main ground argued is, that Article 142 of the Limitation Act applies to a case of this description and that the decision of the Munsif was, therefore, correct. The plaintiffs themselves stated that the defendants had taken unlawful possession of the site three years before the suit, and it is urged that it was for them to substantiate this plea. Reliance is placed upon the Privy Council judgment, *Mohima Chunder* v. *Mohesh Chunder* (1), and numerous other judgments in which this decision has been followed. On the other hand, Counsel for the respondents relies upon *Muhammad Yar* v. *Ghulam* (2), *Ramzan Ali* v. *Basharat Ali* (3) and *Kaman* v. *Umra* (4), as authorities that in the case of waste land possession follows title and that in suits for such land it is for the defendant to prove adverse possession. In cases in which the property sued for has been lying waste throughout, this proposition is generally correct, but it does not apply in cases where the land, according to the plaintiffs' own statement, has been occupied adversely by the defendant. The judgments cited, moreover, so far from assisting the plaintiffs respondents, appear to support the argument of the Counsel for the appellant. In *Muhammad Yar* v. *Ghulam* (2) authorities are approved of that it is for the plaintiff to show that his suit is brought within 12 years from the time when the possession of the defendant becomes adverse. In *Ramzan Ali* v. *Basharat Ali* (3) the facts were somewhat different as it was held that the vacant site had remained waste and unoccupied up to a short time before the suit, and in such a case the learned Judges held that (on the above presumption) plaintiffs had only to prove *prima facie* title not extinguished by limitation. In *Kaman* v. *Umra* (4) the learned Judge held that the Article *prima facie* applicable to the suit was Article 142, but he held that the suit was within time. After perusing, therefore, this and other judgments, I have no hesitation in holding that the Article applicable to the form of suit as brought by the plaintiffs is Article 142 and that the initial onus was on them to prove what they asserted, *viz*, that the defendant had been in adverse possession for only three years. On this point they were unable to bring any proof before the first Court, and it is not suggested before me that, if the onus had been fixed otherwise, they would have been able to substantiate their case.

Counsel for the respondents refers also to a finding of the lower Appellate Court that the defendant has only occupied $1\frac{1}{2}$ *marlas* out of ten *malas* sued for. The finding is against plaintiffs' own claim which was that defendant had taken illegal possession of the whole of the ten *marlas*. This opinion, therefore, of the lower Appellate Court on this point can be disregarded as it is opposed to the claim of the plaintiffs themselves.

(1) 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312.

(2) 49 P. R. 1884.

(3) 105 P. R. 1901.

(4) 47 Ind. Cas. 411; 76 P. R. 1918; 156 P. W. R. 1918; 106 P. L. R. 1918.

I hold that the plaintiffs have failed to prove their suit to be within time and dismiss it with costs in all Courts.

Appeal dismissed.

PATNA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 777 OF 1919.
August 5, 1921.
Present :—Mr. Justice Jwala Prasad.

WAZIR NONIAN—DEFENDANT—APPELLANT
versus
RAM PRASAD LAL AND OTHERS—PLAINTIFFS AND SHAM BIHARI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 106, 107—Service tenure—Refusal to perform service—Ejectment—Notice to quit, whether necessary—Lease for life—Registration, whether necessary.

On failure to perform the service, a service tenure-holder becomes a trespasser, and is not entitled to a notice to quit before ejectment. [p. 894, col. 1.]

A lease for life can only be granted by a registered instrument under section 107 of the Transfer of Property Act. [p. 893, col. 2.]

Appeal from a decision of the District Judge, Patna.

Mr. *A. B. Mukherjee* for Mr. *L. N. Singh*, for the Appellant,

Mr. *B. C. Sinha*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in ejectment. It relates to two *kathas* of land bearing Survey Plot No. 961. The entry in the Record of Rights shows the land as *gair mazruha* of the *maliks* with a Kutchehri in the possession of the plaintiff, Ram Prasad Lal. The Kutchehri consists of a house with an enclosure called *khand*. The *khand* is in dispute in the present case.

The finding of the Courts below is that the defendant took settlement of the *khand* in question on payment of Rs. 25 as *salami* to Ram Prasad Lal. The defendant claimed the land on the basis of a verbal settlement for life made with him by the plaintiff on behalf of all the landlords. There is no deed of settlement; far less is there any registered document. The terms of this settlement are stated by him in the following words:—

"It was settled that I would continue to be on the land, and after that the land would come into the possession of the *maliks*."

The defendant's witness No. 4 stated that the settlement was for ever. The Court below accordingly held that the settlement was invalid under section 107 of the Transfer of Property Act, which requires that a settlement for a term exceeding one year can only be made by a registered instrument. This view of the learned Judge is assailed by the defendant-appellant and it is contended that the lease could be made by delivery of possession and for that reference has been made to section 17 of the Indian Registration Act of 1908. No doubt, section 4 of the Transfer of Property Act has indicated that section 107, amongst others, of the Transfer of Property Act shall be read as supplemental to the Indian Registration Act, but the law as to registration is the same under the latter Act as well; *vide* clause (*d*) of section 17. Therefore, the lease for life set up by the defendant was invalid on account of its not having been made by means of a registered document. The view of the Court below is, therefore, correct and I accordingly overrule the contention of the learned Vakil on behalf of the appellant.

The learned Judge has further held that the settlement was conditioned upon the defendant rendering service to the plaintiff and that, as admittedly he refused to render the service demanded of him, he became a mere licensee or a tenant-at-will and was capable of being ejected at the will of the landlord. This view is also contested, and it is said that the defendant was at least a tenant under the Transfer of Property Act though without a proper and valid document of title, and that he would not be ejected without proper notice under section 106 of the Transfer of Property Act. There is no doubt that the defendant was not a trespasser at the time when he was brought on to the land, but his tenure was a service tenure only according to the finding of the District Judge which I have no reason, upon the evidence in the case, to differ from, and, as a matter of fact, no argument has been

addressed to me to show that the finding of the Judge was in any way improper or incorrect. The lease of a service tenure expires when the service ceases. In the present case, upon the admission of the defendant, he refused to render the service demanded of him by the plaintiff. A service tenure-holder is not entitled to any notice for, after his failure to fulfil the condition upon which he held the land, he becomes a mere trespasser. This view is supported by the case in *Athakutti* v. *Govinda* (1) the facts of which case are similar to those of the present case, *vide* also *Budh Singh* v. *Parbati* (2) and *Sanchiram De Behari* v. *Hara Priya Thakurani* (3). As against these authorities Mr. Mukherjee quotes the case of *Jyotish Chandra Mukerjee* v. *Ramanath Bhadra* (4). That case is distinguishable. In that case it was held that the defendant was holding the house on rent which was to be remitted in lieu of the professional service rendered by him as a Doctor to the plaintiffs. It was rightly held that the settlement amounted to a monthly lease under section 105 of the Transfer of Property Act that it required 15 days' notice for ejecting the defendant. On the other hand, the case of *Gobinda Ghandra Ghose Biswas* v. *Nandadulal Sut* (5) supports the view taken by the learned Judge that the defendant was, at the utmost, a tenant-at-will or by sufferance and as such he was not entitled to any notice. The ruling in *Athakutti* v. *Govinda* (1) is based upon the earlier authorities of that Court and is consistent with principle. The defendant was, therefore, not entitled to any notice. As a matter of fact, this ground was not taken in the written statement; no issue was raised upon it and, consequently, the points were never raised in the Courts below. I do not think that it is open for Mr. Mukherjee to raise the point for the first time in second appeal and even if he was entitled to do so, I have shown above that there is no substance in it. This obviates the necessity of going into the authorities cited by Mr. Mukherjee to show that the title of the defendant was not necessarily invalidated for want of having a registered deed when he was in actual possession of the land in suit.

The next contention is that the plaintiff being a part proprietor is not entitled to eject the defendant. The learned District Judge has clearly shown that, according to the case of the defendant himself, the plaintiff was exclusively managing the entire property and that he was in possession of the same and that he representing the 16-annas proprietor granted to him the lease to occupy the land. The name of the plaintiff, Ram Prasad Lal, alone is recorded as being in exclusive possession of the plot in question in the Survey Record of Rights. The other co-proprietors of the village had obviously allowed the plaintiff to hold the property exclusively and the appellant accepted him as the sole owner thereof and competent to deal with and settle the land with him. The plaintiff is, therefore, entitled to eject the defendants, who, as held above, were mere trespassers on the land after they refused to render service to the plaintiff. It is immaterial that summonses were not served upon some of the *pro forma* defendants as alleged by the appellant. The plaintiff was alone entitled to bring the suit to eject the defendants.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

(1) 16 M. 97; 5 Ind. Dec. (N. S.) 775.
(2) 29 A. 652; 4 A. L. J. 556; A. W. N. (1907) 231.
(3) 45 Ind. Cas. 611.
(4) 32 C. 243.
(5) 45 Ind. Cas. 317; 27 C. L. J. 523 at p. 524.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 255 OF 1919 AND CIVIL REVISION PETITION No. 566 OF 1919.

April 28, 1919.

Present:—Justice Sir Abdur Rahim, KT., and Mr. Justice Napier.

T. S. MANICKA GRAMANAI—PETITIONER—APPELLANT

versus

E. K. PARASURAM MUDELEY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 146, O. XXI, rr. 97, 98, 99—Auction-purchaser under money decree, whether representative of judgment-debtor.

MANICKA GRAMANI *v.* PARASURAM MUDELEY.

An auction-purchaser under a simple money decree is a representative of the judgment-debtor for the purpose of Order XXI, rule 98, Civil Procedure Code, against whom proceedings can be taken under section 146 of the Code.

Appeal against the order of the District Court, Chingleput, in Civil Miscellaneous Petition No. 643 of 1917, in Original Suit No. 6 of 1914 and Civil Revision Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act of 1915, praying the High Court to revise the same order of the District Court, Chingleput.

Messrs. *A. Krishnaswami Aiyar* and *A. S. Visvanatha Aiyar*, for the Appellant.

Mr. *C. Narasimhachariar*, for the Respondents.

JUDGMENT.

NAPIER, J.—Appeal against Order No. 255 of 1919 is an appeal against the order passed in the District Court of Chingleput on a petition under Order XXI, rule 98, Civil Procedure Code. There is no dispute about the facts. The petitioner was the purchaser at a sale in a mortgage suit.

The 4th respondent purchased the property under a money decree in a suit filed after the decree in the mortgage suit. The lower Court held that the respondent was a person who came within the mischief of rule 98 of Order XXI and was not protected by the language of rule 99. He based his decision on a certain ruling of this Court to the effect that a person in the position of the 4th respondent was really a representative of the judgment-debtor and that, therefore, his rights should properly be adjudicated on in execution proceedings.

This was before the decision of the Full Bench in *Veyindramuthu Pillai* v. *Maya Nadan* (1), which case came before my learned brother as Officiating Chief Justice and two other learned Judges. It was held by the Full Bench in that case that, in circumstances exactly similar to these, the proceedings were properly taken under section 47 and that the auction-purchaser is a representative of the judgment-debtor. It is now argued before us that, although the Full Bench have held that he is a representative, the Full Bench had not before them for decision the construction of the language of rules 98 and 99 of Order XXI, Civil Procedure Code. That is so. But if we must hold that rules 98 and 99 do not apply to persons in this position, the result would be to make the decision of the Full Bench entirely infructuous. We must, therefore, see if it is not possible to give such a meaning to the language in rules 98 and 99 as will reconcile them with the rights arising out of section 47. It seems to me that this can be done by the application of section 146 of the Code. That section says that, "save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him." There cannot be the slightest doubt that words "claiming under him" are wide enough to cover the position of this auction purchaser. The decision of the Full Bench and the ruling of their Lordships of the Privy Council as far back as *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2) are sufficient to establish this proposition. If, therefore, we read these words "claiming under him" with the operative rules 98 and 99 we get a perfectly clear position, namely, that when the judgment-debtor or other person claiming under him or a person acting at his instigation causes obstruction, he may be removed and, conversely, where the Court is satisfied that the resistance or obstruction was occasioned by any person other than the judgment-debtor or any person claiming under him in good faith to be in possession on his own account, that is, a stranger who based his title on a title entirely outside the proceedings, he cannot be removed. This is, I think, the correct view. I would, therefore, dismiss this appeal with costs.

Civil Revision Petition No. 566 of 1919 is dismissed with costs.

ABDUR RAHIM, J.—I agree.

M. C. P.

Appeal and petition dismissed.

(1) 54 Ind. Cas. 209; 43 M. 107; (1919) M. W. N. 881; 26 M. L. T. 391; 38 M. L. J. 32 (F. B.).

(2) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 203; 9 Ind. Dec. (N. s.) 898.

PATNA HIGH COURT.
LETTERS PATENT APPEAL No. 65 OF 1919.
December 7, 1920.
Present:—Sir Dawson Miller, KT.,
Chief Justice, and Mr. Justice Ross.
RAGHO PRASAD SINGH AND OTHERS—
APPELLANTS
versus
JADUNANDAN PRASAD SINGH
AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (2) *—Execution of decree—Appeal, dismissal of, for default—Limitation, commencement of.*

Where there has been an appeal from a decree and that appeal has been properly presented and is within time, any order of the Appellate Court dismissing the appeal or putting an end to the appeal in any way is either a decree or order within the meaning of clause (2) of Article 182 of Schedule I to the Limitation Act, and limitation for the execution of the decree begins to run from the date of the decree or order of the Appellate Court, even where the order of the Appellate Court is not capable of execution and the decree to be executed is the decree of the Original Court. [p. 897, col. 2.]

Letters Patent appeal against the judgment of Mr. Justice Das, dated the 4th July 1919.

Messrs. *Fakhruddin* and *S. Dayal*, for the Appellants.

Mr. *Rai Gurusaran Prasad* for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal under the Letters Patent from a decision of a Single Judge of this Court, dated the 4th July 1917.

On the 27th June 1914 the appellants obtained judgment in a suit instituted against them by the respondents in the Court of the Subordinate Judge of Patna. The decree which dismissed the suit awarded costs to the appellants. The respondents subsequently appealed to the High Court from that decision but failed to pay the printing costs, although several extensions of time were granted for the purpose. Finally, on the 6th November 1917, the matter was placed before a Division Bench of the Court and the appeal was dismissed for want of prosecution. Up to that time the appellants had taken no steps by way of execution to enforce their decree for costs made in their favour by the Subordinate Judge on the 27th June 1914 but had awaited the decision of the High Court in the pending appeal. On the 21st March 1913 the appellants applied for execution but were met by the objection that the application was barred by Article 182 of the Indian Limitation Act, 1908, more than three years having elapsed since the date of the decree. In answer to this objection the appellants contended that, as there had been an appeal, the period of limitation was extended to three years from the date of the final decree or order of the Appellate Court under the provisions of clause (2) of Article 182 of the Limitation Act. The learned Subordinate Judge who heard the objection came to the conclusion that the period of limitation was three years from the order of dismissal of the appeal passed by the High Court on the 6th November 1917 and that the application for execution was not time-barred. He accordingly made an order dismissing the objection.

The respondents appealed from that order to the High Court. The appeal was heard by a Single Judge of the Court. The learned Judge considered that the case was governed by the decision of the Judicial Committee in the case of *Abdul Majid* v. *Jawahir Lal* (1). He accordingly allowed the appeal, overruling the decision of the Subordinate Judge, and dismissed the application for execution.

From that decision the appellants have preferred this appeal. So far as the 182nd Article of the Limitation Act is concerned, there appears to me, with great respect to the learned Judge, to be little doubt as to what the exact interpretation of that Article ought to be. The period for execution of a decree or order is primarily three years from the date of the decree or order which it is sought to execute. By clause (2), however, in the third column of the Article where there has been an appeal the date from which the three years limitation runs is said to be the date of the final decree or order of the Appellate Court or the withdrawal of the appeal. Now, giving their natural interpretation to the words in sub-clause (2)

(1) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

I should say that where an appeal has been instituted then the period of limitation is extended to three years from the date of the final decree or order in that appeal. In the present case it is not disputed that there has been an appeal and that the presentation of that appeal was within time. It can hardly be disputed that there has been a final order in that appeal because the appeal was dismissed by a Division Bench of this Court after considering the question of whether any further indulgence should be granted to the appellants who had failed to comply with the procedure requiring them to deposit certain printing costs. That that order is final I think there can be no doubt, because it finally disposed, so far as that appeal was concerned, of the rights of the parties. The learned Judge, however, considered that the case was governed by the decision of the Judicial Committee in *Abdul Majid* v *Jawahir Lal* (1) (*ubi sup*). It is necessary, therefore, to consider what the effect of that decision was. Two points arose for decision in that case. The first was whether an application, which was barred by Article 179 of the Limitation Act then in force at the expiry of three years from the date of the decree, could be revived by the operation of the Civil Procedure Code which came into force at a later date. We are not concerned with the decision on that point but the chief matter for argument in that appeal concerned the question not as to the construction of what is now Article 182 of the Limitation Act but the construction of Article 180 of the previous Act which corresponds to Article 183 of the present Act. It is only necessary to look at Article 183 to see that there is a considerable difference between that Article and Article 182. Article 183 provides for a limitation period of 12 years in the case of an application to enforce an order of His Majesty in Council and the period of 12 years begins to run from the time when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right and the question to be determined in that case was not whether sub-clause (2) of the present Article 182 came into operation but whether what is now Article 183 came into operation in the circumstances of that case. What happened there was that there had been granted by the High Court leave to appeal from a decree of the High Court to the Privy Council. On the 13th May 1901 the appeal before the Privy Council had been dismissed automatically because of the failure on the part of the appellant to prosecute his appeal and the question for determination there was, whether that automatic dismissal of the appeal for want of prosecution was an order of His Majesty in Council within the meaning of Article 180 of the previous Act. Their Lordships came to the conclusion that it was not and that, therefore, there was no order of the Privy Council which could be enforced at all. It was a mere automatic dismissal of the appeal to His Majesty in Council and was not such an order in Council as could be enforced under Article 180 of the former Act. Therefore, that Article did not apply and the limitation period was not 12 years as therein provided but was three years from the date of the only decree that they could execute and that was the decree of the High Court made considerably more than three years before the application for execution. But when we turn to the Article upon the interpretation of which the present appeal depends, it seems to me that it is quite clear that, where there has been an appeal and where that appeal has been properly presented and is within time, any order of the High Court dismissing the appeal or putting an end to the appeal in any way is either a decree or order within the meaning of the present Article 182, clause (2), and I think that, although it may be that in many cases such an order is not an order of which execution could be sought, this is not necessary under the wording of the Article itself. Even assuming that the decree which it is sought to execute is in the present case the decree of the Subordinate Judge, nevertheless, in my opinion, under Article 182 the three years limitation for presenting an application for execution of that decree does not begin to run until the final order of the High Court which puts an end to the appeal, and this view seems to me to be borne out by the fact that it is not only a decree or order of the High Court which is contemplated by sub-clause (2) but even the withdrawal of the appeal would be sufficient within the terms

of that clause to revive the period of limitation. It would be a strange thing if the period of limitation were to be revived where the appellant withdraws his appeal and yet it were not to be revived in cases where the appellant, instead of withdrawing his appeal, allows the appeal to be dismissed by default. I cannot believe that this was the intention of the Legislature. The wording of the clause appears to me clearly to be wide enough to cover the circumstances of the present case and, with great respect to the learned Judge, I think that he has not sufficiently realised in dealing with the decision of their Lordships of the Judicial Committee in the case referred to that that was not really a decision upon the Article in question at all but dealt solely with the question of whether there had been an order in Council under Article 183 which could be executed so that the period of limitation was 12 years within that Article.

Another decision of their Lordships of the Privy Council was also relied upon in which the question of the interpretation of Article 182 was raised. That was the case of *Batuk Nath* v. *Munni Dei* (2). That case appears to me to carry the argument no further. It was a case where a petition of appeal was presented to His Majesty in Council and it was not properly lodged by the appellant. The Registrar accordingly dismissed the appeal for non-prosecution under rule 5 of the Standing Order in Council of the 13th June 1853 then in force and the question for determination there was, whether such a proceeding was within the meaning of Article 182 a final decree or order of His Majesty in Council so as to come within the words of Article 182, clause (2), which refers to a final decree or order of the Appellate Court. Their Lordships came to the conclusion that there was in fact in the circumstances which I have mentioned no order of His Majesty in Council dismissing the appeal nor was it necessary that any such order should be made in the appeal and Sir John Edge who delivered the judgment of their Lordships' referred to rule 5 of the Order in Council of the 13th June 1853 and observed that under that rule the appellant or his agent not having taken effectual steps for the prosecution of the appeal the appeal stood dismissed without any further order. Now, the ground upon which that decision was come to cannot possibly apply in the case of an order made by the High Court in an appeal of this nature for the simple reason that an appeal presented to the High Court is not automatically dismissed and cannot in fact be dismissed without an order made by the High Court itself, when the matter is considered not necessarily upon the merits of the case but is considered and dealt with. The decision which I have just referred to appears to me to be no authority for the proposition that an order made in circumstances in which the order was made in the present case is not an order within the meaning of Article 182, clause (2) of the Limitation Act. In my opinion this appeal should be allowed and the decision of the learned Judge should be overruled and the order of the Subordinate Judge should be restored. The appellants are entitled to their costs. Hearing fee before Mr. Justice Das and in this appeal should be assessed at two gold *mohurs* in each case.

Ross, J.—I agree.

Appeal allowed.

(2) 23 Ind. Cas. 644; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729; (1914) M. W. N. 437; 41 I. A. 104 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 456 OF 1919.

March 16, 1920.

Present:—Mr. Justice Moore.

ARUMUGA CHETTIAR—DEFENDANT No. 1 —PETITIONER

versus

RAMANADAN, MINOR BY GUARDIAN THENUKODI ATHAL—PLAINTIFF —RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment —Letter expressing willingness to pay amount due on comparison of account.

A statement contained in a letter that if upon a comparison of accounts any amount is found due by the writer of the letter he is prepared to pay it, is an admission that he had dealings with the person addressed and implies a promise to pay, and is consequently a sufficient acknowledgment of liability under section 19 of the Limitation Act. [p. 899, col. 2.]

BAIDYANATH MAHTO v. SHYAM MAHTO.

Petition, under section 25 of Act (IX of 1887), praying the High Court to revise the decree of the Court of the Subordinate Judge, Negapatam, in Small Cause Suit No. 182 of 1918.

FACTS appear from the judgment.

Mr. *R. Srinivasa Aiyangar*, for the Petitioner.—The acknowledgment of liability is at least only conditional on accounts being immediately compared. There is a repudiation of liability when it is stated that the amount mentioned in plaintiff's notice was not due by the defendant. The defendant offers to pay only if a comparison of the accounts discloses a balance against him. See *Narayanaswamy Mudali* v. *Gangadhara Mudali* (1), *Ballapragada Ramamurthi* v. *Thammanna Gopayya* (2) and *Andiappa Chetty* v. *Devarajulu Naidoo* (3).

Mr. *N. M. Malim Sahib*, for the Respondent. The case is covered by the principle of the Full Bench ruling in *Maniram Seth* v. *Seth Rupchand* (4). There is an admission that there are dealings between the plaintiff and defendant, coupled with a promise to pay whatever may be found due on a scrutiny of the accounts. That is sufficient acknowledgment to save limitation under section 19 of the Limitation Act.

JUDGMENT.—The point for determination is, whether the letter, Exhibit B., sent by the defendant's Pleader to the plaintiff's Pleader constituted a sufficient acknowledgment of liability under section 19 of the Indian Limitation Act, to save the suit from being barred.

The following sentences are relied on by the respondent as containing the acknowledgment of liability :—

"In case the account is compared now, and if any amount is found due, my client is prepared to pay it. The amount mentioned in your notice is not due as per your account.

"As my client is not aware of certain amounts contained in the *kaichitas* given to the aforesaid person it is not possible to set right the account of my client. I am, therefore, instructed by my client that your client should be made to give forthwih the *kaichitas* and accounts and on getting them compared should receive the amount found to be due."

The question is, I think, covered by the Privy Council ruling in *Maniram Seth* v. *Seth Rupchand* (4). The statement in the letter contained an admission that the defendant had dealings with the plaintiff and implied a promise to pay, if he should be found to be indebted on the account being gone into. An acknowledgment of liability, should the balance turn out to be against the person making it, is a sufficient acknowledgment under section 19 of the Limitation Act.

The cases cited by the learned Vakil for the petitioner, *Narayanaswamy Mudali* v. *Gangadhara Mudali* (1), *Ballapragada Ramamurthi* v. *Thammanna Gopayya* (2) and *Andiappa Chetty* v. *Devarajulu Naidoo* (3), are clearly distinguishable from the present case, as the acknowledgment was conditional.

I cannot accept the contention that the acknowledgment of liablility in the Vakil's letter was conditional on the account being at once compared, which was in fact not done. No objection was apparently taken to the correctness of the plaintiff's accounts which were filed in the lower Court. There is no force, I think, in the contention that the Vakil had no authority to send the letter on behalf of his client, and this question was not raised in the lower Court. The petition is dismissed with costs.

M. C. P.

Petition dismissed.

(1) 48 Ind. Cas. 89; 37 M. L. J. 353.
(2) 35 Ind. Cas. 675; 40 M. 701; 4 L. W. 48; 20 M. L. T. 129; 31 M. L. J. 231.
(3) 12 Ind. Cas. 378; 36 M. 68; 10 M. L. T. 251; (1911) 2 M. W. N. 225; 21 M. L. J. 1024.
(4) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 120; 33 I. A. 165 (P. C.).

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 21 OF 1916.

December 15, 1920.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Ross.

BAIDYANATH MAHTO—DEFENDANT—APPELLANT

versus

SHYAM MAHTO—PLAINTIFF AND UPENDRA MAHTO AND OTHERS—DEFENDANTS—RESPONDENTS.

Digwari *tenure*—Digwar, *whether can grant permanent lease or acquire interest in waste land.*

BAIDYANATH MAHTO *v.* SHYAM MAHTO.

A *digwar* cannot either transfer the lands comprised in the *digwari* grant to another so as to create an interest in them by permanent lease, nor can he himself acquire any interest in the uncultivated land, such as jungle or waste land which is comprised within the *Mauza*. [p. 900, col. 1.]

Appeal from a decision of the Subordinate Judge, Manbhum, dated the 4th October 1915.

Mr. *S. C. Mittra*, for the Appellant.

JUDGMENT.

MILLER, C. J.—This is an appeal by one of the defendants in the suit against a decision of the Subordinate Judge of Manbhum, dated the 4th October 1915. The case has taken a long time to come on for hearing because there have been various substitutions owing to the death of some of the parties. The plaintiff, who was the son of one of four brothers, instituted the suit claiming partition against the descendants of his uncle, Baishnab Charan, and against the widow of another uncle, Sridhar, and against a third uncle, Bholanath, himself, his own father's name being Lakshmi Charan. The claim was for partition of certain properties alleged to belong to the family jointly. The eldest of the four brothers, Baishnab Charan, was during his lifetime the Digwar of *Mauza* Chargali. He left three sons Mahendra, Upendra and Makunda who are the defendants Nos. 1, 2 and 3 and on his death Mahendra was appointed Digwar of the same property in place of his father. Mahendra died after the suit was instituted and his son, Baidyanath, thereupon became the Digwar in his turn. He also has died since that time and is now represented by his mother.

The properties in suit are comprised within five *Mauzas*, *viz.*, Chargali, of which Baishnab and after him his descendants were the Digwars, Barasini, Agaya, Lakhanpur and Ketankiyari. The plaintiff's case was that certain areas within these *Mauzas* had been acquired by different members of the family and were the joint property of them all and he claimed a fourth share of these properties as being a descendant of one of the four brothers to whom they belonged. The defendants, other than those descended from Baishnab, offered no opposition to the present suit, and claimed, just as the plaintiff did, that these properties were the proper subject of partition and they claimed to be entitled to their proper share. I have already mentioned that, so far as the properties in Chargali are concerned, they were situated within a Digwari village of which, after Baishnab, Mahendra was the Digwar at the institution of the suit. With regard to Barasini, Agaya and Lakhanpur it appears that these were in the possession of the defendant Bholanath, the plaintiff's uncle, who at that time exercised the office of Sardar Digwar over these *Mauzas*. Before Bholanath's time his family and that of the plaintiff had apparently no interest in either Barasini or Agaya or Lakhanpur. The fifth village in which it is claimed there are certain portions of land belonging to the family is Ketankyari but, so far as this is concerned, the learned Subordinate Judge has dismissed the claim and there is no appeal with regard to that portion of the case. In addition to the land which is claimed as the subject of partition certain moveables, such as bullocks and carts and farm implements at these various villages, are also claimed as the subject of partition by the plaintiff and there is also a certain quantity of grain which was held for the purposes of a paddy *mahajani* business and if the plaintiff is entitled to partition at all it is proved that the family was a joint family at the time when the suit was instituted and it has been found by the learned Judge that the paddy *mahajani* business was in fact carried on for the benefit of the joint family. Unless, therefore, it can be shown by the appellant, who was the Digwar at the time the suit was instituted and whose successor has been appointed in his place and is now the Digwar, that the paddy-lending business was not a joint family affair but a separate business carried on by Baishnab and afterwards by Mahendra and his branch of the family it follows that the plaintiff must succeed as to that portion of his claim.

The learned Judge found as a fact that the family was a joint family and that these properties claimed had been acquired by one or other of the members of the family at the time when they were joint in estate and that they could be partitioned in the present suit, that is to say, all except those within Mouza Ketankiyari.

From that decision the appellant who represents Baishnab's branch of the family

as the Digwar of Chargali has appealed and his main objection is that the properties in question form part and parcel of a Digwari grant and they could not, at all events so far as Chargali is concerned, be either transferred by the Digwar to other members of the family so as to make them joint family property either as cultivating tenants or under any larger interest such as a permanent lease, because this would be entirely contrary to the conditions under which such a grant is made to a Digwar. That this proposition as a general proposition of law is accurate I do not think can be denied. There is authority for it in the case of *Grant* v. *Bangsi Deo* (1) where it was distinctly laid down that a *ghatwal* (which for this purpose may be regarded as the same as a Digwar) is not competent to grant a lease in perpetuity and his successors are not bound to recognise such an incumbrance, That case, which was decided in 1871, was referred to with approval in 1901 in the High Court at Calcutta in the case of *Narain Mullick* v. *Badi Roy* (2). The head-note, which alone it is necessary to refer to, says that as a general principle a *ghatwal* is not competent to grant a lease in perpetuity and that his successor is not bound to recognise such an incumbrance. A lease granted in perpetuity to the plaintiff in that suit by the defendant No. 7 who was a *ghatwal* jointly with the predecessors of the other *ghatwal* defendants was held to be inoperative even as against the defendant No. 7. As the Digwar holds his property by virtue of his office and cannot bind his successors by granting any permanent leases without the consent of the Government for that purpose it follows that, in so far as the properties in suit may be claimed by reason of any permanent lease granted to any of the members of the family, that lease is not binding upon the successor of the Digwar who granted the lease and, in so far as the property comprised in Chargali is concerned, it seems to me also to follow that the Digwar himself cannot grant a tenancy to the members of the joint family including himself because he, being the proprietor for the time being of the property, cannot grant himself a lease of that property as a cultivating tenant. It is impossible, from the plaint in this case and it is not easy from the evidence, to discover exactly the nature of the interest in the property claimed in *Mauza* Chargali by the plaintiff; that is to say, whether it was a mere cultivating right or whether it was something larger in the nature of a permanent lease or tenure, but in any case it seems to me that the plaintiff, by setting up that his family have acquired any co-parcenery rights in the Digwari property by grant from the Digwar himself, must fail. The Digwari grant is not a matter which in itself cannot be the subject of a co-parcenary. One of the points for consideration in the case was whether the properties which were claimed in Chargali were the self-acquired properties of Baishnab or whether they had been acquired by him during his term as Digwar as his own self-acquired properties, and not on behalf of the joint family, but, whichever way the case is looked at, it seems to me equally clear that if these properties were acquired by Baishnab during the term of his office as Digwar such an acquisition cannot for a moment be allowed to stand. It is quite clear from the documentary evidence that what was granted to Baishnab as his Digwari property was the whole of *Mauza* Chargali, and he, being in as Digwar cannot acquire in that property any other interest either by clearing and cultivating the jungle land or in any other manner, because we find, on turning to the appointment of his son Mahendra and the document may be taken as in the same terms as the grant made to his father, that he is appointed Digwar of the village of *ghatwali* upon the terms of rendering Government service faithfully and honestly; and it is provided that he should not be able to transfer by mortgage or sale or in any other way any portion of the *ghatwali* lands and if it be necessary to settle any land he shall not be able to do so without the order of the Deputy Commissioner; that he should not be able to hold possession of any lands in excess of the *ghatwali* lands mentioned alleging the same to be *ghatwali*; that he shall properly look after the jungle in the said *Mauza* and shall not cut or sell any wood from the jungle

(1) 15 W. R. 58; 6 B. L. R. 652.
(2) 6 C. W. N. 94; 29 C. 227.

or settle the said jungle with any one without the permission of the Deputy Commissioner. There is a further prohibition against settling the sub-soil of the *Mauza* with any one and his term of office is restricted in this way, "You will possess and enjoy the said *ghatwali* lands as long as you will hold the office of *ghatwal* and fulfil your duties properly, and regularly pay the rent. And if for any reason you are dismissed from the said office then you will have no claim to the said lands." The lands there given to Mahendra as Digwari or *ghatwali* are described as the *Mauza* known as Chargali in Pargana Obharra; and what the land comprised is shown from a certified copy of the list of names of Digwars and *ghatwals* within the jurisdiction of the town of Purulia for the year 1859. There the land is described, under the heading whether the Sardar gets a salary or holds a *jagir*, thus "the *Mauza* Chargali forms a Digwari" which means that it belongs to the Digwar and there is no Sardar Digwar who gets a salary. It is clear, therefore, that the whole of *Mauza* Chargali was comprised in the Digwari grant. In these circumstances, it seems to me that there cannot be any doubt that the Digwar himself cannot either transfer this land to another so as to create an interest in it by any permanent lease nor could he himself acquire any interest in the uncultivated land such as jungle or waste land which is comprised within the *Mauza*; and, therefore, whether the interest which is now claimed by the plaintiff was what had originally been jungle land but had been brought under cultivation by the Digwar Baishnab, or whether it was some land of which a permanent lease was granted to the other members of the family, in either case it cannot form any joint family property to which the members of the family could have a valid claim. So far, therefore, as the property in Chargali is concerned, I think that the judgment of the learned Subordinate Judge must be set aside.

With regard to the rest of the property which it was decreed should be partitioned that is situated in Barasini, Agaya and Lakkhanpur. With regard to that in Agaya and Lakkhanpur as well as that in Barasini it appears that that is held or was held at the time the suit was instituted by Bholanath, defendant No. 4, as the Sardar Digwar and it is contended by the plaintiff that certain portions of the land comprised in these *Mauzas* had been acquired also by Baishnab during his lifetime and that they were treated as joint family property. How these lands came to be acquired there is on the record no very clear evidence to show, but it is clear that if they were acquired by Baishnab they were not acquired by a person who was at that time himself the Digwar of the property. It has been suggested that these *Mauzas* of Barasini, Agaya and Lakkhanpur were appurtenant in some way to Chargali but it does not appear from the documentary evidence that they are included in the description of *Mauza* Chargali and it is admitted that the Sardar of Agaya and Lakkhanpur as well as of Barasini did not pay any rent or render any tribute or service to the Digwar of Chargali and so far as the evidence goes there is nothing to shew that the Digwar of Chargali had any real interest by virtue of his office in any of these *Mauzas*. It may well be, therefore, that some interest was acquired in some portion of these properties by the father of defendants Nos. 1, 2 and 3 either by adverse possession or in some other legitimate way. We cannot tell, but at all events it has been found by the learned Judge that these properties were acquired and treated as joint family property all along. The defence, therefore, of the appellant does dot apply in the same way to these *Mauzas*, because he has failed to make out that the acquisition of these properties, whenever it took place, was contrary to the terms under which the property was held by the person at that time entitled to it as Digwar. I think, therefore that the appellant has failed to satisfy us that the Subordinate Judge was wrong in so far as he ordered a partition of the properties comprised within these three *Mauzas*. Barasini, Agaya and Lakkhanpur and to that extent I would dismiss this appeal. I may add that Bholanath who was the Sardar *ghatwal* of these properties has raised no objection to the present suit for partition.

The only other matter to be determined is as to the moveable properties in the

suit. So far as the moveable properties in Chargali are concerned, I think the plaintiff has failed to make out any case. He has failed to show that these properties were joint family properties and it is quite clear that the moveables at Chargali are moveables which are being used in connection with the cultivation of the whole of the *Mauza* in so far as it is in the *khas* possession of the Digwar himself and possibly in connection with his office as Digwar in collecting the rents and so on. With regard to the moveables in the possession of the other defendants, there is no dispute that these should form the subject of partition and, therefore, we see no reason to differ from the conclusion arrived at by the learned Judge with regard to them. With regard to the paddy *mahajani* business the learned Judge has found that at the date of this suit that business existed and the family was joint and that that business was carried on for the benefit of the joint family. Again, the appellant has failed to satisfy us that he was wrong in arriving at the conclusion that the paddy-lending business formed a legitimate subject of partition in the present suit.

The result is, that the decree of the learned Subordintae Judge will be affirmed in a modified form and it will be ordered that a preliminary decree for partition be passed in the plaintiff's favour and that the extent of his share in the family property be declared to be four annas; that a Commissioner be appointed to effect a partition of the plaintiff's four annas share in the *khas* possession of the family (excluding the tenanted portion) in *Mauzas* Barasini, Agaya and Lakkhanpur. Then the decree will read "and also a partition of the plaintiff's four annas share in the moveable properties admittedly in the possession of the defendants respectively other than the defenants Nos. 1, 2 and 3 and those who have been substituted in place of any of them." The moveables which form the subject of the paddy lending business wherever found shall also be partitioned the plaintiff receiving his four-annas share.

Ross, J.—I agree

Decree modified.

ALLAHABAD HIGH COURT.

APPLICATION IN SECOND APPEAL No. 653 OF 1918.

April 21, 1920.

Present:—Mr. Justice Walsh.

LACHMI NARAIN—PETITIONER

versus

MUHAMMAD YUSUF AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9—Limitation Act (IX of 1908), s. 5—Appeal, abatement of, owing to death of appellant—Application for substitution of names, nature of—Court, power of, to set aside order of abatement—Sufficient cause.

Owing to the legal representatives of a deceased appellant not having been brought on to the record, an appeal automatically abated, but no formal order carrying the abatement into effect was drawn up. More than six months after the death of the appellant an application was made to bring his legal representatives on to the record and to continue the appeal:

Held, (1) that the application was, in substance, an application to set aside the abatement under Order XXII, rule 9, of the Civil Procedure Code, and that the absence of a formal order of abatement was no obstacle thereto; [p. 904, col. 1.]

(2) that the Court had power to entertain the application and decide whether the applicant was prevented by sufficient cause from continuing the appeal, under sub-rule (2) of rule 9, independently of sub-rule 3). [p. 904, col. 2.]

The provision in sub-rule (3) of rule 9 of Order XXII of the Civil Procedure Code does not confine the sufficient cause mentioned in sub-rule (2) to the circumstances given in section 5 of the Limitation Act. [p. 904, col. 2.]

Application for substitution of names.

Dr. *S. N. Sen* and Mr. *Durga Prasad* for the Applicant.

Mr. *M. L. Agarwala* and Dr. *S. M. Sulaiman*, for the Opposite Parties.

JUDGMENT.—This is an application in form to bring on record the names of two persons, Gomti Prasad and Kaleshar Prasad, collateral relatives of the deceased appellant, Lachmi Narain. Lachmi Narain died on the 2nd July 1919 and the time for substitution of names, namely, six months, therefore, expired on the 2nd of January 1920. An application was made to this Court, *ex parte*, on the 5th of February, a month and three days beyond time. The learned Judge, who happened to be myself, issued notice to the other side to show cause why in spite of the expiration of time, leave should not be given. Mr. M. L. Agarwala for the plaintiff appears to show cause, and he has raised certain objections which it is necessary for me to deal with,

In the first place he says that there is no order of abatement, and that the application is one to bring certain names on the record and not to set aside any order of abatement. I agree that that is an accurate description of the technical position but for some reason or another, which I have never been able to understand, we have no system in this Court by which, if an appeal abates or is dismissed automatically for breach of some condition precedent, or for failure to comply with some order such as giving security for costs, an order is automatically drawn up in the ministerial side of the office recording that the appeal stands dismissed or abated, as the case may be. What happens is, that it is put up amidst a lot of other applications of a similar kind before an unfortunate Judge who has to deal with them with some rapidity in the half hour allowed for petitions and the usual order is made, namely, "put up in the ordinary course". I have in my experience known of more than one such case which has been put up in the ordinary course because it was found that the appeal had abated, and afterwards an adjudication in Court took place, whereas in fact, the appeal abates automatically on the expiration of six months The absence of any formal order by this Court carrying the abatement into effect, cannot serve as an obstacle to any body who wants to put himself right, or to correct some *bona fide* mistake which has occurred. Therefore, I agree with Mr. Durga Prasad for the applicant that in substance this is an application to set aside the abatement under Order XXII, rule 9 and to allow the names to be substituted and the appeal to proceed, in spite of the fact that the six months have expired and the right of appeal abated automtically by law. I hold that I have the right to consider this matter and to decide whether, in my opinion, the applicant was prevented by any sufficient cause from continuing the appeal, and, if I am satisfied on that ground, to set aside the abatement and allow the appeal to be continued on such terms as I think right. Order XXII, rule 9, is made to apply to appeals by rule 11.

Then, Mr. Agarwala says that the circumstances of the case do not bring the application within section 5 of the Limitation Act. Without deciding whether they do or whether they do not, I think I have a duty, under rule 9, sub rule (2), to decide whether there was sufficient cause independently altogether of sub rule (3). Sub-rule (3) merely provides that the provisions of section 5 of the Limitation Act shall apply to such applications, so that if the case is one clearly within section 5 of the Limitation Act the Court may rule that that is sufficient cause. But I do not think that that provision confines the sufficient cause mentioned in sub-rule (2) to the circumstances given in section 5 of the Limitation Act.

Thirdly, Mr. Agarwala objects that there is a serious question as to whether the persons applying before me are or are not the legal representatives of the deceased appellant. He says that *Musammat* Sitabo has an interest. There is an affidavit by her before me to the effect that she disclaims any interest and support this application. Mr. Agarwala asks me to refer that question so that it may be determined by the Court. I propose to do that but I refer that question with the affidavits relating to it to the decision of the Court hearing this appeal. In this case the evidence before me, which I believe, goes to show that one of the applicants was ill for a very long time and unable to attend to this matter. The affidavit is not very specific on the point. On the contrary, it does not say when and for how long, nor does it say when the applicant first heard of the pendency of this appeal. But I think I can remove any possible injustice to anybody by making it part of the terms on which I allow this application that the applicant shall deposit in cash in this Court the sum of Rs. 60, being the amount of costs incurred in the lower Appellate Court, as security for the costs of this appeal. If this is done within a month, I extend the time for bringing the names of Gomti Prasad and Kaulesbwar Prasad on the record to that date whenever it may be, that is to say, to the date of the deposit of the security within a month from to-day. If they fail to do it within a month, this application will stand dismissed. Costs of this application will be costs in the appeal.

Application allowed.

RAWLINS *v.* ANANT LAL SAHU.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 69 OF 1919.

December 15, 1920.

Present :— Mr. Justice Das and Mr. Justice Adami.

E. F. RAWLINS—PLAINTIFF—APPELLANT

versus

ANANT LAL SAHU—DEFENDANT—RESPONDENT.

Defamation—Entry of name in surveillance register—Damages, suit for, maintainability of—Criminal Procedure Code (Act V of 1898), s. 107—Order requring security to keep peace, whether conviction.

The entry of a person's name in class "C" of the surveillance register, without justification, does not give him the right to recover damages from the person making the entry. [p. 905, col. 2; p. 906, col. 1.]

An order binding down a person in a proceeding under section 107 of the Criminal Procedure Code is not an order convicting a person under any law. [p. 905, cols. 1 & 2.]

Appeal from a decision of the Additional District Judge, Muzaffarpore, dated the 13th September 1918, reversing a decision of the Subordinate Judge, First Court, Muzaffarpore, dated the 22nd May 19 6.

The Government Advocate and Mr. *Kulwant Sahai*, for the Appellant.

Mr. *Abani Bhusan Mukherjee*, for the Respondent.

JUDGMENT.

DAS, J.—I am of opinion that the plaint discloses no cause of action. It is admitted that the defendant caused the name of the plaintiff to be entered in class C of the surveillance register. The plaintiff complained of this entry and his case is that the entry was malicious and illegal and that he has suffered damages in consequence. He has in this action claimed to recover Rs. 2,500 from the defendant.

Now, I may say at once that, in my opinion, there was no justification at all for the defendant to enter the name of the plaintiff in the surveillance register. The rules empower the Superintendent of Police to enter the name of a person in the surveillance register only when a person has been convicted under some law. It is true that the plaintiff was bound down to keep the peace in a proceeding under section 107 of the Criminal Procedure Code but, in my opinion, an order binding down a person in a proceeding under section 107 of the Criminal Procedure Code is not an order convicting a person under any law that I know of. At the same time, I must point out that the drafting of the rules leaves much to be desired and may mislead an inexperienced officer. We can only hope that the matter will receive the careful attention of the authorities concerned.

But the question which we have to determine is not whether the action of the defendant is wrongful but whether it is legally wrongful: in other words, has the act of the defendant prejudicially affected the plaintiff in any of his legal rights? That is the question which we have to determine. It is impossible to give an adequate definition of the legal rights to which a person is entitled, but, speaking broadly, we may say that these legal rights are, first, the right of personal liberty and security; secondly, the right of reputation: and thirdly, the right of property. It is not suggested in this case that there has been an infringement of any right of propepty. We are, therefore, left to consider whether the act complained of is an invasion of the right of personal liberty and security, or the right of reputation. In my view it has not been shown that the act complained of is an invasion of the plaintiff's right of personal liberty and security. It is not suggested that any restraint has been placed on the plaintiff by reason of the act complained of. If, indeed, his liberty was in any way curtailed or his movements hampered, there would, in my view, have been a cause of action for the plaintiff. But that is not the suggestion here, although it is suggested that the Police have from time to time paid visits to the plaintiff and have annoyed him and harrassed him in various ways. If, indeed, there was an unjustifiable intrusion on the part of the Police on plaintiff's property, an action for trespass would lie against them. If the Police have been guilty of any offences under the Penal Code, it was open to the plaintiff to take such action against them as he thought that he was entitled to take; but, I do not know of any law which prevents persons from paying visits to another person so long as in paying those visits they do not intrude upon the property of another person.

Nor do I think that there has been an infringement of the plaintiff's right of

reputation. It is true that the defendant has posted the name of the plaintiff in the surveillance register but that is a document which is kept by the department for the use of the department.

The learned Vakil for the respondent contended that the authorities have framed these rules under section 12 of the Police Act. Section 12 of the Police Act provides as follows:—

"The Inspector-General of Police may, from time to time, subject to the approval of the Local Government, frame such orders and rules as he shall deem expedient relative to the organization, classification, and distribution of the Police force, the places at which the members of the force shall reside, and the particular services to be performed by them; their inspection, the description of arms, accoutrements and other necessaries to be furnished to them; the collecting and communicating by them of intelligence and information; and all such other orders and rules relative to the Police force as the Inspector General shall, from time to time, deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties."

In my view these rules do not relate to the organization, classification and distribution of the Police force, and, therefore, are not contemplated by section 12 of the Act at all. The rules are, in my opinion, purely departmental rules for the guidance of the department and kept by the department. There is no publication at all, nor is it alleged in the plaint that there was any communication of what is alleged to be defamatory matter to any person other than the plaintiff. It is, in my view, much to be regretted that the defendant acted somewhat hastily in the matter: but the question before us is, whether in acting as he did he infringed any of the legal rights of the plaintiff. I am of opinion that he has not. I must, therefore, allow this appeal, set aside the judgment and decree of the Court below, and dismiss the plaintiff's action with costs throughout.

ADAMI, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 507 OF 1919.

April 1, 1920.

Present:—Mr. Justice Seshagiri Aiyar.

KANDASAMI CHETTY—DEFENDANT—PETITIONER

versus

RAMALINGA CHETTY—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 4 (1)—Provincial Small Cause Courts Act (IX of 1887), s. 25—Judgment of Small Cause Court, contents of—Brief reasons for decision, statement of.

The judgment of a Judge of a Small Cause Court should contain a brief statement of the reasons for the decision which would satisfy the High Court that the Judge had applied his mind to the materials placed before him. A judgment in a Small Cause suit as follows:—'Point: Is the plaint claim true? I find the plaint claim true', is not a judgment in conformity with the law. [p. 907, cols. 1 & 2; p. 908, col. 2.]

Protap Chandra Dutt v. *Abhimanini Surini*, 43 Ind. Cas. 752, dissented from.

Malik Rahmat v. *Shiva Prasad*, 13 A. 533; A. W. N. (1891) 172; 7 Ind. Dec. (N. S.) 337 and *Bai Jasoda* v. *Bamansha*, 23 B. 331; 12 Ind. Dec. (N. S.) 222, considered.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Cuddalore, in S. C. S. No. 113 of 1919.

FACTS appear from the judgment.

Mr. *M. S. Vaidyanatha Aiyar*, for the Petitioner.—Though a Small Cause Court is not bound to write an elaborate judgment, it should record even concisely its reasons for its decision. There are no materials in the present judgment on which the High Court could say whether the Judge applied his mind to the evidence before him. The High Court cannot be expected to scrutinise all the evidence itself to see if the judgment is correct.

Mr. *S. T. Srinivasagopala Chariar*, for the Respondent, relied on the language of Order XX, rule 4 (1) and (2) Civil Procedure Code and *Protap Chandra Dutt* v. *Abhimanini Surini* (1) for the position that the Small Cause Court is not bound to give reasons for its decision.

JUDGMENT.—The judgment of the District Munsif under revision is in these terms, "Point; Is the plaint claim true? I find the plaint claim true." The question for consideration is, whether this is a judgment

(1) 43 Ind. Cas. 752.

which should be accepted by this Court. Mr. Srinivasagopala Chariar, who appeared for the respondent, has drawn my attention to the language of Order XX, rule 4 clauses (1) and (2) of the Civil Procedure Code and contended that, in a Small Cause suit, the Judge is not bound to give reasons for his decision. He is supported by the Calcutta High Court in *Protap Chandra Dutt* v. *Abhimanini Surini* (1). On the other hand, in *Malik Rahmat* v. *Shiva Prasad* (2) Mr. Justice Mahmood and in *Bai Jasoda* v. *Bamansha* (3) one of the Judges of the Bench examined the materials placed before them to find out whether the Small Cause Judge had applied his mind to the consideration of the evidence adduced before him. I may at once say, with reference to the observations contained in the judgment of Farran, C. J., in *Bai Jasoda* v. *Bamansha* (3), that I am not prepared to act upon the suggestion. The learned Chief Justice says: "In a case where there is nothing to excite suspicion, and where the plaintiff has given such proof of her claim as the law requires, the plaintiff is entitled, and this Court is entitled, to have some indication from the Judge of the point upon which he dismisses the suit, to show that he is not acting from mere caprice or in ignorance of the rules of law which regulate the proof requisite to establish a plaintiff's claim." The learned Judge prefaces this with a remark by saying, "In many cases the point for determination which forms the basis for dismissing the suit, is obvious upon the face of the proceedings." With all deference, this seems to me to necessitate an enquiry on the part of the High Court whether the case is one in which, upon the face of it, the unsatisfactory judgment of the lower Court should be accepted or is one which should be further examined notwithstanding the unsatisfactory and uninforming nature of the judgment under revision. Now this would cast more work upon the High Court than section 25 of the Small Cause Courts Act requires. In a given case, whether a judgment should be looked upon with suspicion or whether it is one where, despite the meagre judgment given by the lower Court, the High Court should see whether the parties have not been injured will not be an easy process and I am not, therefore, prepared to make the distinction suggested. Once the Court is compelled to embark upon an enquiry as to whether a particular judgment should be scrutinized or not, it would be tantamount to the Court examining for itself the materials which were available to the lower Court and judging for itself whether the decision has been properly arrived at by the lower Court. I am free to admit that the interpretation sought to be placed upon Order XX, rule 4, would appeal to Judges in different ways. Speaking for myself, I have been under the impression while at the Bar that in this Court it had always been insisted upon that the Judge of the Small Cause Court should give some reasons which would satisfy the High Court that he had applied his mind to the materials placed before him. Brought up in that tradition, while sitting in the Admission Court, I have always insisted upon the lower Court exercising Small Cause jurisdiction giving some indication as to what was in its mind, so that I may be in a position to say whether its conclusion is right or not. There are three reasons for this attitude of mind. First of all, the High Court, in exercising its powers of revision under section 25, is really supervising the work of the lower Court, in order to enable it effectually to do its work, the lower Court must give us some materials upon which we can say that it has done its duty properly. Otherwise, we will have to go into the whole record to see whether the work has been properly done. That is from the point of view of the Judge of the High Court revising the work of the Small Cause Judge. Secondly, a party who has adduced evidence—it may be one or two witnesses in a case or half a dozen witnesses in another—must have some satisfaction that the Judge has really come to the conclusion whether his witnesses should be believed or not and whether his documents should be accepted as genuine or not. If, after the examination of all the witnesses and documents, a particular point is decided in a particular manner, the party will be able to see whether what he did has the approval of the Judge or not. Thirdly, what is most important is, that the High Court should not encourage this habit of mind in the lower Court. Once we allow the lower Court to be slack in the discharge of its duty by not

(2) 13 A. 632; A. W. N. (1891) 172; 7 Ind. Dec. (N. S.) 337.

(3) 23 B. 334; 12 Ind. Dec. (N. S.) 222.

giving reasons which induced it in coming to a certain conclusion, I am not quite sure whether this habit of mind would not ultimately have a serious effect upon the temperament of the Judge and upon the rights of the parties, in more important cases. It would not be a mere waste of time on the part of the Small Cause Judge to say simply whether it believed certain witnesses and whether the documents produced before it in the case are to be relied on or not. While it may not be absolutely necessary that it should go into the details regarding the conclusion it has come to, I think that this Court is entitled to have some glimpse into the inner working of the mind of the Small Cause Judge to see whether the work has been done properly or not. For these reasons, I am of opinion that the judgment before me under revision is not one which I can accept. Fortunately, there are not many such judgments coming up for revision. In most cases the Judges elaborately give their reasons for the conclusions they come to. I think this learned District Munsif should be called upon to give his reasons for the decision he has come to. I must, therefore, reverse the judgment and send the case back to him for disposal in the light of the above observations. Costs will abide the result.

M. C. P.

Petition allowed ;
Case remanded.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 472 OF 1919.

December 15, 1920.

Present :—Mr. Justice Das and Mr. Justice Adami.

RAMJANUM SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Babu KHUB LAL SINGH AND OTHERS—PLAINTIFFS, AND *Babu* SARJUG PRASAD MISSIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 87—Abandonment, proof of.

In order to succeed under section 87 of the Bengal Tenancy Act, a plaintiff must establish, first, that the *rayait* voluntarily abandoned his residence without notice to his landlord, secondly, that he did so abandon his land without arranging for payment of his rent as it fell due, and, thirdly, that he ceased to cultivate his holding either by himself or by some other person. [p. 909, col. 1.]

Appeal from a decision of the Officiating District Judge, Darbhanga, dated the 5th March 1919, reversing that of the Munsif, First Court, Darbhanga, dated the 10th May 1918.

Messrs. *P. N. Sinha* and *Murari Prasad*, for the Appellants.

Mr. *Ganesh Dutta Singh*, for the Respondents.

JUDGMENT.

DAS, J.—This was an action by the plaintiffs-respondents for recovery of possession of certain lands which are specified in the plaint. The suit was resisted mainly by the appellants before us on the ground that they have taken a *kabala* of the major portion of the lands in suit. It is necessary to state that the defendants, who are the appellants before us, have taken the conveyance from one Behari Missir whose heirs were cited in the action as defendants third party.

The plaintiffs brought the action on the allegation that the defendants second party were their tenants; that the defendants second party having abandoned the land they were entitled to recover *khas* possession of the land.

The case of the defendants is, that the defendants second party had nothing whatever to do with the land; that one Behari Missir was the tenant in respect of this land, and that the contesting defendants, who are the appellants before us, have taken a conveyance of the major portion of the lands from the heirs of Behari Missir.

The lower Appellate Court has found that Behari Missir was the *benamidar* of the defendants second party; that it was the defendants second party who were the tenants in respect of this land; that the defendants second party were in possession of the land until the 17th December 1915 when they executed a *ladavi* deed in favour of Behari Missir, and that since the 17th December 1915 the defendants first party are admittedly in possession of the major portion of the holding. But the conveyance in favour of the defendants first party did not include 16 *kathas* of

land which was admittedly a portion of the holding and with reference to this 16 *kathas* the learned Judge has said as follows :—

"It is of no concern to us to ascertain as to who is in possession of the 16 *kathas* and odd out of the disputed holding when the defendants second party cut off his connection with the whole of the holding by executing the *ladavi* deed."

It seems to me that a case under section 87 of the Bengal Tenancy Act is not established by the findings arrived at by the lower Appellate Court. Its finding that the defendants second party cut off their connection with the whole of the holding was a finding based not on the evidence in the case but on its view of the *ladavi* deed. If it was based on the evidence in the case, it would have been in a position to record a finding that the defendants second party were not in possession of the 16 *kathas* of land. Now, it is perfectly clear that, in order to succeed under section 87 of the Bengal Tenancy Act, the plaintiff must establish, first, that the *raiyat* voluntarily abandoned his residence without notice to his landlord, secondly, that he did so abandon his land without arranging for payment of his rent as it fell due ; and, thirdly, that he ceased to cultivate his holding either by himself or by some other person. The learned Judge has not considered any of these three points at all, and it is essentially necessary that, before he gives any reliefs to the plaintiff, he must consider the evidence in the case with reference to section 87 of the Bengal Tenancy Act.

I must allow this appeal, set aside the judgment and decree of the Court below and remand the case to the lower Appellate Court for a decision according to law. The appellants are entitled to the costs of this appeal ; the costs incurred in the Court below will abide the result and will be disposed of by the lower Appellate Court.

ADAMI, J.—I agree.

Appeal allowed ;
Case remanded.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS (REFERENCE) No. 235 OF 192 .

August 7, 1920.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Sulaiman.

DEBA NAND—PETITIONER

versus

ANANDMANI—OPPOSITE PARTY.

Hindu Law—Guardian—Testamentary appointment of guardian, validity of—Suit to remove guardian, maintainability of.

Under the Hindu Law the testamentary appointment by a father of a guardian of his son is valid, and, in the absence of an act of misfeasance or bad management, the mother, acting as the next friend of the minor, is not entitled to an order removing such guardian from his office. [p. 910, col. 1.]

Civil Miscellaneous Reference by the Local Government under Rule 17 of the Rules and Orders relating to the Kumaun Division.

Mr. *Damodar Das*, for the Petitioner.

Mr. *M. L. Agarwala*, for the Opposite Party

JUDGMENT.—This is a reference by the Local Government under rule 17 of the Rules and Orders relating to the Kumaun Division. The facts are clearly set forth in the letter of reference.

The plaintiff Anandmani was the minor son of one Chandramani and formed a joint Hindu family with him. Chandramani, by a written Will, appointed the defendant, Deba Nand, his nephew, a guardian of the plaintiff's person and property. On Chandramani's death the testamentary guardian in 1910 took over the management of the estate. In 1918 *Musammat* Parbati, the widow of Chandramani, acting as the next friend of her minor son Anandmani, brought the suit, out of which this reference has arisen, for rendition of accounts, damages and for the removal of Deba Nand from the managership of the property. The case for the plaintiff was that no valid Will had been made by the deceased, nor had he any authority to appoint a guardian of his minor son by Will, and that the defendant had been guilty of mismanagement. The defendant pleaded that the Will was a valid one and was binding on the plaintiff, and denied the allegations of mismanagement. The Court of first instance decreed the suit. On appeal, the District Judge found that the Will had been validly executed by Chandramani, who had been of

sound disposing mind, and that no *mala fides* or lack of prudence, due diligence or care on the part of the defendant had been established. On these findings he set aside the decree of the first Court and dismissed the suit. The learned Commissioner in second appeal accepted all the findings of fact, but, holding that the plaintiff's father had no power to appoint a guardian of the minor's property by Will, restored the decree of the Court of first instance decreeing the suit.

The main question for our consideration is, whether a Hindu father has under the Hindu Law power to appoint by Will a guardian of the property of his minor son. The difficulty is caused by the circumstance, as Mr. Mayne says, that "little is to be found on the subject of guardianship in works on Hindu Law." There can, however, be no doubt that the father is the natural guardian of his minor son and, ordinarily, is the best person to judge under whose care and protection his son should be brought up and by whom his property should be managed during his minority. The power to appoint a testmentary guardian would be quite consonant with the parental authority which a Hindu father has a right to exercise over his son. At least, there seem to be no provisions of Hindu Law opposed to the exercise of such a power. As early as 1866 it was laid down in the case of *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (1) that, "no doubt the mother is the natural guardian of her child; and were any person to attempt to deprive her of this right without authority, her right would, under ordinary circumstances, be supported; but we are not aware of any provisions of the Hindu Law, nor have any such been shown us in support of the principal Sudder Amin's view which prohibit a father from appointing by writing or by word any other person than the mother to be the guardian of his minor children." The facts of that case are certainly distinguishable from those of the present case, but the statement of the law contained therein has not, so far as we are aware, been ever doubted. In fact, the case has been accepted by several eminent commentators as an authority for the propcsition that a Hindu father can by word or writing nominate a guardian for his children, the nomination taking effect after his death, and that he is unrestricted in the choice of a guardian and may exclude even the mother from the guardianship, *vide* Trevelyan's Law of Minors, Chapter IX, page 62, 5th Edition; Ghosh's Hindu Law, page 1013, 3rd Edition, and Dr. Gour's Hindu Code, paragraph 59, page 401.

In the case of *Albrecht* v. *Bathey Jellamma* (2) the rule that a Hindu father has power to appoint a testamentary guardian for his minor son, as enunciated in the case of *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (1) was quoted with approval. The learned Judges, however, thought that the wishes of the father were not conclusive and that, in a case under the Guardians and Wards Act, the paramount consideration would be the welfare of the minor, and that if it would be injurious to the minor to give effect to the father's wishes the Court will interfere even in the father's lifetime.

The case before us is not one arising under the Guardians and Wards Act where the District Judge may have very wide powers of interference. Here the suit in substance is one by the mother of the minor brought as his next friend, and is directed against the defendant who had been duly appointed guardian by the minor's father under a Will. No act of misfeasance or bad management has been proved against him. We are of opinion that the mother, acting as the next friend of the minor, is not under the circumstances of this case entitled to an order removing the defendant from the guardianship of the property of the minor, as, on the authorities, the power of a Hindu father to appoint a testamentary guardian of the property of his minor son seems to be well recognised. If the defendant is not a fit and proper person to remain a guardian of the minor's property, it may still be open to persons interested in his welfare to seek redress under the Guardians and Wards Act.

Having regard to the fact that all the allegations as to the invalidity of the Will and the bad faith, negligence and bad management of the defendant have been found against the plaintiff, the suit cannot

(1) 7 W. R. 73.

(2) 13 Ind. Cas. 453; 22 M. L. J. 247 11 M. L. T. 53; (1912) M. W. N. 53.

be said to have been for the benefit of the minor. The proper person liable for the costs of the defendant is *Musammat* Parbati, the next friend herself.

Our answer to the questions referred to us are, therefore, as follows :—

(1) The learned Commissioner was not right in holding that in this case the deceased father had no power to appoint a guardian to the property by Will and in decreeing the suit on this ground.

(2) The costs of litigation, including the costs of this reference, should be borne by *Musammat* Parbati, the next friend of the minor.

Questions answered.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 13, 1920.

Present :—Lord Buckmaster, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

NAKIMO DEWANI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat PEMBA DICHEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure (Act XIV of 1882), *ss.* 375, 462, 464 *—Bengal Court of Wards Act (IX of* 1879), *ss* 14, 15, 51*—Compromise of suit—Minor defendants—Guardian appointed by Court of Wards, whether requires leave of Court for compromise.*

A guardian appointed under the Bengal Court of Wards Act, 1879, on behalf of infants has power to compromise proceedings in the Civil Court to which those infants are defendants, without obtaining the leave of the Court under section 462 of the Civil Procedure Code, 1882. Upon such a guardian consenting to an agreement for compromise, that agreement is necessarily recorded by the Court under section 375 of the Code, without the examination of its terms required in the case of ordinary guardians. [p. 912, col. 1.]

Appeal from a decree of the Calcutta High Court, dated the 17th January 1917, reported as 37 Ind. Cas. 971, affirming a decree of the District Judge of Darjeeling.

FACTS.—On the death of one Reshuk in 1899 a dispute arose between his widow Nakimo (first appellant) and his cousin Phurbu with regard to a certain estate. In 1905 the Lieutenant Governor of Bengal declared Nakimo to be a disqualified proprietor under the Court of Wards Act, 1879, and ordered that the estate in question should be managed by the Court of Wards. The Court of Wards subsequently declared Nakimo's daughters (second and third appellants) to be minors under section 6 (*b*) of the Act and took charge of their properties. In 1907 Phurbu's son, Jerung, brought a suit against Nakimo and her daughters claiming the estate. A compromise was arrived at and accepted by the Board of Revenue and Jerung and the manager under the Court of Wards thereupon presented a joint petition to the District Judge before whom the suit was pending, for an immediate preliminary decree in terms of the compromise. The District Judge made such a decree in 1907 and it was made absolute in 1908.

In 1910 Nakimo brought the present suit for a declaration that these decrees were inoperative against her on the ground, *inter alia*, that the compromise was made without the leave of the District Judge. Later on, Nakimo's daughters were added as plaintiffs and Jerung having died, the first three respondents were impleaded as defendants in his place, the 4th respondent being also joined as defendant as representing the Court of Wards.

The District Judge dismissed the suit. He held that, under section 18 of the Court of Wards Act, the Court of Wards had the same powers over the properties of its wards when those properties were the subject of a suit as in any other circumstances, and that the minor wards were properly represented under section 51 of the Act. In his opinion section 464 of the Code of Civil Procedure, 1882, governed this case, and section 462 did not apply. This decision was affirmed on appeal by the High Court (Fletcher and Richardson, JJ.)

Hence this appeal.

Mr. *Kentorthy Brown*, for the Appellants.—Under section 51 of the Court of Wards Act the manager has no authority to enter into any compromise of a suit in which he acts as guardian *ad litem* without obtaining the leave of the Court in which such suit is pending under section 462. It is contended that section 464 excludes section 462 but

if so the manager's powers would depend on what his powers were before 1882. The general powers of management given by section 18 of the Court of Wards Act, 1879, do not include the power to compromise: that view is supported by *Ganesha Row* v. *Tulja Ram Row* (1). The manager under the Court of Wards is in exactly the same position as any other guardian in requiring the leave of the Court to a compromise. The position of the widow, the first appellant, is different from that of the minors, but if this compromise is set aside as regards the minor defendants it cannot be binding upon her (Reference was made to Trevelyan's Law Relating to Minors, 3rd Edition, 1906, p. 319).

Messrs. *DeGruyther*, *K. C.*, and *Parikh*, for the Respondents, were not called on.

JUDGMENT.

LORD BUCKMASTER.—The sole question in this appeal is, whether a guardian appointed by the Court of Wards on behalf of infants has power to compromise proceedings in the Civil Court, to which those infants are defendants. It is alleged on behalf of the appellants that such a compromise cannot take place unless the agreement for compromise has been examined by the Civil Court and the Civil Court has assented to its terms. Section 375 of the Civil Procedure Code of 1882 provides that if a suit is wholly or in part compromised by any lawful agreement, such agreement shall be recorded "and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final." That section received qualification by section 462, which enacted that "no next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor;" but by the Code, as it was originally passed, it was expressly enacted that section 462 shall not apply to any minor for whose person or property a guardian or manager has been appointed by the Court of Wards or by the Civil Court under any local law.

The position, therefore, under the Code was this:—By section 375 the Court was compelled to register the agreement that had been come to for the compromise of the suit, and the necessity for the examination of the terms of the compromise on behalf of the infant did not arise where the infant was represented by a guardian or manager who had been appointed by the Court of Wards or by the Civil Court under any local law.

Alterations were made in that Code in 1883 and 1890, and, instead of excluding in terms sections 400 to 462, as provided in the earlier Code, section 464 extended it by providing that:—

"Nothing in this Chapter applies to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect, or in any way derogate from, the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind."

The Court of Wards Act of Bengal is admittedly a local law within the meaning of that section, and, as already pointed out by the provisions of that law before the passing of the Codes of 1888 and 1890, the guardian so appointed was the only person who could assent to the agreement for the compromise of the litigation, and that agreement, when assented to, was necessarily recorded under section 375, and there is nothing in the later provisions to take away this power.

For these reasons, in their Lordships' opinion, this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *Orr Dignum & Co.*

Solicitors for the Respondents:—Messrs. *Downen & Johnson* and The Solicitor, India Office.

(1) 19 Ind. Cas. 515; 40 I. A 132 (P. C.); 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M L. J. 150; 36 M. 295.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No 274 OF 1920.

(CASE REFERRED No. 28 OF 1920.)

August 13, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

In re JONNALAGADDA APPALANARASAYYA BHUKTA AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order for, without examining all complainant's witnesses, legality of.

Before making an order against a complainant under section 250 of the Criminal Procedure Code awarding compensation to the accused, notice should be given to the complainant and he should be permitted to adduce evidence It is illegal to make such an order before concluding the examination of all the witnesses of the complainant.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge, Vizagapatam Division, in his Letter No. 456 of 1920, dated the 19th February 1920.

Mr. *E. L. Ethiraj*, for the Public Prosecutor, for the Crown.

Mr. *B. Satyanarayana*, for the Accused.

ORDER.—Reading sections 250 and 253 of the Code of Criminal Procedure together, we cannot say that the order for compensation made in spite of the complainant's request for the examination of his remaining witnesses is illegal. But, in our opinion, it is not one that should be made except in very exceptional cases. Directly the Magistrate informs a complainant that he is considering making an order against him under section 250 of the Code of Criminal Procedure, the complainant's position is changed and he comes within the mischief of the Criminal Procedure Code and is on his defence, though not actually accused. The Code provides for a record of his objection and it seems to us that his position is made by the words of the Code stronger than that of a complainant against whom sanction for prosecution for an offence under section 182 or 211, Indian Penal Code, is sought, and in such cases this Court has always required that notice and opportunity to meet should be given and the party permitted to adduce evidence, though section 195 has no such provision. We think that he should be allowed to call his witnesses for, until the Magistrate has heard them, he cannot say whether their evidence will not help him to decide, first, the propriety of such an order and, secondly, the extent of the culpability of the complainant to be expressed in the amount of the compensation. The case of *Queen-Empress* v. *Chiragh Ali* (1) relied on by Mr. Satyanarayana, who appears for the person who received compensation, was a case where the accused was acquitted and such acquittal in a summons case could only be after all the evidence for the prosecution was taken, and in a warrant case after charge framed. We, therefore, set aside the order for compensation.

M.C.P.

Order set aside.

(1) A. W. N. (1898) 198.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 531 OF 1920.

November 18, 1920.

Present:—Mr. Justice Shadi Lal, Chief Justice, and Mr. Justice Leslie-Jones.

KEHR SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code Act V of 1898), s. 237—Charge of murder—Abetment, conviction for, whether legal—Confession of co-accused, value of.

K. and *N.* were charged with the murder of one *W.* It was found that while *N* committed the actual murder he did so at the bidding of *K.* whose actual presence at the scene of the murder was not established. The Sessions Judge convicted *N.* under section 302, Indian Penal Code, and *K.* of abetment of murder:

Held, that on the facts found *K* could have been charged not only with the commission of the principal offence of murder, but also with the abetment thereof and, therefore, by virtue of section 237, Criminal Procedure Code, he could be convicted of the offence of abetment though he was not charged separately with it. [p 917, col. 1.]

KEHR SINGH *v.* EMPEROR.

Yeditha Subbaya v. *Emperor*, 15 Ind. Cas. 85; 23 M. L. J. 722; 3 Cr. L. J. 453; (1912) M. W. N. 725; 12 M. L. T. 203, followed

The confession of a co prisoner cannot *per se* sustain a conviction, and in order to achieve that object it must be corroborated *aliunde* by independent evidence in some material circumstance. [p. 915, col. 2.]

Criminal appeal from the order of the Sessions Judge, Amritsar, dated the 23rd July 1920.

Mr. *Saunders* and Bakhshi *Tek Chand*, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.—On the evening of the 5th of April 1920, the corpse of a boy, aged about 14 years, was found floating in a well situate within the boundaries of the village of Jagdeo in the Amritsar District. The body was taken out of the water, and after being photographed was sent to the Assistant Surgeon who conducted the *post mortem* examination. The evidence of the medical witness shows that he did not find any wounds or other injuries on the body which could account for the death, and that he expressed his opinion that the boy's death was due to drowning. The Sessions Judge has found that the boy was thrown into the well on the night of the 4 5th April 1920; and has convicted two persons, *viz.*, Narain Singh and Kehr Singh, in connection with the murder, and sentenced them to death each.

We may clear the ground by stating at once that there is ample evidence on the record to establish the fact that the body recovered from the well was that of a boy, Wassan, who was living a short time before the murder with his mother, *Musammat* Bhagwani, in the village of Bhalapind, which is not far from Jagdeo. The mother and several other witnesses have deposed to the fact that the photograph shown to them is a likeness of boy Wassan, and there is absolutely no reason for disbelieving them. We have seen the photograph ourselves, and find that the features are quite distinct and could be easily recognised by the relatives of the victim. We must, therefore, take it that the identification of the body has been fully established.

Before narrating the circumstances which led to the commission of the crime, we may briefly refer to the love affairs of *Musammat* Bahgwani. This lady was originally married to a person called Kharak Singh, by whom she had one son, *viz.*, the boy Wassan. Kharak Singh died about ten years ago, and a year after his death the widow married Ishar Singh, a resident of the village of Ghampur, by whom she had two daughters. The convict Narain Singh is the son of Ishar Singh's maternal uncle, while Kehr Singh is a collateral of Wassan. Narain Singh is a resident of Dhariwal but came to Ghampur about a year ago to render assistance to Ishar Singh in cultivating his land, and stayed with him in his house. It appears that *Musammat* Bhagwani contracted a liaison with Narain Singh, with the result that the injured husband turned Narain Singh out of the house. He, however, continued to live in the village, and subsequently arranged with the help of Kehr Singh to abduct *Musammat* Bhagwani. On or about the 26th of March the two convicts took *Musammat* Bhagwani with her children, namely, Wassan and the two daughters, to the house of one Naraini, a resident of Bhalapind, who was acquainted with Kehr Singh and *Musammat* Bhagwani. The exact date on which she arrived at *Musammat* Naraini's house cannot be ascertained with any reasonable certainty; but we agree with the learned Sessions Judge in holding that it was on the 4th of April that the two convicts asked *Musammat* Bhagwani to allow Wassan to accompany them to attend a marriage. There is ample evidence upon the record that the boy left his mother and went away with the convicts, and was not seen by her again. She, after making an infructuous search for the boy, returned to her husband's village Ghampur where she was informed by a Policeman of the recovery of the body from the well.

Now, the story for the prosecution is that Kehr Singh coveted the land of the boy Wassan, and the pedigree table prepared by the *patwari* shows that he and Jawahar Singh, a sonless old man of about 80 years of age, are the only collaterals of Wassan. It is alleged that Kehr Singh wanted to get rid of the boy, and in order to carry out his object he hired Narain Singh to commit the murder. That Narain Singh was employed as a hired assassin and was given some money as an inducement to commit the deed rests upon the confession which he made before

the Magistrate but retracted before the Sessions Judge. Whatever the exact motive may be, there can be no doubt that, on the 4th of April the boy left in the company of Narain Singh and Kehr Singh. As to what happened afterwards we must turn to the evidence of two persons Hari Das (P. W. No. 12) and Mahandu (P. W. No. 13), and to the confession of Narain Singh. Hari Das is a *garanthi* of a shrine situate at a distance of about half a mile from the well from which the body was recovered, and Mahandu is a singer at that shrine. Both these witnesses depose to the visit of the accused Narain Singh and Wassan to the shrine in the evening where they were given food and bedding. They got up, however, about midnight, and then left the temple.

The circumstances immediately preceding the commission of the crime are disclosed in the confession of Narain Singh. This accused was produced before the Magistrate on the 19th of April 1920, when he made a clean breast of the whole affair and narrated a long and circumstantial story of all the incidents in connection with the crime. According to him, it was Kehr Singh from whom the suggestion to kill the boy emanated, to which suggestion Narain Singh at first demurred, Kehr Singh, however, gave him liquor at a shop at Amritsar, and eventually induced him to agree to kill Wassan in return for Rs. 400, out of which Rs. 200 were paid in advance. Kehr Singh then asked *Musammat* Bhagwani to allow him to take Wassan away on the pretext that he and his companion, Narain Singh, were going to attend a marriage and that they wanted to take Wassan to his prospective father-in-law whose daughter might be betrothed to him. *Musammat* Bhagwani at first refused but subsequently consented on learning that her paramour, Narain Singh, was also going. The convicts then brought the boy to the temple near the village of Jagdeo shortly before sunset. Kehr Singh himself did not appear at the temple but concealed himself somewhere in a garden, and it was Narain Singh and Wassan who went to the shrine and, after partaking of their food there, went to sleep. They were awakened at midnight by Kehr Singh, and the three then proceeded to the well where, at the bidding of Kehr Singh, Narain Singh held the victim, while the former tied a piece of cloth round the boy's neck and after knocking him down tied his arms and legs with his *pagri* and threw him into the well.

This confession was adhered to by Narain Singh when he was examined by the Committing Magistrate on the 9th of May 1920 but was retracted before the Sessions Judge. Now, so far as Narain Singh is concerned, we have not only his confession, but also the fact that he, along with Kehr Singh, took the boy from his mother, and the important circumstance that he was seen with the victim afterwards in the vicinity of the well from which the corpse, was recovered. His guilt does not, therefore, admit of any doubt, and his conviction under section 302, Indian Penal Code, is fully justified.

Coming now to the case against Kehr Singh, the learned Sessions Judge has relied upon the following evidence:—

(1) the retracted confession of the co-accused, Narain Singh;

(2) the fact that Kehr Singh, by making a false statement to the mother, induced her to let the boy go with both the convicts, and that the boy actually left the mother in their company and was not seen alive afterwards;

(3) Kehr Singh had a strong motive for doing away with the boy.

Now, the confession shows that Kehr Singh took a leading part in planning and committing the crime, and that it was he who threw the boy into the well. There is, however, a well established rule of practice that the confession of a co-prisoner cannot *per se* sustain a conviction, and that it must be corroborated *aliunde* by independent evidence in some material circumstance. The learned Sessions Judge, while holding that there is no independent evidence to connect Kehr Singh with the actual murder, finds that there is adequate proof upon the record that this convict abetted the commission of the murder. It is beyond doubt that Narain Singh had no grudge whatsoever against the victim or his mother, and had no personal object other than that which he himself gives, namely, a bribe from Kehr Singh, for the removal of Wassan. Indeed, so far as he was concerned, he would be most reluctant to do anything which would displease the boy's mother, *Musammat* Bhagwani, with whom he was carrying on a love intrigue. Further, this lady was

enjoying the income of the boy's landed estate, and the boy's death would probably deprive her of that income and thereby indirectly affect her paramour. It is perfectly clear that Narain Singh, if left alone, would rather like the boy to live than bring about his death.

On the other hand, Kehr Singh had a very strong motive for wishing to get rid of Wassan. If Wassan died, Kehr Singh would immediately succeed to a moiety of his estate, and only the life of a childless old man of 80 years of age stood between him and the other half. So far as we can see, Kehr Singh was the only person who was vitally interested in getting rid of the boy; and we, therefore, accept the statement of Narain Singh that he was induced by Kehr Singh to accept the bribe and to participate in the commission of the crime. The motive on the part of Kehr Singh constitutes a very strong corroboration of the confession of the co-accused.

Further, there can be no manner of doubt that it was at the instance of Kehr Singh that *Musammat* Bhagwani was induced to allow Wassan to leave Bhalapind, and that the reason given by Kehr Singh for taking Wassan with him was absolutely false. It is obvious that the boy did go with Kehr Singh and Narain Singh, and that he was murdered very shortly afterwards, apparently on the night following the day on which he left his mother.

Kehr Singh's subsequent conduct also lends support to the theory that he was implicated in the commission of the crime. It appears that the mother, after making an infructuous search for the boy, came back to her own village, Ghamupur, and that Kehr Singh, though he was living in that village, did not offer any explanation of the disappearance of the boy, nor did he give any imformation as to the scene of the marriage to which he had intended to take him, or as to the prospective parents of the girl to whom the boy was to be married. Indeed, he has all along maintained a complete silence as to his movements since he left Bhalapind, and has not told us as to what happened to the boy who undoubtedly left his mother in his company.

There is ample evidence upon the record that a pair of shoes belonging to Wassan was recovered from a well, known an Malu-wana, which is situated at a short distance from the well from which the body was recovered. This discovery was made in pursuance of information supplied by Kehr Singh, and *prima facie* there is no reason to doubt the veracity of the story relating to the discovery. The learned Sessions Judge, however, thinks that it would not be safe to hold that the clue to the discovery of the shoes was solely furnished by Kehr Singh and he has, consequently, excluded from consideration the evidence as to this discovery which would have connected Kehr Singh with the commission of the murder itself.

Whatever doubt there may be as to the source of the information with respect to the discovery of the shoes, we are of opinion that the learned Sessions Judge was not right in saying that Kehr Singh "was not present at the time" when the murder was committed. What he might have found was that Kehr Singh's presence at the time of the murder had not been established, not that his absence had been proved. It is, however, unnecessary to dwell on this subject, because the evidence and the circumstances referred to above leave no doubt in our minds that Kehr Singh was guilty at least of the abetment of murder.

The learned Counsel for Kehr Singh impeaches the conviction of his client on the ground that the latter was charged only with the commission of the principal offence and that he could not, therefore, be convicted of the abetment of murder in respect of which no charge was preferred against him. In support of his contention he places his reliance upon two cases, namely, *Reg.* v. *Chand Nur* (1) and *Padmanabha Panikannaya* v. *Emperor* (2). The learned Judges who decided the latter case did not intend to lay down any universal rule that in no case can a conviction for abetment be possible where the charge relates only to the principal offence. The principle laid down in the Bombay case has our entire approval, though its applicability must depend upon the peculiar facts of each case. The learned Judges, while dealing with the provisions of section 457 of the old Code of Criminal Procedure, which corresponds to section 238 of the present Code, say :—

(1) 11 B. H. C. R. 240.

(2) 5 Ind. Cas. 145; 33 M. 264; 7 M. L. T. 79; 11 Cr. L. J. 49; 20 M. L. J. 84.

ABDUS SAMAD v. YUSUF.

"That section applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The graver charge in such a case gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere substraction from the former. But when this is not the case, where the circumstances embodied in the major charge, do not necessarily, and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter. The section is not intended to apply to a collateral offence."

The provisions of the law applicable to a case of this kind are to be found in section 237, Criminal Procedure Code, which runs as follows: —

"If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

The question is then reduced to this:— Whether on the facts in this case the accused could have been charged not only with the commission of the principal offence but also with the abetment thereof. The answer to this question must, in our opinion, be in the affirmative. Then, by virtue of the provisions of the aforesaid section, the accused may be convicted of the offence of abetment though he was not charged separately with the commission thereof. This is exactly the rule which is laid down in the Madras judgment reported as *Yeditha Subbaya* v. *Emperor* (3). In the case before us the facts urged by the prosecution in connection with the charge of the principal offence included all the facts which are now relied upon to support the conviction for the abetment of murder. The only thing which the Sessions Judge was unable to find against Kehr Singh was that he was present at the time of the commission of the murder; and it was in consequence of inadequate proof to substantiate that fact that the convict's offence was reduced from murder to the abetment thereof. He had notice of all the facts which constituted the offence of abetment, and the conviction does not, therefore, contravene the principle enunciated above.

The murder was undoubtedly a coldblooded and atrocious one, and there is absolutely no extenuating circumstance which would warrant the infliction of the alternative punishment. We accordingly uphold the conviction of both the appellants, and confirming the sentences of the death dismiss their appeals.

Appeals dismissed.

(3) 15 Ind. Cas. 85; 23 M. L. J. 722; 13 Cr. L. J. 458; (1912) M. W. N. 725; 12 M. L. T. 203.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 615 OF 1920.

October 29, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Shaikh ABDUS SAMAD—PETITIONER

versus

YUSUF—OPPOSITE PARTY

Workman's Breach of Contract Act (XIII of 1859), s. 2—Criminal Procedure Code (Act V of 1898), s. 4 (o), 260—Punishment—Offence—Summary trial legality of.

Inasmuch as the Legislature in the Workman's Breach of Contract Act has described the order which a Magistrate is authorised to make against a workman in a case proved as "punishment", the act if proved amounts to an "offence" punishable by law within the meaning of section 4 (o) of the Criminal Procedure Code, consequently a Magistrate of the First Class has jurisdiction under section 260 to deal with the case summarily. [p 918, col. 1.]

Criminal reference made by the Sessions Judge, Benares.

Mr. *Janki Prasad*, for the Applicant.

JUDGMENT.—In this case the complainant, a master, made a complaint before a Magistrate of the First Class against a young workman under section 2 of Act No. XIII of 1859, alleging that he had been guilty of a breach of contract inasmuch as he had failed to continue to work although payment for his labour had been made under the contract in advance by the master. The Magistrate

of the First Class dealt with the case summarily and dismissed it on the merits. The matter came up before the Sessions Judge who raised the question whether the proceeding was a proper one, on the ground that the Magistrate had no jurisdiction to try the case summarily. The learned Sessions Judge has set out his view in a closely reasoned statement referring to the authorities, and the Magistrate who tried the case has submitted his explanation in an equally clear statement, maintaining his original view that he had jurisdiction to dispose of the case summarily. The question turns upon the interpretation to be given to section 260 of the Code of Criminal Procedure. A Magistrate of the First Class has jurisdiction to try in a summary way offences not punishable with imprisonment for a term exceeding six months. The question which we have to decide is, whether this is a punishable offence within the meaning of that section. In the ordinary colloquial sense of the term it certinly is not, but when reference is made to the definition of offence provided by section 4 (*o*) of the same Code, it is found to mean any act made punishable by any law for the time being in force. The Act under which this complaint was brought authorises a Magistrate to pass certain orders if a breach of contract is proved, and in the preamble, which does not conflict in any way with the enacting portion of the Act, it is provided that it is just and proper that persons guilty of such breach of contract shall be subject to punishment. Inasmuch as the Legislature has described the order which a Magistrate is authorised to make against a workman, in a case proved as "punishment" we find it impossible to say that the act, if proved, is not an offence punishable by law within the meaning of section 4 (*o*) and, therefore, within the meaning of section 260. It is unfortunate that we should find ourselves in conflict on this point with both ancient and modern authorities of other High Courts. The Madras High Court in the case of *Pollard* v. *Mothial* (1) took another view but, as pointed out in the case of *Queen Empress* v. *Ratnayan* (2), the definition in the Criminal Procedure Code on which we base our decision is subsequent in date to that authority. As regards Bombay, there is a quite recent authority following a previous authority both of which are to be found in the same volume, namely, *Emperor* v. *Dhondu* (3) and *Emperor* v. *Balu Saluji* (4) in which the Bombay High Court, following an English authority which dealt with the question of a penalty, has emphatically taken the other view without, however, noticing the use of the word "punishment" in Act No. XIII of of 1859. On the other hand, there is a clear dictum by a Judge of this Court reported in the case of *Queen-Empress* v. *Indarjit* (5) which has never been questioned and which must be taken to have been for all these years the guiding principle in this Province. We have come to the conclusion that we are compelled by the force of language to follow this ruling and we hold that this offence is triable summarily by a Magistrate of the First Class. Let the record be returned.

Record returned.

(1) 4 M. 234; 1 Weir 685; 1 Ind. Dec. (N. S.) 999.

(2) 20 M. 235 at p. 238; 1 Weir 697; 2 Weir 40; 7 Ind. Dec. (N. S.) 167

(3) 1 Ind. Cas. 378; 33 B. 22; 6 Bom. L. R. 255; 1 Cr. L. J 263.

(4) 1 Ind, Cas. 387; 33 B. 25; 10 Bom. L. R. 1126; 8 Cr. L. J. 409.

(5) 11 A. 262; A. W. N. (1889) 85; 6 Ind. Dec. (N. S.) 595.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1244 OF 1920.

December 16, 1920.

Present :—Mr. Justice Chevis and Mr. Justice Scott Smith.

HAZARA SINGH AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 89, applicability of, to criminal proceedings—Criminal proceedings, whether abate on death of complainant.

Section 89 of the Probate and Administration Act has no application whatever to a criminal prosecution. [p. 920, col. 1.]

Criminal proceedings once legally instituted, whether upon a complaint or otherwise, do not

HAZARA SINGH v. EMPEROR.

terminate or abate merely by the death of the complainant or the person injured. [p. 12, col. 2]

Ishar Das v *Emperor*, 10 P R 1908 Cr 8 P W R. 1908 Cr.; 7 Cr. L J 290; 112 P. L R 1908, *Rama Nand* v. *Emperor*, 40 Ind Cas 1008; 26 P R 1917 Cr; 18 Cr L. J. 688; 31 P. W. R. 1917 Cr., *Labhu* v. *Emperor*, 52 Ind. Cas. 797; 25 P. R. 1919 Cr; 20 Cr. L. J. 717, dissented from.

Petition for revision under section 439, Criminal Procedure Code of the order of the Sessions Judge, Amritsar, dated the 20th August 1920, varying that of the Magistrate First Class, Amritsar, dated the 16th July 1920.

Mr. *Feroz-ud-din Ahmad*, for the Petitioners.

The Government Advocate, for the Respondent.

JUDGMENT.

SCOTT SMITH, J.—(*December* 11, 1920).—Hazara Singh, Sohan Singh, Jwala Singh and Harnam Singh were *chalaned* by the Police under section 304, Indian Penal Code, for causing the death of one Jagat Singh. The Magistrate who tried the case convicted Jawala Singh and Harnam Singh under section 304, Indian Penal Code, and Hazara Singh and Sohan Singh under section 325. They appealed to the Sessions Judge who held that it was not proved which of the accused had actually struck the blow which caused the death of Jagat Singh and altered the conviction of all of them to one under section 323. Hazara Singh and Sohan Singh filed an application for revision which came before a Single Judge of this Court, who, holding that there was no good ground for disagreeing from the finding of the Sessions Judge, dismissed the petition on its merits. There was also, however, an additional ground of revision to the effect that, as the Appellate Court held that only an offence under section 323 had been committed, and as the person injured had died, the proceedings abated and the accused should have been acquitted. *Rama Nand* v. *Emperor* (1) and *Labhu* v. *Emperor* (2) were cited as authorities in support of this proposition. The Single Judge referred the point to a Division Bench for consideration as to whether there was any essential distinction between a section 323 case brought by a complainant who dies during the course of the trial, and a Police *chalan* instituted after the injured person's death. An application for revision has also now been put in on behalf of Jawala Singh and Harnam Singh which has not yet been before a Single Judge.

It should be noted that the hurt for the causing of which the petitioners have been convicted did not cause the death of Jagat Singh. The actual hurt which caused his death was a fracture of the skull, but the Court has not found which of the petitioners caused this particular hurt. The contention on behalf of the petitioners is that, the person to whom the hurt was caused having died, and the offence held to be proved being a compoundable one, no cause of action survives, and the proceedings against the petitioners must be held to have terminated by the death of Jagat Singh. Section 89 of the Probate and Administration Act V of 1881, is relied upon as also the three rulings of the Punjab Chief Court reported as *Ishar Das* v. *Emperor* (3), *Rama Nand* v. *Emperor* (1) and *Labhu* v. *Emperor* (2). Section 89 of the Probate and Administration Act runs as follows:—

"All demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of this decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory."

This section was considered in *Krishna Behari Sen* v. *Corporation of Calcutta* (4) in which it was held that, "a suit for malicious prosecution falls within the general words of section 89 of the Probate and Administration Act and not within any of the exceptions," and that the cause of action of the deceased plaintiff survived to his administrators. In *Ishar Das* v. *Emperor* (3) it was held that the death of the com-

(1) 40 Ind. Cas. 1008; 26 P. R. 1917 Cr.; 18 Cr. L. J. 688; 31 P. W. R. 1917 Cr.

(2) 52 Ind. Cas. 797; 25 P. R. 1919 Cr.; 20 Cr. L. J. 717.

(3) 10 P. R. 1918 Cr; 8 P W. R. 1908 Cr; 7 Cr. L. J. 290; 112 P. L. R. 1908.

(4) 31 C. 993; 8 C. W. N. 745.

plainant terminated a prosecution for defamation, which, being essentially a personal action, could not be continued or carried on by the legal representatives of the deceased petitioner. It was pointed out in that case that the offence of defamation is compoundable without permission of the Court before conviction, and that under section 198, Criminal Procedure Code, no Criminal Court can take cognizance of the offence except upon the complaint of a person aggrieved; also that prosecution for defamation is essentially a personal action, and the institution of proceedings depends on the temperament of the person defamed. The Judges were of the opinion that the principle underlying the rule laid down in section 89 of the Act was applicable to a criminal prosecution for defamation, having regard to the narrowness of the line between a prosecution and a suit for damages.

In the case reported as *Rama Nand* v. *Emperor* (1), Broadway, J., held that an action under section 323, Indian Penal Code, is a personal one and comes to an end on complainant's death. He referred to *Ishar Das* v. *Emperor* (3) and said that in his opinion the principle therein enunciated applied equally to an offence under section 323, Indian Penal Code. He said that, just as a prosecution for defamation is essentially a personal one so, in his opinion, was one under section 323, Indian Penal Code. There is, however, a distinction between a prosecution for defamation and one for causing hurt. A prosecution for defamation can only be lodged by a person aggrieved, but there is no such restriction in the case of one for causing hurt under section 323. In *Labhu* v. *Emperor* (2) Rattigan, Chief Justice, following *Rama Nand* v. *Emperor* (1) held, that a complaint under section 323 abated upon the death of the complainant. It will be noticed that in all these cases the Court took cognizance upon the complaint of a private person and not, as in the present case, upon a Police report of the facts. Now, with all due deference to the Judges who decided the cases above referred to, I am clearly of opinion that section 89 of the Probate and Administration Act has no application whatever to a criminal prosecution. It applies, as its wording shows, to all "demands" whatsoever and, "all rights to prosecute or defend any suit or other proceedings, existing in favour of, or against a person at the time of his decease." Now, the word "demands" clearly means demands of a civil nature, and the words "suit or other proceeding" must be interpreted as suit or other proceeding *of a similar nature*, the rule of *ejusdem generis* applying. The word "suit" obviously means a civil suit and "other proceeding" must mean other proceeding of a nature similar to a suit. If the section extended to criminal proceedings it would give a cause of action *against* the executors or administrators of a deceased offender, because the section applies not only to rights existing *in favour of* a person, but also to rights existing *against* a person, at the time of his decease. Even if the section could apply to private complaints, I do not see how it could apply to a case like the present in which the Court has taken cognizance upon a Police report of the facts under section 190 (*b*), Criminal Procedure Code. In all criminal proceedings the first important point to see is, whether the Court is properly seized of the case. A Court may take cognizance of an offence in any of the ways specified in section 190, Criminal Procedure Code, and once it has lawfully taken cognizance of an offence it must try it in one of the ways laid down for the trial of cases in the Code. There are certain cases in which the absence of the complainant terminates the proceedings. Thus under section 247, Criminal Procedure Code, the non-appearance of the complainant in a summons case, if the summons has been issued on complaint, causes the proceedings to terminate and the Magistrate shall acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day. Again, in a warrant case, section 259 of the Code lays down that when the proceedings have been instituted upon complaint and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, the Magistrate may, in his discretion, at any time before the charge has been framed discharge the accused. These sections would, of course, apply if the complainant died during the proceedings and was, therefore, necessarily absent upon the day fixed for the hearing of the case.

Again, there are certain cases in which

the complainant or the person injured or aggrieved himself puts a stop to the proceedings by compounding the offence. The offences which can be compounded are specified in section 345 of the Code. There is nothing in the Criminal Procedure Code in support of the proposition that the death of the person injured or of the complainant of itself causes the proceedings to abate. With the exception of the three Punjab rulings cited above, I can find no other authority for holding that a criminal proceeding once properly lodged against an accused person abates or comes to an end, and there is no authority at all that such a result occurs through death in a case of which the Court has taken cognizance under section 190 (*b*), Criminal Procedure Code. The decisions in the Chief Court cases appear to me to involve an assumption that the complainant would, if he had lived, have compounded the offence committed by the accused. This appears to me to be an unwarrantable assumption, because when a person makes a complaint, the presumption is that he desires that the person complained against should be punished for the offence which he alleges he has committed.

I think it is a mistake to speak of an offence as a purely personal one. In Volume IX of Halsbury's Laws of England, at page 232, a crime is said to be "an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to a private person, who has a remedy in a civil action, it is as an act or default contrary to the order, peace and well being of society that a crime is punishable by the State." The offence under section 323, Indian Penal Code, is one which causes injury to a private person and it is as well an offence against the public, and once a Court has legally commenced criminal proceedings against a person accused of an offence, the proceedings must go on unless and until they came to an end in one of the ways detailed above by discharge, acquittal or conviction of the accused.

Mr. Herbert points out that it is the practice of this Court in hearing appeals from convictions under sections 302 and 304, Indian Penal Code, when it is of opinion that a lesser offence has been committed to alter the conviction to one under section 325, or even in some cases to one under section 322, Indian Penal Code. He has also referred to the case reported as *Emperor* v. *Sultan Singh* (5) where three persons were assaulted by three others with the result that one of the persons assaulted died.

The survivors compounded the offence which was held to be one under section 323, Indian Penal Code, with their assailants, but it was held that it was not competent to the survivors to compound the case in respect of the injury caused to the deceased person, even if the offence committed amounted to one under section 323, Indian Penal Code, and a re-trial was ordered. In other words, the Judges held that even if an offence under section 323 had been committed as regards the deceased person the offence could not be compounded and that the accused were liable to punishment. I would, therefore, hold that criminal proceedings once legally instituted, whether upon a complaint or otherwise, do not terminate or abate merely by the death of the complainant or the person injured, and would reject the petition of Hazara Singh and Sohan Singh.

CHEVIS, J., (*December* 16, 1920.)—I concur and have nothing to add. The petition of Hazara Singh and Sohan Singh is rejected.

Petition rejected.

(5) 4 Ind. Cas. 24; 31 A. 606; 6 A. L. J. 882; 10 Cr. L. J. 473.

PATNA HIGH COURT.

CRIMINAL REVISION No. 426 OF 1920.

November 1, 1920.

Present :—Mr. Justice Jwala Prasad.

DEODHARI MAHTO—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 417—Cheating, what constitutes—Money paid to creditor—Creditor, refusal of, to return bond—Offence.

DEODHARI MAHTO *v.* EMPEROR.

In order to constitute the offence of cheating it is essential, in the first place, that the person who delivers property should have been deceived before he makes delivery and, in the second place, that he should have been induced to do so fraudulently or dishonestly. The deception may be by words or by conduct. [p. 922, col. 2.]

Accused lent a sum of money to the complainant and got the latter to execute a bond. He also gave the complainant a *kamiati parcha* in respect of his homestead land. After some years, the complainant paid the money back to accused, but the latter refused to return the bond until the *kamiati parcha* was returned to him :

Held, that the accused could not be convicted of the offence of cheating under section 417 of the Penal Code. [p. 924, col. 1.]

Criminal revision against the order of the Deputy Commissioner, Palamau, dated the 24th August 1920, confirming in appeal the conviction and sentence of the Deputy Magistrate (with second Class powers) of Palamau, dated the 24th July 1920.

Mr. *S. N. Datta*, for the Petitioner.

JUDGMENT.—The petitioner has been convicted under section 417 of the Indian Penal Code by the Magistrate of Palamau, exercising second class powers. The conviction has been upheld by the Deputy Commissioner.

The complainant had executed a *kamiati* bond on a stamp paper, eight or nine years ago, for an advance of Rs. 15. On the 10th of June 1920 the complainant paid the petitioner Rs. 22, the amount of the bond with interest. The complainant naturally expected that the bond would be returned to him and the accused after taking money went inside his house to fetch the bond. The bond was, however, not returned and the complainant was told by the accused that the *kamiati parcha* of his homestead must also be returned before he could get the bond. While accepting the services of the accused under the *kamiati* bond in question, the complainant had got settlement of the homestead land out of the accused's holding.

The complainant forthwith went to the Magistrate and lodged his complaint the next day.

On the 20th June a warrant of arrest of the accused was sent for execution to the Sub-Inspector of Police. The bond was returned by the accused to the complainant on the 21st and the accused appeared in Court on the 22rd,

The accused pleaded not guilty, but admitted receipt of the money and explained his failure to return the bond on account of his son being away who had with him key of the basket containing the bond. He also pleaded premature return of the money in *Asadh*, whereas according to the stipulation in the bond the money was to be paid back in the month of *Magh*, and that the complainant's giving up services in the month of *Asadh* when agricultural operations commence, was inconvenient to the accused.

The Magistrate held that the accused in refusing to return the bond after receipt of the money was actuated by a motive to retaliate for the inconvenience caused to him by the complainant returning the money before its due date and giving up services in *Asadh*, and was, therefore, guilty of having practised deception and having a fraudulent intention, and accordingly convicted him of cheating under section 417, Indian Penal Code.

The learned Deputy Commissioner took the same view He replied to the argument on behalf of the accused that the facts proved did not constitute an offence of cheating, by holding that the accused by consenting to receive the money did in fact induce the complainant to believe that he would return the bond and that it was clearly under this belief that the complainant paid the money, and that it was not necessary that the inducement should have been by express words.

The question for determination is, whether the facts found in this case constitute an offence of cheating. According to the definition of the term given in section 415 of the Indian Penal Code, it is essential, in the first place, that the person who delivers property should have been deceived before he makes delivery and, in the second place, that he should have been induced to do so fraudulently or dishonestly. The deception may be by words or by conduct *vide Khoda Bux* v. *Bakeya Mundari* (1) and *Ramanath Kalapahar* v. *King Emperor* (2). In this view the learned Deputy Commissioner is perfectly right. As to what is sufficient to constitute deception must be decided in each

(1) 32 C. 941; 9 C. W. N. 1006; 2 Cr. L. J. 764.
(2) 2 C. L J. 524; 3 Cr, L. J, 160,

case on its merits, as held by Woodroffe, J., in the latter case.

In the former case, the accused after receiving the mortgage-money handed over to an illiterate messenger of the complainant a bogus unstamped bond instead of the real *zarpeshgi* deed, and it was held that there was a clear misrepresentation and fraudulent intention.

In the latter, the case of the prosecution was that the accused after receipt of the money returned a forged unregistered bond saying that it was the real bond. Rampini and Mookerji, JJ., differed in their views as to whether this would constitute cheating. The case was referred to Woodroffe, J., who agreed with Rampini, J., and held that the facts, if established, would constitute cheating, but on merits he held that the facts were not established.

These cases do not approach in any way to the facts of the present case. Later on, in the case of *Kumeda Charan Ghose* v. *Emperor* (3), Holmwood and Sharfuddin, JJ., in the circumstances very nearly similar to the present case, held that the offence of cheating was not established. In that case the complainant who was a tenant on bad terms with the accused, his landlord, was sent for by the landlord and was asked to pay rent, and accordingly the rent was paid. The complainant left for home to fetch money requesting the accused and his *gomashta* to have in the meantime his dues worked out and *dakhlas* (receipts) written. He returned soon with Rs. 90 and paid the same to the accused who drove him away refusing to give *dakhals* or return the money until Rs. 25 more was paid by him to make the sum of Rs. 90, the said amount of Rs. 25 having been taken towards *swadeshi* subscription. It was held that there was no subsequent misrepresentation but only an illegal demand and that the case did not come within the purview of the criminal law. The case of *Khoda Bux* v. *Bakeya Mundari* (1) was observed by their Lordships to have gone so far as the law could possibly be taken in the direction of misrepresentation by conduct and was further distinguished on the ground that there was a positive conduct to show fraudulent intention, namely, the return of a bogus unstamped bond to an illiterate messenger. We have only to substitute the words "*kamiati* bond" for the word "*dakhlas*" and the words "homestead *parcha*" for the words "Rs. 25" and it would at once be obvious that the facts of the case of *Kumeda Charan Ghose* v. *Emperor* (3) quoted above are exactly similar to the present one. Here the accused took the money inducing the complainant to believe that his *kamiati* bond would be returned, but instead of returning the same he demanded the homestead *parcha* which the complainant had obtained from the Settlement Department.

As held by the Magistrate, this "homestead" was settled with the complainant out of the accused's holding while accepting the services of the accused. Thus the homestead land originally belonged to the accused and was carved out and settled with the complainant as a part of the agreement entered into by the complainant and as set forth in the *kamiati* bond for and in consideration of the services of a *kamia* to be rendered by the complainant to the accused. The complainant paid the money and wanted back the bond in order to dissolve the agreement, which was the object of the transaction which is the subject of the trial in the present case. Although it may not have been stated at the time of negotiation for the return of money and the bond, the return of the homestead land was a natural concomitant of the cessation of the relationship between the parties. The accused could very well demand return of the *parcha* with respect to the homestead granted by the Settlement Department, on the basis of which the complainant wanted to hold on despite the accused. As held by the Magistrate, the giving of the *parcha* would certainly have meant a transfer of the land covered by it back to the accused. The fact that the *parcha* showed that the complainant was recorded as a *raiyat* in respect of the homestead direct under the *malik* would not affect the right of the accused to demand the land back which was given to the complainant in lieu of and as a consideration for the services to be rendered as a *kamia*. In any case, the accused could *bona fide* believe that he was entitled to have the homestead land and the *parcha* back from the com-

(3) 15 Ind. Cas. 656; 15 C. L. J. 515; 13 Cr. L. J. 512.

plainant. In this view the demand for the *parcha* was not illegal and was at least under a *bona fide* belief. There is no question of dishonesty in the matter, for the accused received the money and retained it as legally being due under the bond. There was no wrongful gain to himself or wrongful loss to the complainant. There could also be no fraudulent conduct on his part in demanding the *parcha* from the complainant. He must have known his position with respect to the homestead and the terms upon which he got the land from the accused. He could not possibly have been deceived by the demand of the *parcha* by the accused when he wanted to sever his connection of eight or nine years with the accused once for all. The complainant was not in any way, deceived by any previous inducement to him by the subsequent demand of the *parcha* which may not have been told to him at the time that he understood that the money was to be paid and the bond was to be returned, for, as observed above, the return of the *parcha*, or at least the demand of it, was a necessary sequence of the severance of the connection between the parties. This puts the case much higher than the case of *Kumeda Charan Ghose* v. *Emperor* (3). The two necessary elements constituting cheating under section 415 of the Code and as set forth at the outset of this judgment are wanting in the present case. The Courts below have not considered the case from this aspect. To my mind, judging the case on its own merits and circumstances, the accused is not guilty of cheating of which he has been convicted. Far less is he guilty under section 403, Indian Penal Code, of misappropriation of the money or of the receipt, inasmuch as it was his just due without any tinge of dishonesty in it. Still less would the accused be guilty under section 383, Indian Penal Code of extortion, for the money was paid by the complainant not in consequence of his having been put in fear of any injury. There was no threat by the accused to dishonestly induce the complainant to return the *parcha* for the homestead land. I do not agree with the view taken by the learned Deputy Commissioner that if the accused was not guilty of cheating under section 417 he was at least guilty of misappropriation under section 403, Indian Penal Code, or extortion under section 383, Indian Penal Code, I do not also agree with him that the accused could be straight away convicted without any charge under those sections in case the charge of cheating which he was called upon to meet, failed.

I have given my best consideration to the case and its circumstances, and I do not think, in the concluding words of Holmwood, J., in the case of *Kumeda Charan Ghose* v. *Emperor* (3), that the accused comes within the purview of the criminal law.

The result is that the conviction of and the sentence passed on the accused are set aside and the petitioner is set at liberty.

Conviction set aside.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 407 OF 1920.

November 5, 1920.

Present:—Mr. Justice Shadi Lal Chief Justice, and Mr. Justice Leslie-Jones.

EMPEROR—APPELLANT

versus

SAMAND AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 417—Appeal from acquittal—Trial Court, finding of, value of—Appellate Court, interference by, when justified.

If in an appeal from an acquittal the evidence is all oral and its credibility is a mere matter of opinion without involving other considerations, the opinion of the Court which heard the witnesses must be treated as almost conclusive. [p. 926, col. 1.]

The indications of mistake must be obvious, or the evidence too strong to be rejected, before the Appellate Court will interfere. [p. 926, col. 2.]

Criminal appeal from the order of the Sessions Judge, Jhelum, dated the 11th March 1920.

Sardar *Mehtab Singh*, S. B., Public Prosecutor, for the Appellant.

Mr. *Morton*, for Respondents Nos. 3 to 8.

JUDGMENT.—The Sessions Judge of Jhelum, concurring in the unanimous opinion of the Assessors, has acquitted eight persons

who were charged with the murder of one Malak, an Awan of *mauza* Ransial, in the Jhelum District. Against the order of acquittal the Local Government has preferred an appeal under section 417, Criminal Procedure Code, and we have heard the case agrued at length by the Public Prosecutor for the Crown and Mr. Morton for the respondents.

It appears that the village of Ransial is populated by turbulent people, and that the Awans residing there are divided into factions. It is common ground that there was considerable bitterness between the deceased and the witness Mian Khan on one side, and all the accused or, at any rate, the majority of the accused, on the other. This enmity is a double-edged sword which cuts both ways. While it is put forward by the prosecution as an adequate motive for the crime, it is relied upon by the defence as furnishing the reason for falsely implicating the accused. A perusal of the judgment of the learned Sessions Judge makes it clear that the dominant idea in his mind was that the relatives and friends of the deceased had spread their net much too wide, and had tried to fasten the charge upon their enemies irrespective of the question whether they actually participated in the assault on the deceased.

There can be no doubt that the deceased Malak was subjected to a brutal assault on the 5th January 1920, a short time before sunset, just when he was entering the village *abadi* after paying a visit to his daughter in a neighbouring village. The medical evidence shows that the victim received a very large number of incised wounds, and that his skull was fractured.

It is beyond dispute that he succumbed to the injuries within an hour.

Now, eight persons were named as the perpetrators of the crime, and their names were disclosed in the report which was made to the Sub Inspector within a few hours of the occurrence. The prosecution have persisted in the version that all the eight persons were acting in concert and participated in the fatal assault. In support of their case they have relied upon the evidence of five persons who profess to have witnessed the assault, and of four other persons who state that the victim, when questioned as to his assailants, repeated in their presence the names of all the eight accused.

We consider it unnecessary to enter into a lengthy discussion of the evidence and the various points urged by the learned Counsel on both sides in support of their respective contentions. Suffice it to say, that some of the reasons assigned by the learned Sessions Judge for distrusting the evidence for the prosecution do not appear to be altogether justified, but there can be little doubt that the alleged eye-witnesses have repeated in almost identical terms all the material facts in connection with the assault. A perusal of their evidence gives one an impression that they were deposing to a pre-arranged story. We are not prepared to say that the suspicion engendered in the mind of the Sessions Judge as to their being unreliable winesses was unjustified, more especially when we find that they are not men of any status or respectability whose word could be implicitly relied upon. It is possible, nay probable, that some of the witnesses were present at or near the scene when the assault took place, but they did not impress the Sessions Judge favourably, and it is very doubtful whether their evidence as to the culpability of all the eight persons can be accepted at its face value.

With regard to the evidence relating to dying declaration of the victim, it must be remembered that he had received so many severe injuries that it is doubtful whether he was in a fit condition to mention the names of all the assailants. It may be that he did not lose consciousness at once, but it is impossible to believe the story related by Azim Khan, *Sarbarah lambardar*, that the deceased repeated the process of mentioning the names of all the eight assailants several times, and satisfied the curiosity of every person who happened to come to him and make an enquiry as to the names of the perpetrators of the crime. This feat of memory, which cannot be easily performed by an illiterate person in his normal condition, was beyond the capacity of a man who was in the agony of death and who admittedly expired within an hour. It is clear that the witnesses have tried to prove too much.

The probability is that some of the accused took part in the assault, but the prosecution have spoiled their case by implicating all

the persons against whom the relatives of the deceased had some sort of grudge. Indeed, the Police diaries show that several persons informed the investigating officer that only five men were concerned in the assault and that the remaining three were innocent. It must be remembered that it is by no means a rare phenomenon to find that a person taking advantage of the commission of a crime makes an attempt to implicate all his enemies irrespective of the question whether they are innocent or guilty, but such an attempt often ends in a dismal failure. So far as the judicial record is concerned, the case for the prosecution against all the accused stands exactly on the same footing, and there is really nothing to justify any discrimination. As we are not prepared to dissent from the view of the learned Sessions Judge that it has not been proved that all the persons participated in the assault, we have no alternative but to accept the conclusion reached by him in favour of the accused.

As laid down in *Emperor* v. *Chattar Singh* (1), the Court of first instance which has the witnesses before it, has a great advantage over the Court of Appeal which deals with the evidence second hand. Great regard is, therefore, as a rule, paid to the opinion of the first Court on the oral evidence, and a Court of Appeal is ordinarily reluctant to differ from its opinion, unless for cogent reasons. These considerations apply with greater force to an appeal from an acquittal, and naturally the Court is chary of disturbing a finding of the first Court rejecting the evidence against the accused as unreliable and declaring his innocence. The same judgment further lays down the salutary rule that "the findings of fact of a Court which has the evidence before itself, is ordinarily entitled to great weight and should be set aside by the Court of Appeal only when the indications of mistake are clear, and this is specially true in cases where the finding is in favour of the accused's innocence. If in such a case the evidence is all oral and its credibility is a mere matter of opinion without involving other considerations, the opinion of the Court which heard the witnesses must be treated as almost conclusive. Again, if the evidence is such that opinions may reasonably vary as to its worth the Court of Appeal will hardly adopt the view adverse to the accused and believe the evidence as to his guilt, which the lower Court has disbelieved, and take upon itself to set aside the verdict of acquittal. The indications of mistake must be obvious, or the evidence too strong to be rejected, before the Court will interfere." Here we have got not only the opinion of the Assessors but also the considered conclusion of an experienced Sessions Judge, and the mere fact that some of the reasons assigned by him are couched in faulty language, or not fully justified, does not, in our opinion, constitute an adequate ground for setting aside the order of acquittal. We are not prepared to hold that the indications of error in the order of acquittal are clear and unmistakable, and after bestowing our careful and anxious consideration upon the entire material before us we hold that the present case does not fulfil the test laid down in the above ruling.

We accordingly dismiss the appeal and direct that the respondents, who were arrested under section 427, Criminal Procedure Code, pending the decision of the appeal, be released forthwith.

Appeal dismissed

(1) 7 P. R. 1904 Cr.; 97 P. L. R. 1904; 1 Cr. L. J. 781.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 9, 1920.

Present:—Viscount Cave, Lord Moulton, Lord Sumner and Sir John Edge

SAYYAPUREDDI CHINNAYYA DHORA AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 59, 304—Culpable homicide not amounting to murder—Punishment—Transportation for fourteen years, sentence of, legality of—Appeal to Privy Council—Procedure.

Where an offence is punishable with transportation for life or imprisonment for a term of years, section 59 of the Penal Code does not authorise a

sentence of transportation for a term of years exceeding the maximum term of imprisonment to which the offender is liable [p. 928, col 1.]

The appellants were convicted by a Sessions Judge of culpable homicide not amounting to murder under section 304 (1) of the Penal Code and sentenced to three years' rigorous imprisonment. On an application for enhancement of sentence, the High Court enhanced the sentence to transportation for 14 years :

Held, that ten years being the maximum term (short of life) for which the appellants could be sentenced to transportation, the case should be remitted to the High Court with instructions to pass sentence according to law. [p. 928, col 2.]

Consolidated appeals by special leave from a judgment of the Madras High Court, dated the 2nd December 1919, affirming the conviction of the appellants under section 304 of the Indian Penal Code by the Sessions Judge, Vizagapatam, and enhancing the sentences passed upon them from three years' rigorous imprisonment to transportation for 14 years.

FACTS of the case sufficiently appear from their Lordships' judgment and from the foregoing headnote. The learned Judges of the Madras High Court (Bakewell and Phillips, JJ.) expressed the view "that a charge under section 302 of the Indian Penal Code should have been framed".

On this appeal

Messrs. *Dunne*, *K. C* and *Narasimham*, for the Appellants, submitted that the High Court had no jurisdiction to pass the sentences which they had passed. Except under sections 121A and 124A there was no power under the Indian Penal Code to pass a sentence of transportation short of life, except under section 59. On the true construction of section 59, unless the sentence is for life the period of transportation can not exceed the maximum term of imprisonment to which the offender can be sentenced. This has been repeatedly laid down in India:

Queen v. *Rughoo* (1), *Queen* v. *Joseph Meriam* (2), *Queen* v. *Naiada* (3).

The maximum term of imprisonment for offenses under section 304, Indian Penal Code, is fixed by that section at 10 years. The present sentence (14 years) is illegal and should be set aside. We submit that the matter cannot be remitted to the High Court, since that Court is *functus officio*, and there is no statutory provision giving that Court or the Sessions Court further jurisdiction. (As to the revisional powers of the High Court, reference was made to the Code of Criminal Procedure, Act V of 1898, sections 419, 423, 439).

Sir *Erle Richards*, *K. C.*, and Mr. *Kenworthy Brown*, for the Respondent.—It is admitted that the High Court could have transported appellants for life, and they expressed the view that the charge should have been under section 302 (murder) for which transportation for life is the minimum penalty. Even, therefore, if the sentences passed were irregular, there was no such substantial or grave injustice as to make the case one in which the Board could advise His Majesty's interference, *Dillet*, *In re* (4).

[Their Lordships' referred to *Dal Singh* v. *Emperor* (5) and *Ibrahim* v. *Emperor* (6)].

But, further, the Indian cases cited are not binding on this Board, and we submit that when transportation for life is allowed, a sentence for a shorter period is admissible. Section 511, Indian Penal Code, provides for having the terms of transportation in the case of attempts, and section 57 provides for calculating fractions of a life sentence.

If the Board think the appeal should be allowed, it is an impossible result that appellants should go free. There are three alternatives :—

(1) The order made on revision can be set aside, leaving as they stand the affirmed conviction and the sentence passed by the Sessions Judge.

(2) The Board can remit the case to the High Court, indicating their view of the law. This is a course frequently taken in civil matters. In an analogous case, arising out of the jurisdiction of the House of Lords in

(1) (1864) W. R. Cr. 30.

(2) 10 W. R. Cr. 10; 1 B. L. R., A. Cr. J. 5; 1 Ind. Dec. (N. s) 271.

(3) 11 A. 43; 1 Ind. Dec. (N. s.) 29.

(4) (1887) 12 A. C. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 241.

(5) 39 Ind. Cas. 311; 44 I. A. 137; 15 A. L. J. 475; 1 P. L. W. 661; 19 Bom. L. R. 510; 21 C. W. N. 818; 26 C. L. J. 13; 6 L. W. 71; 22 M. L. T. 31; (1917) M. W. N. 522; 18 Cr. L. J. 471; 33 M. L. J. 555; 44 C. 876; 11 Bur. L. T. 54; 13 N. L R. 100; 86 L. J. P. C. 140; 116 L. T. 621; 61 S. J. 351; 33 T. L. R. 249 (P. C.).

(6) 23 Ind. Cas. 678; 18 C. W. N. 705; 15 Cr. L. J. 326; 1 L. W. 989; (1914) A. C. 599; 111 L. T. 20; 30 T. L. R. 383; 83 L. J. P. C. 185 (P. C.).

Criminal Appeals, this procedure has been followed, *Rex* v. *Ball* (7).

That case was stronger than here, because by writ of error the whole conviction and sentence there could have been set aside.

(3) Or the Board can itself advise His Majesty to reduce the sentence to ten years.

Mr. *Dunne, K. C.*, in reply.—This being a matter of want of jurisdiction, it is no answer to say that there is no substantial injustice done.

JUDGMENT.

VISCOUNT CAVE.—The appellants were convicted under section 304 (1) of the Indian Penal Code of culpable homicide not amounting to murder, and were sentenced by the Sessions Judge of Vizagapatam to rigorous imprisonment for three years. On appeal to the High Court of Judicature at Madras, that Court affirmed the conviction and, on the application of the Public Prosecutor for revision of the sentences, enhanced the sentences to transportation for fourteen years. Leave to appeal to His Majesty in Council having been obtained, it was contended on behalf of the appellants that the High Court had no jurisdiction to impose a sentence of transportation for fourteen years.

Section 304 (1) of the Penal Code authorises a sentence of "transportation for life or imprisonment of either description for a term which may extend to ten years"; and section 59, which applies to every case where an offender is punishable with imprisonment for a term of seven years or upwards authorises the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years and not exceeding the term for which by the Code he is liable to imprisonment. These provisions have been considered in several cases in India, and it has been uniformly held that, while they authorise a sentence of transportation for life, they do not empower a Court to impose a sentence of transportation for a term of years exceeding the maximum term for which a sentence of imprisonment can be imposed, namely, ten years. Their Lordships agree with these decisions, and it remains for them to consider what advice they should tender to His Majesty in the present case.

Their Lordships were invited by Counsel for the Crown to apply the rule which has been repeatedly laid down by the Board that, "His Majesty will not be advised to review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done" [*Dillot, In re* (4)] and to say that, as the offence in this case was grave, and the appellants might justly have been sentenced to transportation for life, the sentence of transportation for fourteen years, though irregular, should be allowed to stand. But it appears to their Lordships that as in this case the sentence is found not to be authorised by law they must hold that there has been substantial injustice, for the sentence may involve the incarceration of the appellants during many years without legal authority. Although the crime committed was, no doubt, of a very grave character, and it may be that the High Court, if the legal objection to a sentence of transportation for fourteen years had been brought to their notice, would have passed a life sentence, their Lordships cannot assume that this would have been done, and it is no part of their duty to consider whether a higher sentence than that actually passed should or might justly have been inflicted.

Their Lordships will humbly advise His Majesty that the case be remitted to the High Court of Judicature at Madras with instructions to pass a sentence according to law.

Case remitted.

Solicitor for the Appellants.—Mr. *Douglas Grant.*

Solicitor for the Respondent.—*The Solicitor, India Office.*

(7) (1911) A. C. 47; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 27 T. L. R. 162.

RAM KRIPAL SINGH *v.* HANUMAN SINGH.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 965 OF 1918.

November 15, 1920.

Present:—Mr. Justice Das and Mr Justice Adami.

Babu RAM KRIPAL SINGH—DEFENDANT No. 1—APPELLANT

versus

HANUMAN SINGH AND ANOTHER—PLAINTIFFS AND PANDIT SINGH AND OTHERS—DEFENDANTS RESPONDENTS.

Riparian owners, rights of—Natural and artificial streams, difference between—Water spreading itself along fields and again running in definite channel, whether stream.

The rights of riparian owners to natural streams are somewhat different from their rights to water flowing through artificial water courses. The natural rights do not depend upon a grant or upon the ownership of the soil of the stream, but are *jure naturæ* incident to the ownership of the soil of the land abutting upon the stream. The rights to water flowing through artificial water courses are rights of easement, and must rest on some grant or arrangement, either proved or presumed from, or with the owners of the lands from which the water is artificially brought, or on some other legal origin. [p. 9 9, col. 2; p. 930, col. 1.]

The proper inference from the user of the water of a natural stream though flowing in an artificial channel is that the artificial channel had been originally constructed upon the terms that all the proprietors of lands situated on the artificial channel should have the same rights in regard to the use of the water as they would have had if the stream had been a natural one. [p. 940, col. 2.]

Where the channel of a stream continues as a definite water course up to a certain point, and then spreads along certain fields, but on emerging from those fields it again runs as a definite water course, the identity of the water is not destroyed and it remains the subject of riparian rights. [p. 930, col. 2; p. 931, col 1.]

Appeal from a decision of the Subordinate Judge, Second Court, Gaya, dated the 22nd June 1920, affirming that of the Munsif, First Court, Gaya, dated the 10th April 1917.

Messrs. *S. M. Mullick* and *Sambhu Saran*, for the Appellant.

Mr. *Raghu Prasad*, for the Respondents.

JUDGMENT.

DAS, J.—The plaintiffs claim the right to irrigate their lands in *Mouza* Barunda Rampur by means of a natural water channel issuing out of a hill and running into the plaintiffs' Pokhar No. 1643, and seek to restrain the defendants from erecting *bundhs* at the places marked in the sketch map filed [with] the plaint so as to deprive the plaintiffs of the advantage of the flow of the water in their own lands. The Courts below have concurrently come to the conclusion that there is a defined water channel from the hill up to the Pokhar, except in two blocks of paddy fields referred to in the judgments of the Courts below, and have granted the plaintiffs a decree substantially as claimed by them. Upon this, two arguments have been advanced before us on behalf of the appellant: *first*, that the stream emptying itself in the plaintiffs' Pokhar is, on the allegations of the plaintiffs made in the plaint, only an artificial stream and that the plaintiffs have no right to the water in the natural stream which terminates in the defendants' lands, and does not flow by the plaintiffs' lands and, *secondly*, that the rights of riparian owners cannot be claimed by the plaintiffs since, on the findings of the Courts below, there is no defined water channel in the two blocks of paddy fields mentioned in the judgments.

I will deal with these objections in their order. The first objection is based on the allegations in the plaint. These allegations are, that there is a natural stream from the hill up to the *Bundh* No. 327, which, it may be stated, is situated in the defendants' lands; that the *Bundh* No. 327 was constructed at a time beyond living memory when the ownership of the lands, now belonging to the plaintiffs and the defendants, was in the same proprietors, and it was constructed so as to divert the water into a Pyne No. 322, that flowing into the Pyne No. 322, the stream passes through plots Nos. 253, 314, 305 and 306, when it is again diverted by *Bundh* No 301; that, being diverted by means of *Bundh* No. 301, it flows into Pyne No. 302 and, passing through plots Nos. 1702, 1634, and 1639, it empties itself in plaintiffs' Pokhar No. 1643. These are the allegations in the plaint, and the defendants argue that the plaintiffs cannot claim the natural rights of riparian owner in respect of the natural stream which came to an end at *Bundh* No. 327 and never passed the plaintiffs' lands. Now, it may be conceded at once that the rights of riparian owners to natural streams are somewhat different from their rights to water flowing through artificial water courses. The natural rights do not depend upon a grant or upon the ownership of the soil of the stream, but are *jure*

naturæ incident to the ownership of the soil of the land abutting upon the stream. The rights to water flowing through artificial water courses are rights of easements, and must rest on some grant or arrangement, either proved or presumed, from, or with the owners of the lands from which the water is artificially brought, or on some other legal origin. The defendants say as follows to the plaintiffs: "On your own allegation in the plaint we are the owners of the lands abutting on the natural stream and you are not. It may be that you have acquired some right by easement to the use of such water as flows in the artificial stream running into your Pokhur, but how can you restrict us in the use of the water in the natural stream as to which you have no sort of right?"

Now, it seems to me that the fallacy in the whole argument is in assuming that the stream passing through the plaintiffs' land has a different entity from the stream up to the *Bundh* No. 327. The natural stream does not come to an end at *Bundh* No. 327, but is merely diverted to another direction by human agency. The stream may be and probably is an artificial stream as it empties itself in the plaintiffs' Pokhur, but the problem can only be solved, not by assigning a particular name to the stream, but by asking ourselves the question, what is the character of a stream, which in its inception is a natural stream and is afterwards diverted in a particular direction by artificial means? Does a natural stream, when it is diverted by the operation of man into an artificial channel, retain or change its original character? If it does retain its old character, then the plaintiffs must succeed in the action. If it changes its character, then, so far as the important relief in this action is concerned, they must fail.

Fortunately for me, the point is concluded by authorities. *Sutcliffe* v. *Booth* (1) seems to be the leading case on the subject. That was an action by one riparian proprietor against another for the pollution and diversion of a water course. The water course in question was undoubtedly artificial as it passed the plaintiffs' land, but it was in its origin a stream and probably a natural stream. On motion for new trial, it was held that it was a misdirection to tell the Jury that if the stream was artificial and made by the hand of man, the plaintiff had no cause of action. In *Nuttall* v. *Bracewell* (2) Channell, B., in dealing with the rights of the parties as regards a stream which was natural in its origin, but had been diverted by the hand of man into an artificial channel, said as follows:—

"I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water, though flowing in an artificial channel. It may be that the case of an entirely artificial stream, as one flowing from a mine for instance, would be different; but that an artificial stream may be on the same footing as a natural one as regards the rights of riparian proprietors is held in *Sutcliffe* v. *Booth* (1)." To the same effect are *Holker* v. *Positt* (3) and *Baily & Co.* v. *Clark* (4) The law that I deduce from all these cases is that the proper inference from the user of the water of a natural stream though flowing in an artificial channel is that the artificial channel had been originally constructed upon the terms that all the proprietors of lands situated on the artificial channel should have the same rights in regard to the use of the water as they would have had if the stream had been a natural one. If that be so, then the plaintiffs, as riparian proprietors, have an undoubted right to have the water come to them without obstruction in its ordinary and accustomed course, undiminished in flow, quantity and quality. I would accordingly overrule the first objection urged on behalf of the appellants.

The second objection is equally without substance. Now, in order to dispose of this objection, it is necessary to remember that, on the facts found by the Courts below, the channel continued as a definite water course up to the paddy fields in question, that it spread itself along the fields, and that, emerging from the fields, it ran again

(1) (1863) 32 L. J. Q. B. 136; 9 Jur. (N. S.) 1087; 139 R. R. 744.

(2) (1866) 2 Ex. 1; 12 Jur. (N. S.) 989; 15 L. T. (N. S.) 313; 36 L. J. Ex. 1; 148 R. R. 867; 4 H. & C. 714.

(3) (1873) 8 Ex. 107; 42 L. J. Ex. 85; 21 W. R. 414.

(4) (1902) 1 Ch. 649; 71 L. J. Ch. 396; 86 L. T. 309; 50 W. R. 511; 18 T. L. R. 364.

as a definite water course until it emptied itself in the plaintiffs' Pokhur. It is not suggested that the stream exhausted itself as a stream in entering the paddy fields in question. It is not suggested that the water dispersed itself over the fields without a definite water course so as to be regarded as drainage and surface water. If, indeed, the water had no definite course after it emerged from the fields and its supply, so far as the plaintiffs are concerned, was merely casual, the defendants would be entitled to get rid of it in any way they chose. But that is not the case here. In my judgment, the identity of the water was not destroyed because it spread itself over the fields, but must be held to have been preserved on proof that on emerging from the fields, it ran in a definite course up to the plaintiffs' Pokhur That seems to be the effect of the decisions which were all considered in the learned judgment of the Madras High Court in *Villuri Adinarayana* v. *Polimera Kimudu* (5). In accordance with the decision of the Madras High Court in the case just cited, with which I entirely agree, I must overrule the contention advanced on behalf of the appellants.

I would dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(5) 17 Ind. Cas. 648; 37 M. 304; 12 M. L. T. 637; 24 M. L. J. 17.

BOMBAY HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION

MATRIMONIAL SUIT No. 2927 OF 1919.

March 2, 1920.

Present:—Mr. Justice Marten.

DAISY AMELIA BORGONHA—PETITIONER

versus

WILFRED CHURCHILL BORGONHA—RESPONDENT.

Divorce Act (IV of 1869), s 3 (1)—Divorce, proceedings for—Parties residing within jurisdiction separately—Court, whether has jurisdiction to hear petition.

If both parties to a petition for divorce are resident within the jurisdiction of the Court at the time of the presentation of the petition, the Court has jurisdiction, under section 3 (1) of the Divorce Act, to hear the petition, notwithstanding that the parties are residing separately from each other. [p. 935, col. 1.]

Mr. *Campbell*, for the Petitioner.

JUDGMENT.—This is a wife's petition for divorce on the ground of her husband's adultery, cruelty and desertion.

The case is undefended but raises a question of some importance, *viz*, whether this Court has jurisdiction to hear a petition where the parties last resided together outside the jurisdiction, but at the date of the petition are residing within the jurisdiction separately and not together. This depends on the directions given in section 3 (1) of the Indian Divorce Act, No. IV of 1869, as to which High Court petitions under that Act are to be presented.

The point was not raised until after the bulk of the evidence had been taken. I will accordingly deal with the matter in the same order, and state the facts first.

The parties are domiciled Anglo Indian Christians of the Protestant faith. They were married at Agra on the 31st of October 1898. They resided at various places after their marriage and finally at Muttra, which was the last place where the parties resided together. That place is outside the jurisdiction of this Court under the Indian Divorce Act. There is one child of the marriage—a daughter now aged 13, and she is and has for many years past been maintained by the petitioner.

The respondent deserted the petitioner about 1907, and thereupon the petitioner went to live at Agra with her parents taking the child with her. For a time she lost all trace of her husband. In 1911 she took legal advice at Lucknow, and also asked the Police to trace her husband's whereabouts. In the course of that year she received information that he was at Mysore, and later on, that he had left Mysore and gone to Madras. In 1913 the petitioner met her husband at Lucknow. He then requested her to return to him and promised to reform certain habits of his. The petitioner replied that he had so often broken his promises that she could not rely on his word, but that if he did come and reform she would consider the proposal. He did not, however, come to Lucknow and she heard nothing more of him till 1918.

BORGONHA *v.* BORGONHA.

In June 1919, the petitioner obtained employment in Bombay and took up her residence there, which she has continued up to the present date. She then ascertained that her husband had found employment in Bombay since 1915, first at the Military Hospital, Colaba, and subsequently on the R. I. M. SS. *Investigator*. The copy official records of the Indian Subordinate Medical Department (Exhibits J-1 and J 2) to which the respondent belongs, show that though in 1907 the respondent admitted the existence of his wife and child, he suppressed that fact in 1916 and posed as a single man. This is quite in keeping with what he appears to have done in 1911 judging from the letter, Exhibit E, which the petitioner received, *viz*, pretending his wife was dead and paying attentions to a girl in Madras on the footing that he was free to marry. As the result of enquiries at the R. I. M. Dockyard, the petitioner found that her husband had gone on leave to Bangalore to stay with his mother. She accordingly went there after him in August 1919, and had an interview with him. At that interview the husband lost his temper and struck the petitioner and also abused her. Police Court proceedings followed in which the charge of assault was compounded, the husband apologized and an order for maintenance was made. In fact, the husband only paid one sum of Rs. 75 for maintenance and has paid nothing since.

Later on, the petitioner obtained certain imformation as to her husband's adultery and on that information this petition was filed on the 25th September 1919. Subsequently, on further information, the petition was amended and re-sworn on the 20th October 1919. The original petition was served on the respondent on the 4th October 1919 on board the *Investigator* in Bombay Harbour. The amendments in the petition were served on the respondent on the 22nd October 1919 in Esplanade Road, Bombay.

As regards the charges of adultery on Board the *Investigator* while in Dry Dock in Bombay in August 1917, and also on shore at Karachi in 1918, I am quite satisfied that both these charges are made out. It is unnecessary for me to go into any details, but as regards the latter charge, I think, it reasonably clear that the Madrassi woman, Maryammal, staying with the respondent at Karachi is the same person as Maryammal, the writer of the Tamil post card (Exhibit H), dated the 15th August 1919, and addressed to the respondent at the Government Dockyard, Bombay, which the petitioner saw on making enquiries there. I am also of opinion that the charge of desertion is made out. Farther, I think that the evidence is sufficient to establish the charge of cruelty.

The delay in taking the proceedings is, I think, explained, and I am satisfied that there is nothing before me to lead one to suppose that there is anything in the nature of connivance or collusion in the case.

As regards the evidence, I may state generally that the petitioner impressed me favourably on both occasions when she was in the witness-box, and that I see no reason to doubt her evidence or that of the other witnesses.

That brings me to the point of jurisdiction which I have referred to. That depends on the true construction of the following words in section 3, *viz*, (1), "In this Act, unless there be something repugnant in the subject or context . . . . . In the case of any petition under this Act, 'High Court' is that one of the aforesaid Courts within the local limits of whose ordinary appellate jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together."

What then is the meaning of the concluding sentence? Does the word 'together" govern the word "reside" as well as the words "last resided," or does it only govern the words "last resided?" If, for instance, the concluding sentence was written out in full, ought it to run "..... within... ...whose jurisdiction.....the husband and wife reside together or last resided together" or should it run ".....within.....whose .....jurisdiction,.....the husband and wife reside, or the husband and wife last resided together."

Now, I think one very cogent reason for not making the word "together" govern the word "reside" is that one can hardly imagine any case in which the husband and wife would be residing together at the date of the presentation of a divorce petition. For one thing, to do so would almost inevitably raise the strongest suspicion of collusion or connivance, and lead to the petition being

dismissed. For instance, a wife's petition must depend on adultery *plus* either desertion or cruelty. Obviously, in no petition founded on desertion could the parties be living together at the date of the petition. And it is difficult to imagine any case in which a wife who is charging her husband with adultery and cruelty, would still be residing with him. On the other hand, it would be quite natural, I think, for the Legislature to found a jurisdiction on the presence within the jurisdiction of both parties at the date of the presentation of the petition. *Prima facie*, this would be the most convenient forum to try the case.

It is true that an alternative is given. But one can well understand the Legislature giving a petitioner the alternative of bringing the suit within the jurisdiction of the last matrimonial residence, and that the Legislature should in effect select this as the sole jurisdiction in cases where at the date of the petition both parties were not residing within the same jurisdiction.

Looking at the sentence from a purely grammatical point of view, I think it by no means follows that the word "together" governs "reside." If the printer had put a comma after the word "reside," it would, I take it, be clear that "together" would not govern "reside." But whether or no there is a comma in the original Act, I do not propose to let my decision depend on the punctuation which the printer thought fit to adopt.

The authorities on the point seem very meagre. Despite an adjournment, Counsel has only been able to produce two cases really in point. These cases differ in their conclusions and are decisions not on section 3 (1), but on similar directions in section 3 (3) with reference to District Courts.

The first is *Nush Durand Rebecca* v. *Durand* (1), a decision in 1870 by a Bench of three Judges in Calcutta, confirming a decree of the Recorder of Rangoon, which dissolved a marriage on the husband's petition. As the Act then stood the Recorder of Rangoon was the "District Judge" in Pegu within the meaning of section 3 (2) and (3). There, at the date of the petition, the husband and wife were both living in Pegu, but in different parts of Pegu. There is nothing whatever in the report to show that the parties last resided together within the jurisdiction of the Rangoon Court. On the contrary, the only matrimonial residence mentioned in the report is Madras. The judgment states at the outset the separate residences in Pegu at the date of the petition, and next states that the case is a very clear one. Then, after setting out certain other facts, the learned Judges say that the jurisdiction is clear from the record, but the Recorder ought to have stated in his judgment the facts on which that jurisdiction was founded. The learned Judges do not specifically mention the point I have to decide, but it is clear that their attention was expressly drawn to the question of jurisdiction, and that they thought the Court had jurisdiction in that case. This decision must, I think, have been based on the separate residences within the jurisdiction at the date of petition. Otherwise, the learned Judges would have committed the very fault which they attributed to the Recorder, *viz.*, not stating the facts on which the jurisdiction rested. In my opinion, the case is an authority in favour of the present petitioner.

The other case is one in 1892 on the appellate side of this Court where, by a majority of two to one, the Court held that the word "together" governs the word "reside" in section 3 (3). They accordingly reversed a decree for dissolution of a marriage which had been passed by a Mofussil Court. The case is *Sarah Xavier* v. *Samuel Francis Xavier* (2). There Mr. Justice Birdwood and Mr. Justice Telang held that there was no jurisdiction to hear the petition, but Mr. Justice Jardine thought there was. The facts were that at the date of the petition the husband was in jail at Nagpur, and the parties last cohabited at Bhusawal, which is outside the jurisdiction of the Nagpur Court. Curiously enough, Mr. Justice Telang is the only Judge who mentions the extreme improbability of the parties residing together at the date of the petition, and even he only refers to the case of desertion. He says: "But the living *together* seems to me to be the important matter. I presume the words about 'last *residence*' were introduced to meet such cases, for instance, as where the husband, having

(1) 14 W. R. 416.

(2) (1892) P. J. 153.

deserted the wife, there is no jurisdiction possible based on a present residence together; while it may be assumed that husband and wife *must* have lived together somewhere after marriage, and the jurisdiction would in such a case, therefore, go under the word 'last resided' to the Court of the place where such living took place. I think this is what was intended, and I do not see any such serious inconvenience resulting from this construction as to lead one to suppose that it cannot have been intended."

If it had been really present to the minds of the learned Judges that the Legislature could never have contemplated the parties living together at the date of the petition, I do not think Mr. Justice Telang and Mr. Justice Birdwood would have arrived at the conclusion they did. It may be that the Court did not have the advantage of any argument from Counsel, or had only an imperfect argument: and this would seem to be borne out by the fact that *Nash Durand* v. *Rebecca Durand* (1) was not mentioned by the Court, while, on the other hand, the case of *Wingrove* v. *Wingrove* (3) on the next page was relied on by Mr. Justice Jardine. *Wingrove* v. *Wingrove* (3) is, however, clearly distinguishable, for, as is pointed out by Mr. Justice Birdwood, one of the parties there was living outside the jurisdiction at the date of the petition. The only jurisdiction available, therefore, was that of the "last residence together."

As regards the question of inconvenience referred to by Mr. Justice Telang, if the Bombay jurisdiction is not available in the present case, the parties and their witnesses would have to travel over 800 miles from Bombay to get their suit decided.

There are two other cases from Calcutta which have been cited to me. Both of these are decisions of Mr. Justice Fletcher, *viz.*, *Fright* v. *Bright* (4) and *Francesco Giordano* v. *Flora Giordano* (5). Neither case deals expressly with the point before me, and the actual decisions are irrelevant. The latter case would, however, be relevant, if Shillong in Assam was outside the jurisdiction of the Calcutta High Court at the date of the presentation of the petition in 1912. There the parties last cohabited at Shillong but at the date of the petition were living in Calcutta in separate residences. The report does not show on which particular branch of section 3 the Court was relying for its jurisdiction, and as Shillong appears to be in a Native State, I do not think it would be safe to rely on this case without further enquiry as to the facts and jurisdiction. If, however, Shillong was then outside the jurisdiction, then the case would be an additional authority in favour of the petitioner.

As regards the practice of this Court, I have made enquiries from my brother Kajiji, who was Prothonotary for many years, and also from the present Prothonotary, Mr. Malabari. They are both of opinion that the practice of this Court has been to accept as sufficient foundation for the jurisdiction a residence of both parties within the jurisdiction at the time of the filing of the petition. They have further been good enough to assist me by looking up the records of recent matrimonial cases in this Court. These records certainly tend to show that in some petitions the draftsmen were relying for the jurisdiction on present separate residences within the jurisdiction. But for the moment, no case clearly on all fours with the present one has been found. I may, however, add that the present petition was admitted by the then Acting Prothonotary, Mr. Patel, and that an order for alimony under it was made by my brother Pratt on the 14th November 1919, and that the experienced Counsel who settled the petition and appeared at the hearing was evidently of opinion that the jurisdiction was clear.

I have considered whether it would not be proper for me either to report the case to my Lord, the Chief Justice, under rule 63 of our High Court Rules for hearing by a Bench of two or more Judges, or, alternatively, to dismiss the petition having regard to *Sarah Xavier* v. *Samuel Francis Xavier* (2), so that the question of jurisdiction might be determined by an Appellate Court. But as there is a conflict of authority, I think, I am entitled, with very great respect to the learned Judges in *Sarah Xavier* v. *Samuel Francis Xavier* (2), to act on my own opinion of the Act, and none the less so because the parties can hardly be in a finan-

(3) 14 W. R. 416.
(4) 4 Ind. Cas. 419; 36 C. 964.
(5) 20 Ind. Cas. 512; 40 C. 215; 17 C. W. N. 491.

cial position to stand the expense of further litigation.

The conclusion, therefore, which I have arrived at is that if both parties are resident within the jurisdiction at the time of the presentation of the petition, this Court has jurisdiction to hear it under the Indian Divorce Act notwithstanding that the parties were then residing separately from each other.

That brings me to the last question of fact, *viz.*, whether the parties were then resident within the jurisdiction. It is clear that the petitioner was so resident. She was then engaged in a business establishment in this City and had been so for several months. Her residence, therefore, was "*bona fide*" and not casual or as "a traveller" [See *Nusserwanji Pestonji Wadia* v. *Eleonora Wadia* (6)].

As regards the respondent, his case requires more consideration. But I think I may fairly hold on the evidence that his residence also was in Bombay. It appears that during 1917-1919 he was lent by the War Hospital authorities at Colaba to the R. I. M. SS. *Investigator* which was engaged in mine sweeping during part of that time, and that the home port of the *Investigator* was Bombay. It appears also that on the 4th October 1919, when the petition was served on him, he wrote to the Prothonotary giving the address "SS. '*Investigator*,' Bombay." (See Exhibit K.). The post card from the Madrassee woman (Exhibit H.) is also addressed to him at Bombay. The amendments in the petition were served on him in the streets of Bombay and the official statement (Exhibit L) shows that on the very next day he reverted to his military service at Colaba. The petitioner saw him at Colaba Hospital on duty there only a few days ago, and I think the fair inference is that he has been there ever since October 1919. For these reasons, I think I may hold, as I do, that he was residing in Bombay within the jurisdiction of this Court at the date of the petition and the amendment thereof.

Mr. Campbell did submit an alternative argument to me based on certain observations of Sir Basil Scott in *Nusserwanji Pestonji Wadia* v. *Eleconora Wadia* (6), which I confess, I have some difficulty in understanding. The argument was that the High Court preserved its divorce jurisdiction under section 35 of the Letters Patent, quite irrespective of the Divorce Act, and that, therefore, I was in a position to deal with this matter under the Letters Patent irrespective of the Divorce Act. I, however, pointed out to Counsel that this argument appeared to be in flat contradiction of section 4 of the Divorce Act, which provides that, "the jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise." Further, section 45 of the Divorce Act, which embodies the Civil Procedure Code, is expressly made "subject to the provisions herein contained." One cannot, therefore, rely on section 20 (formerly section 17) of the Civil Procedure Code as if section 3 of the Divorce Act did not apply here. Under these circumstances, Counsel did not pursue this line of argument. Under section 3 the parties here could clearly go to the Court having jurisdiction where the parties last resided together. I have not, therefore, a case to deal with where there never was any matrimonial residence, *e.g.*, if the parties had separated at the Church door and never lived together. I say nothing as to the jurisdiction in any exceptional case such as that.

In the result, I pronounce a decree *nisi* for dissolution of the marriage. I give the custody of the child to the petitioner and direct the respondent to pay the costs of the petitioner. Any application for alimony may be left to be dealt with in Chambers.

I wish to add that I think it would be convenient if all divorce petitions contained a definite statement as to the jurisdiction relied on. This is very frequently done already, but it was omitted in the present case.

Decree accordingly.

(6) 20 Ind. Cas. 492; 15 Bom. L. R. 593 at p. 602; 38 B. 125.

RAJENDRA PRASAD *v.* PROBODH CHANDRA.

PATNA HIGH COURT.

CIVIL REVISION No. 92 OF 1920.

December 21, 1920.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Ross.

RAJENDRA PRASAD AND ANOTHER—PETITIONERS

versus

PROBODH CHANDRA MITRA AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 3, 4—Guardian ad litem, *appointment of—Notice to minor, failure to give, effect of—Minor, wishes of, how far to be regarded—Mother and grandmother, right of.*

An order appointing a guardian *ad litem* of a minor defendant without giving notice to the minor as required by clause 4) of rule 3 of Order XXXII, of the Civil Procedure Code is without jurisdiction and is liable to be set aside. [p 936, col 2.]

In appointing a guardian *ad litem* for a minor defendant it is desirable, if possible, that the Court should consider the wishes of the minor as to the person who should be appointed. Unless there is any valid reason for refusing to appoint either the mother or the grandmother of a minor defendant as his guardian *ad litem*, the mere fact that she is a *parda-nashin* lady is not in itself a sufficient ground for rejecting her claims [p. 937, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Gaya, dated the 19th March 1920.

Mr. *N. K. Prasad, II*, for the Petitioners.

JUDGMENT.

MILLER, C. J.—This is an application in revision against an order of the Subordinate Judge of Gaya, dated the 19th March 1920, appointing Babu Gobind Prasad, a Pleader, as guardian *ad litem* of the minor defendandts Nos. 5 and 6 in the suit. The petition is filed on behalf of defendants Nos. 5 and 6, who were originally represented by their mother as guardian, but subsequently to the institution of the suit their mother died and they now complain that the appointment of Babu Gobind Prasad made on the 19th March was without jurisdiction on the ground that no notice of the application for the appointment of the guardian was served upon them in accordance with the provisions of Order XXXII, rule 3, clause (4) of the Civil Procedure Code. It appears that Babu Gobind Prasad was appointed by the learned Subordinate Judge upon an application made by the plaintiff and no notice of that application was served upon the minors or upon the guardian whom it was proposed to appoint. Subsequently, a petition was filed on behalf of the minor defendants asking for the appointment of their grandmother as guardian *ad litem* and objecting to the appointment of Babu Gobind Prasad which had been made without any notice being served upon them. The learned Subordinate Judge after hearing that objection refused it and the main reason apparently for his refusal was that he was not in favour of appointing a *parda nashin* lady. Before the Civil Procedure Code of 1908 came into force there was no provision corresponding to that which now appears as Order XXXII, rule 3, clause (4), and that rule was no doubt introduced into the Code of 1908 largely in consequence of the decision of the Full Bench of the Calcutta High Court in *Suresh Chunder Wum Chowdhry* v. *Jagut Chunder Deb* (1), in which two of the learned Judges who composed the Court on that occasion expressed the opinion that no order appointing a guardain *ad litem* for an infant defendant on the application of the plaintiff should be made *ex parte* and that no such order should be made until the Court is satisfied that the infant has been duly served and there has been an opportunity for making an application on behalf of the infant. Although the order appointing a guardian was not set aside in that case, still at that time there was no express provision of law in the Civil Procedure Code requiring that notice of such an application should served upon a minor. Under the present law, however, matters stand differently and by the express provision of Order XXXII, rule 3, clause (4), both the minor and his guardian must be served with notice before any order can be made on an application under that rule. It seems to me that in the present case the order made by the learned Judge was without jurisdiction and that his order, dated the 19th March, should be set aside as the minor was not served with notice and had no opportunity of appearing through a Pleader or that court in order to express his

(1) 14 C. 204 (F. B.); 7 Ind. Dec. (N. S.) 135.

views and wishes as to the apppointment of a guardian.

We have been asked to say that the reasons given by the learned subordinate Judge for refusing to appoint the grand-mother of the minors as their guardian when an application was subsequently made by them on the 23rd March are not valid reasons but the order made on that occasion is not at present the subject of revision before the Court. At the same time, we think it desirable to point out to the learned Judge that, in appointing a guardian for a minor, it is desirable if possible that he should consider the wishes of the minor as to the person who should be appointed. It was stated by Mr Justice Straight in the case of *Jwala Dei* v. *Pirbhu* (2) that in his opinion in a proceeding of this kind the Court having to deal with it would be bound by the wish expressed by a minor unless it saw that the guardian he asked to be appointed was an undesirable and unsuitable person, I wish to guard myself from saying that in all cases the wishes of the minor should be taken as conclusive by the Court which has to decide the appointment of a guardian but, at the same time, it is obvious that the wishes of the minor, if it can be shown that the guardian whom he wishes to have appointed is a suitable person, is a matter which ought to carry considerable weight in the mind of the Court. I may further point out that the objection of the learned Subordinate Judge to appoint the paternal grand mother of the minor merely on the ground that she was a *parda-noshin* lady is hardly one which can be supported having regard to the usual practice in this country. It is well known that the mother of the minor is more frequently than not, in the absence of any more suitable person, appointed a guardian and the paternal grand-mother has also a strong claim in the absence of a mother to be so appointed. Indeed, in the case of *Maharanee Ram Buntee Koonwaree* v. *Maharanee Soobh Koonwaree* (3) it was pointed out by the Court that the paternal grand-mother with the assent of the nearest male kinsman on the father's side has (in preference to the step-mother) the right to dispose of a minor in marriage and that, according to Hindu Law, a paternal grand mother has a preferential right over a step-mother to the guardianship of the minor. That case, it is true, was a case dealing with the guardianship of the person of the minor but unless there is any valid reason for refusing to appoint either the mother or the grand-mother it seems to me that the mere fact that she is a *parda nashin* lady is not in itself a sufficient ground for rejecting entirely her claims. We set aside the order of the 19th March 1920 appointing Babu Goband Prasad, with the result that it will be necessary for the plaintiff again to make an application for the appointment of a guardian *ad litem* for the infant defendants and before any appointment can be made notice of that application must be served upon the minors so that they may appear and state their desires in the matter and argue the matter if necessary before the learned Subordinate Judge. The costs of this application will be costs in the suit. We assess the hearing fee at one gold *mohur*.

Ross, J.—I agree.

Order set aside.

(2) 14 A. 35; A. W. N. (1891), 192; 7 Ind. Dec. (N. S.) 394.

(3) 7 W. R. 321.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 124 OF 1917.

June 25, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Ryves.

SHEO MOHAN PANDE AND OTHERS—DEFENDANTS—APPELLANTS

versus

KALI PRASAD SHUKUL—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Sufficient cause—Mistake of Counsel's clerk—Letters Patent Appeal—Court, power of, to go behind order of Judge

Owing to a *bona fide* mistake by Counsel's clerk in calculating the time within which to file a second appeal, the appeal was filed four days out of time and was rejected as time-barred. In Letters Patent Appeal against the order of rejection:

Held, that the mistake amounted to sufficient cause within the meaning of section 5 of the Limitation Act,

and that the Court had power to go behind the order of rejection and extend the period of limitation.

Appeal under section 10 of the Letters Patent from a judgment of Mr. Justice Tudball, dated the 8th August 1917.

The Hon'ble Mr. *M. Nehru*, for the Appellants.

Mr. *G. P. Gupta*, for the Respondent.

JUDGMENT.—This appeal arises out of the following circumstances. A suit for pre-emption was brought in the Court of the Munsif of Bansi on the allegations that, (1) the custom of pre-emption prevailed in the village, and (2) the consideration had been exaggerated. The defence was that there was no such custom and that the consideration was as given in the sale-deed. The learned Munsif found for the plaintiff and gave him a decree on the basis that the consideration for sale was Rs. 1,181-4-0. From this judgment and decree there were two appeals, one by the vendee in which he contested the issue of custom and the other, a cross appeal by the plaintiff as to the real amount of consideration. The learned Subordinate Judge dismissed the vendee's appeal but held that the consideration which passed was really Rs. 800. The defendant appealed to this Court, and as two decrees had been passed by the learned Subordinate Judge he had to file two appeals in this Court. Appeal No. 1102 of 1917 was from the decree of the learned Subordinate Judge in which he held that the custom of pre emption had been proved, namely, Appeal No. 162. Along with that appeal was filed another appeal against the decree of the Court below in Appeal No. 191 on the same date. In that appeal the issue raised was the amount of consideration. A learned Judge of this Court admitted Appeal No. 1102 from the Appellate Court's decree in Appeal No. 162 of 1917, it being within time but he held that the other appeal against the appellate decree in Appeal No. 191 of 19 7 was beyond time, and that there was nothing in the affidavit filed along with the memorandum of appeal which disclosed any ground for admitting it out of time, and he consequently rejected that appeal. We have read the affidavit which has been filed in the case and it satisfies us that the clerk of the learned Advocate who was engaged to file these appeals made a mistake in calculating the time within which he had to file the appeal. The mistake arose from the fact that, in the first instance, he was provided only with one certified copy of the judgment and decree of the Subordinate Judge. He not unreasonably assumed that the time required for obtaining one copy would be the same as that required for obtaining the second copy. However, on the 7th of August 1917, on checking the second certified copy he found that four days less had been required for obtaining that copy than the first. The consequence was that the second appeal was four days beyond time. This was no fault of the appellant. It seems to us that we have the power to go behind the order of the learned Judge of this Court if we think, on the whole, that it would be reasonable to do so. The case of *Kura Mal* v. *Ram Nath* (1) is precisely in point. We may add that our action will only result in saving possible future litigation because we find, as a matter of fact, that Second Appeal No. 1102 of 1917 of this Court has been decreed and it was held in that appeal that the custom of pre emption did not prevail in the village with the result that the plaintiff's suit stood dismissed with costs. If this order stands, we have this anomalous position that there is still outstanding a judgment of the Subordinate Judge which decrees the plaintiff's suit for pre-emption on payment of Rs. 800. On the whole we think we are justified in holding that there was sufficient cause to extend the period of limitation under section 5 of the Indian Limitation Act. We, therefore, allow the appeal, set aside the order of the learned Judge of this Court, and direct that the appeal be admitted, and notice will go returnable before the Special Bench dealing with pre emption cases. We make no order as to costs as this appeal has been heard *ex parte*.

Appeal allowed.

(1) 28 A. 414; A. W. N. (1906) 67; 3 A. L. J. 218.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 731 OF 1919.

August 14, 1920.

Present:—Mr. Justice Jwala Prasad.

MULCHAND KALWAR—DEFENDANT No. 4—APPELLANT

versus

GOBIND SINGH AND OTHERS—DEFENDANTS—2ND PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 1, 3—Abatement of suit—Suit, whether can abate after decree—Personal right, suit based on, effect of.

A suit which has terminated in a decree cannot abate by reason of the death of the plaintiff after the passing of the decree.

Even in cases of personal right, such as a claim for damages, the maxim *actio personalis moritur cum persona* does not apply after a decree is passed, inasmuch as a decree is property capable of inheritance as any other property.

Appeal from a decision of the Additional Sub-Judge, Mozuffarpore, dated the 12th July 1919, setting aside the decision of the Second Munsif.

Messrs. *Kulwant Sahay* and *Harnarayan Prasad*, for the Appellant.

Messrs. *Parmeshwar Dayal* and *Bhagwan Prasad*, for the Respondents.

JUDGMENT.—The appeal must be decreed. The Court below decreed the appeal and dismissed the suit upon the ground that the plaintiff died before the appeal was filed. The plaintiff obtained a decree from the Munsif on the 3rd October 19 8 for a declaration that the *kobala* executed by his father, defendant No. 4, in favour of defendants Nos. 1 and 2 in the name of defendant No. 3, was invalid and not binding upon him, and for confirmation of possession. The decree of the Munsif confirmed the possession of the plaintiff along with his father, defendant No. 4.

The defendants Nos. 1, 2 and 3, therefore, appealed, and as the plaintiff had died before the appeal was filed, the defendant No. 4, his legal representative, was made respondent. The learned Additional Judge decreed the appeal simply upon the ground that the suit had abated. The ground stated by him is that the right to sue was personal to the deceased plaintiff, Babu Ram Sahu, and upon his death there was no one to continue the suit. In this he is clearly wrong. The suit related to property and the father of the deceased plaintiff was his legal representative.

In the second place, the suit having terminated in a decree could not abate. Order XXII, relating to abatement, applies only before the suit terminates in a decree. The case relied upon by the learned Judge: *Padarath Singh* v. *Raja Ram* (1) was overruled by a Full Bench of the same Court in *Muhammad Husain* v. *Khushalo* (2). On the same point may be referred the cases of *Gopal Ganesh Abhyankar* v *Ramchandra Sadashiv* (3), *Paramen Chetty* v. *Sundararaja Naick* (4) and *Josiam Thiruvengadachariar* v. *Sowmi Iyengar* (5).

Even in cases of personal right, such as claim for damages, the principle *actio personalis moritur cum persona* does not apply after the decree is passed inasmuch as, in my view, the decree is a valuable property and is capable of inheritance as any other property.

The judgment of the Court below is set aside. The case is sent back to the learned Judge for deciding the appeal on merits. The appellant is entitled to costs.

Case sent back.

(1) 4 A. 235; A. W. N. (1882) 29; 6 Ind. Jur. 542; 2 Ind. Dec. (N. S.) 863.

(2) 9 A. 131 (F. B.); A. W. N. (1886) 322; 5 Ind. Dec. (N. S.) 519.

(3) 26 B. 697; 4 Bom. L. R. 325.

(4) 26 M. 499.

(5) 5 Ind. Cas. 937; 34 M. 76; 7 M. L. T. 195; (1910) M. W. N. 543; 20 M. L. J. 760.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 896 OF 1920.

January 4, 1921.

Present:—Mr. Justice Scott-Smith.

ATMA SINGH—PLAINTIFF—APPELLANT

versus

HEM RAJ SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 16 (fifthly)—Joint wall, user of, whether easement.

The existence of a joint wall between two houses is not an easement within the meaning of section 16 (fifthly) of the Punjab Pre-emption Act. [p. 941, col. 2.]

ATMA SINGH v. HEM RAJ SHAH.

The owner of a house having a joint wall with another house can use that wall in any reasonable manner, but by such user he does not acquire any right of easement over the other house. [p. 941, col. 1.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 26th February 1920, reversing that of the Extra Junior Subordinate Judge, Rawalpindi, dated the 1st June 1918.

Messrs. *Dev Raj Sawhney* and *M. S. Bhagat*, for the Appellant.

The Hon'ble Pandit *Sheo Narain*, R. B., and Mr. *Labh Singh*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was one for pre-emption of a house sold to Sain Ditta by *Musammat* Nur Bano and Karim Bakhsh on the 15th January 1917. Atma Singh, plaintiff appellant, sued for pre-emption on the ground that his house was contiguous to the property sold and also that he was a co-sharer in it under section 16, (fifthly) and (sixthly) of the Punjab Pre emption Act. One day prior to the institution of the suit the vendee re sold the house to Hem Raj, the contesting defendant respondent, who claimed to be a co sharer in another house which was contiguous to the one sold and who also claimed that he had a right under section 16, (fifthly) of the Punjab Pre emption Act. The first Court found that the plaintiff had a right of pre-emption under section 16, (sixthly), but not under section 16 (fifthly). It also held that Hem Raj was not a co-sharer in the other contiguous house in which he claimed to have a share and that, therefore, he had no right of pre-emption. It accordingly decreed the plaintiff's claim. The lower Appellate Court remanded the case for further enquiry into the following points :—

1. "Is Hem Raj, the vendee, an owner in the house contiguous to the one in suit? O. P. on defendant-vendee, Hem Raj.

2. "Have the owners of the house alleged to be the property of the vendee an easement by prescription or grant as regards the wall separating their house from the house in suit? O. P. on defendant-vendee, Hem Raj."

The Tial Court's findings on these issues were, (1) that Hem Raj had no share in the house in question, and (2) that the rafters of that house were on the wall of the house in dispute and that the owner of the house had an easement. The lower Appellate Court, differing from the Trial Court, held that Hem Raj was a co-sharer in the adjacent house and that neither of the claimants had any right under section 16 (fifthly) of the Punjab Pre-emption Act. On these findings he dismissed the plaintiff's suit. The plaintiff has filed a second appeal in this Court. Hem Raj is one of four brothers who, according to him, constitute a joint Hindu family. Hari Shah, in whose name the house in which Hem Raj claims to be a co-sharer was bought, has died and has been succeeded by his sons. The first point urged on behalf of the appellant is that, though the lower Appellate Court laid the onus of proof upon Hem Raj, it appears, however, when writing its judgment, to have considered that the onus was really upon the other side. The onus was certainly laid by the Court upon Hem Raj, but it appears to me that it considered that the onus was shifted by the evidence of the other members of the family who had admitted that Hem Raj had a share in the house. It is also pointed out by Counsel for the appellant that the learned District Judge has not come to a clear finding as to whether Hem Raj is a co-sharer in the house or not. The finding certainly is not a very clear one, because what the Judge says is that there is a probability that Hem Raj is a co-sharer in the house and that the presumption should be against Hari Shah's separate ownership. At the same time, it is quite clear from his decision that he considered it proved that Hem Raj was a co-sharer in the house, because if he had not been of this opinion he would have maintained the decree in favour of the plaintiff. It is an undoubted fact that upon Hari Shah's death the proprietary land together with the mortgagee's rights in land standing in his name were mutated in favour of his surviving brothers and his own sons in equal shares. That would in itself have been very strong evidence in support of the contention that the family was a joint and undivided one. Having regard to this mutation, there is also a strong presumption that the house which Hari Shah purchased in his own name was purchased on behalf of the joint family and that all the members thereof are co sharers in it. The finding of the District Judge that Hem Raj is a co sharer in the house is one of fact which is borne out by the evidence on

the record and which cannot be contested in second appeal.

As regards easement, the plaintiff claimed various kinds of easement all of which are set forth in detail in the judgment of the Trial Court. The only one dealt with in the lower Appellate Court's judgment is the easement founded upon the fact that the house has a joint wall with the house sold. The existence of a joint wall is not, however, an easement. In the grounds of appeal to this Court there is no specific allegation to the effect that the plaintiff has a superior right under section 16 (fifthly) of the Pre-emption Act, but Counsel for the appellant refers to ground No 6 in which it is stated that the lower Appellate Court has not disposed of all the objections raised by the plaintiff appellant to the report of the Subordinate Judge. In this connection he refers to the third objection, *viz.*, that the lower Court did not mention in its judgment the various easements as to the joint staircase, the joint wall and rafters and the discharge of water which the house in dispute and the plaintiff's house had on each other. There was no issue remanded by the lower Appellate Court in regard to these easements and there was nothing about them in the report of the Trial Court, and this objection was, therefore, quite irrelevant and there was no necessity for the lower Appellate Court to dispose of it. Besides, it is clear that the owners of the house having a joint wall can use that joint wall in any reasonable manner and by such user they do not acquire any right of easement therein.

In my opinion it cannot be said that the decision of the lower Appellate Court is in any way contrary to law and I dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1347 OF 1917.

August 10, 1920.

Present :—Mr. Justice Piggott and Mr. Justice Gokul Prasad.

A. CURLENDER AND OTHERS—DEFENDANTS APPELLANTS

versus

ABDUL HAMID AND ANOTHER—PLAINTIFF—RESPONDENTS

Limitation Act IX of 1908, s. 19—Acknowledgment Letter enclosing account and showing how account settled, whether acknowledgment of right.

D wrote a letter to *P.* enclosing a memorandum of account which showed that on the date of the letter a certain specific sum was due by him to *P.*, and that on that date this account had been squared by debiting *P's* account with a sum due to *D* from a third party, and remitting the balance due to *P* :

Held, that the mere fact that *D* had appropriated a part of the amount due to *P.* in satisfaction of a claim due to *D* by a third party, did not alter the fact that on the date of the letter a certain specific sum was due by *D* to *P.*, and that the letter amounted to an acknowledgment of right within the meaning of section 19 of the Limitation Act, so as to afford a fresh starting point of limitation in favour of *P.* for a suit to recover the amount appropriated by *D*. [p. 942, col. 2.]

Second appeal against the decree of the District Judge, Benares, dated the 16th of July 1917.

Messrs *M. L. Agarwala* and *H. K. Mukerjee*, for the Appellants.

Mr *Nehal Chand*, for the Respondents.

JUDGMENT.—The circumstances under which the present appeal has arisen are as follows:—The plaintiff is the proprietor of a firm of bone dealers in Benares called Abdul Hamid and Sons. The defendants carry on a business in bones which goes by the name of Bengal Bone Mills in Calcutta. It appears that there had been dealings between the parties for some years; and in January 1913, according to the plaintiff, Rs. 1,654 were due to the plaintiff from the defendants' firm. The defendants had also dealings in bone with the Muslim Bone Company, Limited, of Benares. The plaintiff's father was the Manager of this Company and after his death the plaintiff was elected the Manager of the Company. The plaintiff's allegation is that his firm, Abdul Hamid and Sons, had nothing whatever to do with the Muslim Bone Company, Limited, yet the defendants debited the plaintiff with a sum of Rs. 1,497-7-6 alleged to have been due to the defendants from

the aforesaid Company and deducting the amount from Rs. 1,654 due to the plaintiff, sent him Rs. 156-8 6 in payment of his claim on the 17th of January 1913. The defendants had no justification for doing so and hence the plaintiff's claim for Rs. 1,497-7-6 with interest by way of damages. The present suit was instituted on the 14th of January 1916. The only pleas in defence with which we are concerned in this appeal are, (1) that the plaintiff was only an agent of the Muslim Bone Company and supplied their goods to the appellants and, therefore, nothing was due to him, and (2) that the suit was barred by limitation. The first Court came to the conclusion that the bones were really sent by the plaintiff as the Manager of the Muslim Bone Company and not as a representative of a distinct firm known by the name of Abdul Hamid and Sons and consequently the defendants very rightly debited the plaintiff with the amount due to them from the Company. On the second plea it came to the conclusion that the items claimed are up to the 13th January 1913, that "no payment had been made by the defendants acknowledging their liability to the plaintiff within the period of three years under section 19 of Act IX of 1908, the suit is barred by the three years' limitation."

It further held that the payment of Rs. 156-8-6 did not amount to an acknowledgment under section 19 of Act IX of 1908 and, therefore, the suit was barred by time. It accordingly dismissed the suit. On appeal, by the plaintiff, the learned Judge of the lower Appellate Court came to the conclusion that the two firms Abdul Hamid and Sons and the Muslim Bone Company, Limited, were separate and "the defendants had no power to dictate to Abdul Hamid and Sons and tell them that they were the same thing as Muslim Bone Company, Limited." He does not seem to have considered the question of limitation of any importance. In the result he decreed the plaintiff's claim. The defendants come here in second appeal. The question of agency was not seriously pressed and in fact could not be so pressed having regard to the distinct finding of the lower Appellate Court mentioned above. The point of limitation, however, has been strenuously argued by the learned Counsel and the learned Vakil respectively who appeared on behalf of the parties. It was contended that the letter of the 17th January 1913 forwarding Rs. 156 8 6 to the plaintiff in full satisfaction of the amount due to them did not amount either to an acknowledgment of a right under section 19 of the Limitation Act, nor did it amount to a part-payment of the principal within the meaning of section 20 of the said Act and could not, therefore, operate to give a fresh start to the period of limitation which had, at the latest, commenced to run on the 13th of January 1913 when the last item was received. If this contention of the defendants is correct, it is quite clear that the present suit is barred by limitation.

We have examined the letter sent by the defendants to the plaintiff and the memorandum of account enclosed therein, and we find that the account clearly shows that on the 17th of January 1913, Rs. 1,654 were, as a matter of fact, due to the plaintiff on that date, and the defendants squared the account on that date by debiting the plaintiff's account with the sum of Rs. 1,497-7 6 due to the defendants from the Muslim Bone Company, Limited and remitting the balance of Rs. 156 8-6 to the defendants. It is not disputed that the letter and the accounts were signed by the defendants and sent to the plaintiff. It is true that the defendants do not in express terms admit that they are liable to pay any further amount to the plaintiff; but nonethe-less the account clearly shows that on that particular date, namely, 17th January 1913, Rs. 1,654 were due to the plaintiff. The mere fact that the defendants in the same account say that they have on that day appropriated a part of the amount due towards satisfaction of a claim due to them from a third party and have remitted the balance to the plaintiff, does not alter the fact that on that day Rs. 1,654 were, as a matter of fact, due to the plaintiff before the alleged appropriation was made. This is, in our opinion, an acknowledgment of right within the meaning of section 19 of the Limitation Act. From another point of view also this suit is clearly within time. Rs. 156 8 6 were sent to the plaintiff by the defendants on that day under the covering letter mentioned above. No interest was payable to the plaintiff from the de-

fendants on that day so that no question of any payment of interest arises in this connection. The payment of Rs. 156 8-6 aforesaid could be and was, as a matter of fact, in payment of the principal sum due. It has, however, been contended on behalf of the defendants-appellants that the endorsement of part-payment of principal must appear in the handwriting of the debtor under section 20 of the Limitation Act, that is to say, that the writing must show that the payment is made in part payment of the principal or to it, in other words, the same conditions attach to the part-payment of principal which have been expressly laid down in case of payment of interest. To put it in short, the words "as such" should be read into the latter portion of sub-section (1) of the section. In our opinion this contention is not sound. What the section provides is that "in the case of part-payment of the principal of a debt the fact of the payment appears in the handwriting of the person making the same." The law does not require that the entry should contain the words "part-payment of the principal." It is "the fact of the payment" which should appear in the handwriting of the person making the same. This is so in the present case, as a reference to the letter, dated the 17th of January 1913 and the account sent along with it would show. This view of ours is supported by the case of *Ambrose Summers, In the matter of* (1) with which we are in full accord. See also the case of *Sakharam Manchand* v. *Keval Padamsi* (2). We are, therefore, of opinion that from no point of view the present suit is barred by time. The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale. Nothing has been said to us on any of the remaining grounds taken in appeal nor have the respondents addressed any arguments to us in support of their cross-objection. We, therefore, dismiss it with costs.

Appeal dismissed.

(1) 23 C. 592 at p. 598; 12 Ind. Dec. (N s.) 394.
(2) 56 Ind. Cas. 429; 44 B. 392; 22 Bom. L. R. 313.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1618 OF 1919.

July 21, 1920.

Present:—Mr. Justice Spencer and Mr. Justice Odgers.

KUNHIPARAMBATH PARKUM KUNHI KORANATH CHANDU *alias* APPA—PLAINTIFF—APPELLANT

versus

ANTHOLI THOOVAKUNNON RAMUNNI—DEFENDANT—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), ss. 4, 15, 16—Amending Act of 1914—Promissory-note executed before Amending Act to payees in alternative, validity of—Acknowledgment of payment under promissory-note signed by one payee—Endorsement—Transfer of actionable claim—Transfer of Property Act (IV of 1882), s. 130.

A promissory-note executed before the passing of Act V of 1914 and made payable to payees in the alternative is not a negotiable instrument within the meaning of section 4 of the Negotiable Instruments Act of 1881. [p. 944, col. 2.]

A mere written acknowledgment of receipt of money due under a promissory-note does not fall within the provisions of sections 15 and 16 of the Negotiable Instruments Act. [p. 944, col. 2.]

Nor is it a transfer of an actionable claim within the meaning of section 130 of the Transfer of Property Act. [p. 945, col. 1.]

Muthar Sahib Maraikar v. *Kadir Sahib Maraikar*, 28 M. 544; 15 M. L. J. 384, distinguished.

Second appeal against the decree of the Court of the District Judge, North Malabar, in Appeal Suit No. 800 of 1917, preferred against the decree of the Court of the Additional District Munsif, Tellicherry, in Original Suit No. 75 of 1916.

FACTS appear from the judgment.

Mr. *Mir Zynuddin*, for the Appellant.—Exhibit A is a negotiable instrument. The provision for payment to joint payees is valid. *Muhammad Khumarali* v. *Ranga Rao* (1). There is nothing to imply that payment to alternative payees is invalid. The preamble to Act V of 1914 only declares the expediency of removing doubts that were felt in regard to the making and endorsement of promissory-notes in certain forms. The Amending Act should be deemed to declare the pre-existing law that instruments drawn in favour of joint or alternative payees is valid.

The written acknowledgment by payee amounts to an endorsement. At any rate, it falls under section 130 of the Transfer of

(1) 24 M. 654.

Property Act as an assignment of an actionable claim. See *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar* (2).

Mr. *O. Madhavan Nair*, for the Respondent.—Exhibit A, the pro note, is not a negotiable instrument within Act XXVI of 1881. It was executed before the Amending Act V of 1914. Under Act XXVI of 1881 negotiable instrument drawn in favour of joint or alternative payees is not valid. It was so under the English Law. Act V of 1914 did not declare what was the pre-existing law. It is an amending enactment. Section 4 of the Negotiable Instruments Act defining 'promissory-note' followed the English Law. The provisions of section 7 of the English Statute, 45 & 46 Vic., C. 61 providing for a bill being made payable to alternative was introduced in India only by the Act of 1914.

The so called endorsement, Exhibit A-2, is not an endorsement either in full or in blank within section 16 of the Negotiable Instruments Act as there is no direction to pay to a specified person and it does not consist only of the signature of the indorsee's name.

It cannot be brought within section 130 of the Transfer of Property Act as there are no operative words of transfer.

JUDGMENT.

SPENCER, J.—I feel no hesitation in holding that there was no valid endorsement contained in Exhibit A-2.

This purports to be an acknowledgment of the payment of Rs. 631 and odd and is signed by Ampu who is one of the three alternative payees under Exhibit A.

This is not either an endorsement in full or an endorsement in blank as defined in section 16 of the Negotiable Instruments Act. It is not the former as there is no direction to pay the amount in the instrument to a specified person and it is not the latter as it does not consist only of the signature of the indorsee's name.

The District Judge dismissed the suit for another reason also. He held that Exhibit A was not a negotiable instrument as it was executed before the passing of the Act V of 1914. That Act in its preamble declared that it was expedient to amend the Act of 1881 so as to remove doubts as to the validity of the making and endorsing of negotiable instruments in certain forms. These words might lead to the supposition that the law was really the same before the Act was passed and that all that was needed was to remove uncertainty as to the validity of negotiable instruments drawn in favour of joint payees or alternative payees.

But in fact it does not appear that negotiable instruments drawn in favour of alternative payees would have been treated as valid if a case of one of them had come before an Indian Court before 1914 and an authoritative ruling obtained.

In England it was held so long ago as 1809 that a note whereby the maker promised to pay a specified sum to *A* or to *B* and *J* was not a valid promissory-note under the Statute of Anne See *Blanckenhagen* v. *Blundell* (3).

It was not till the Bill of Exchange Act of 1882 was introduced that a bill was allowed to be made payable in the alternative to one of two or one or some of several payees. Chalmers in his commentary on section 7 (2) of that Act observes that this sub section materially altered the previous law. Thus, when the Negotiable Instruments Act of 1881 was passed in India the English Law did not recognize alternative payees.

When the Indian Act was enacted it may be taken to have embodied the law prevailing in England at the time, when it defined in section 4 a "promissory-note" as an instrument in writing containing an unconditional undertaking to pay a certain sum of money only to or to the order of a certain person or to the bearer of an instrument.

The omission to include a provision resembling section 7 (2) of the English Act was not rectified till 1914.

Joint payees were recognised even before the amendment of the Negotiable Instruments Act of 1881. [See section 51 of that Act and *Muhammad Khumarali* v. *Ranga Rao* (1)] but not payees in the alternative. I consider, therefore, that the District Judge was justified in his refusal to treat Exhibit A as a negotiable instrument.

The appellant's Counsel relies on *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar* (2) and argues that the endorsement Exhibit

(2) 28 M. 544; 15 M. L. J. 384.

(3) (1819) 106 E. R. 418; 2 B. & Ald. 417.

A-2 may be upheld as effecting an assignment of an actionable claim under section 130 of the Transfer of Property Act. The objection to so doing is the complete absence of operative words of transfer.

The second appeal fails and is dismissed with costs.

ODGERS, J.—Mr. Madhavan Nair, Counsel for the respondent, contends that the Act of 1914 (V of 1914) is not retrospective and, therefore, that if the date of execution of the promissory note in question is subsequent to the Act (which is admitted) it must fall within the previously existing law. Now the Negotiable Instruments Act came into force on 1st March 1882 and the English Statute (45 and 46, ic, Ch. 61) of 1882 came into force on 18th August 1882. The latter contains, in section 7 (2), a provision that a bill may be made payable to two or more payees jointly or it may be made payable in the alternative to one of two or one or some of several payees. But this provision was not incorporated by the Legislature into the Indian Law till the Act of 1914 and there seems no authority for saying that it was incorporated into the Indian Law by any judicial decision between 1882 and 1914. There is no doubt that the Act of 1914 is an Amending Act. It distinctly says that it is (section 1) and does not say that it is only declaratory of the existing law. Now section 4 of the Negotiable Instruments Act defines a promissory note and states that it contains an unconditional undertaking to pay a certain sum of money only to or to the order of a certain person—a certain person is an ascertained person and it was held as long ago as 1811, in the leading case of *Blanckenhagen* v. *Blundell* (3), that a note wherein the maker promised to pay to *A.* or to *B.* and *C.* is not a promissory note within the Statute of Anne and that an action could not be maintained upon it.

It, therefore, seems to me that the document sued on is not a negotiable instrument within the Negotiable Instruments Act 1881, as it was made before 1914 I am inclined to think that Mr. Madhavan Nair is also right in his second contention, *i. e.*, that the so called endorsement (Exhibit A-(2) does not fall within the provisions of section 16 of the Negotiable Instruments Act. Section 15 of the Act defines endorsement as, "when the maker or holder of a negotiable instrument signs the same, otherwise than as such maker for the purpose of negotiation on the back or face thereof, etc"

Section 16 sets out the different sorts of endorsements, *e. g.*, "in blank" and "in full." Here, in Exhibit A-2, all we have is an acknowledgment of the receipt of Rs. 631-6-5 "being the principal and interest under this pro note" signed by one of the alternative payees of the suit note. There is nothing to show that the money was not received on account of the maker; at any rate, it appears clearly not to be such an endorsement as would fall within section 15 and section 16 of the Act. This is quite apart from the question as to whether one of several alternative payees under the Act of 1914 could validly endorse—a question which, in the face of my finding as to the invalidity of Exhibit A as a promissory-note, does not arise in the present case.

On the point as to whether Exhibit A-2 can be a transfer of an actionable claim under section 130 of the Transfer of Property Act several cases have been referred to. It is clear that Exhibit A-2 contains no words of assignment as such. In *Muhammad Kumarali* v. *Ranga Rao* (1) it was held that, though there could not be endorsement by one joint payee to another, yet the endorsement might be relied on as evidence of an assignment by way of release in favour of the endorsee. In that case it was expressly stated (page 653) that the suit was maintainable "by reason of the other joint payee having transferred his interest therein to him." It further would appear that in this case the endorsement was in the shape of an order or request to the maker to pay the amount of the note to the endorsee though this is not clear from the report. In any case, it seems no authority for the present case which is that of a receipt by one of the payees and signed by him.

As laid down in *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar* (2), endorsement is not the only mode by which negotiable instruments may be assigned; but the difficulty in the present case is that there are no words of assignment or any expression of intention to transfer the rights of Ampu to the plaintiff. A direction in writing to

pay the amount due on an instrument endorsed on such instrument by the payee thereof, coupled with delivery of the instrument so endorsed to the person to whom the payment is directed, is an assignment within section 130 of the Transfer of Property Act. This was laid down in *Rama Iyen* v. *Venkatachellam Patter* (4). There is no such direction to pay here. These are the cases relied on by Mr. Mir Zynuddin, Counsel for the appellant, and, as already stated, they do not, in my opinion, bear upon this case. I, therefore, agree with the learned District Judge that Exhibit A-2 does not constitute a valid assignment under section 130 of the Transfer of Property Act.

I agree with my learned brother and would dismiss this second appeal with costs.

M. C. P.

Appeal dismissed.

(4) 30 M. 75; 16 M. L. J. 554.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1062 OF 1920.

January 21, 1921.

Present :— Mr. Justice Chevis.

NAWAB AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PUNJABA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Alienation—Suit to contest alienation, dismissal of—Suit for possession, whether maintainable.

Plaintiffs brought a suit for a declaration that a gift made by *R.* in favour of *N.* shall not affect their reversionary rights. The suit was dismissed on the ground that on *R's* death her grand-daughter *J.* would have a right to succeed to her, and that the plaintiffs' interest was too remote. After *R's* death, plaintiffs brought a suit against *N.* for possession of her estate :

Held, that *J.'s* right to succeed to *R* being *res judicata*, and *J* being alive the plaintiffs' suit was not maintainable.

Miscellaneous second appeal from the order of the District Judge, Amritsar, dated the 21st February 1920, reversing that of the Munsif, Second Class, Amritsar, dated the 5th August 919.

Dr. *Shuja ud din*, for the Appellants.

Mr. *Devi Dayal*, for the Respondents.

JUDGMENT.—The genealogical tree is to be found in the judgment of the learned District Judge. The plaintiffs, nephew of Imami, sue for possession of six *kanals* of land and a house which Imami's daughter-in-law, *Musammat* Rajji, gifted to her son-in-law, Nawab. *Musammat* Rajji is now dead and plaintiffs claim that succession has opened out to them. The gift was made in 1912 and in the same year the plaintiffs brought a suit for a declaration that the gift should not affect their reversionary rights after the death of *Musammat* Rajji. This suit was dismissed and the plaintiffs' appeal was dismissed by the Divisional Judge on the ground that, although the plaintiffs were entitled to contest an alienation made by a female, the daughter, *Musammat* Karam Bibi, and the grand daughter, *Musammat* Jhando, of *Musammat* Rajji, would succeed to the property on her death in preference to the plaintiffs and, therefore, the suit was so speculative that no declaratory decree should be given. Against this decision plaintiffs might have filed a further appeal to this Court but they did not do so. *Musammat* Karam Bibi is now dead as well as her mother *Musammat* Rajji, but *Musammat* Jhando, the grand daughter of *Musammat* Rajji, still survives and the plea of the donee defendant is that the suit is barred by the rule of *res judicata*, it having been decided in the former suit that *Musammat* Jhando is entitled to succeed in preference to the plaintiffs and the plaintiffs being, therefore, debarred from getting a decree for possession in the presence of *Musammat* Jhando. The first Court held this contention to be correct and dismissed the suit, but the learned District Judge on appeal holds that the former decision does not operate as *res judicata*, as in the former case there was no express issue as to, whether *Musammat* Jhando would succeed to the property. It is true that no issue as to *Musammat* Jhando's right to succeed was framed by the first Court, but still the question of her succession became a matter of controversy between the parties when the District Judge based his dismissal of the appeal on a finding that *Musammat* Jhando was entitled to succeed.

This finding might have been attacked by a further appeal to this Court, but it was not attacked and, therefore, became final.

I have no hesitation in holding that *Musammat* Jhando's right to succeed is a matter which is *res judicata*, and that in her presence the plaintiffs cannot obtain a decree for possession. The appeal is accepted and the suit is dismissed with costs in all Courts.

Appeal accepted.

MADRAS HIGH COURT.
FULL BENCH.
SECOND CIVIL APPEAL No. 504 OF 1919.
April 29, 1920.
Present:—Sir John Wallis, KT.,
Chief Justice, Mr. Justice Oldfield,
Mr. Justice Sadasiva Aiyar,
Mr. Justice Spencer and
Mr. Justice Seshagiri Aiyar.
N. N. L. RAMASWAMI CHETTIAR—
DEFENDANT No. 2—APPELLANT
versus
MALLAPPA REDDIAR—PLAINTIFF—
RESPONDENT.

Transfer of Property Act IV of 1882), s. 53—Transfer in fraud of creditor decree-holder—Claim by transferee, dismissal of—Suit to set aside order on claim petition—Plea that transfer voidable by decree-holder, competency of.

It is open to an attaching decree-holder to plead in defence to a suit by the alienee from the judgment-debtor whose claim has been rejected, that the transfer to him was fraudulent under section 53 of the Transfer of Property Act without the creditor himself filing a suit to avoid the transfer. [p. 953, col. 2.]

Subramania Ayyar v *Muthia Chettiar*, 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 760; 33 M. L. J. 705, overruled.

Vyse v. *Brown*, (1884) 13 Q. B. D. 199; Cab. & E. 223; 33 W. R. 168; 49 J. P. 151, *Glegg* v. *Bromley*, (1912) 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825, *Phul Kumari* v. *Ghanshyam Misra*, 35 C. 202; 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 503; 14 Bur. L. R. 41; 35 I. A. 22 (P. C.), distinguished.

Ramu Aiyar v. *Palaniappa Chetty*, 8 Ind. Cas. 117; 33 M. 35; (1910) M. W. N. 589; 8 M. L. T. 381; 21 M. L. J. 756, explained.

Second appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Appeal Suit No. 71 of 1918, preferred against the decree of the Court of the District Munsif, Tuticorin, in Original Suit No. 360 of 1916.

This second appeal coming on for hearing on the 27th and 28th January 1920, and having stood over for consideration till the 5th February 1920, the Court (Sadasiva Aiyar and Spencer, JJ.), made the following

ORDER OF REFERENCE TO A FULL BENCH:—

SPENCER, J.—The plaintiff claims the suit properties by virtue of a gift in his favour, dated 19th November 1914. The second defendant is a creditor of the donor, the first defendant, who obtained a decree and attached the properties in execution. The plaintiff made a claim under Order XXI, rule 58, Civil Procedure Code. It was dismissed and this suit is brought to set aside the summary order and to obtain a declaration that the property is not liable to be attached.

The trial of the plaintiff's suit raised the question of law, whether it is open to an attaching decree-holder to plead in defence, against the alienee's suit, that the alienation is a fraudulent one intended to defeat or delay the alienor's creditors. This question was answered in the negative in *Subramania Ayyar* v. *Muthia Chettiar* (1), which is a Full Bench decision. We have decided to refer the same question of law once more to a Full Bench. It need hardly be said that we should not have ventured to take this extreme course if we were not fully convinced that the law, as laid down by that Full Bench, seriously requires reconsideration.

In order to justify this reference it is necessary that I should, as briefly as possible, enumerate the reasons which have impelled us to make it:—

1. There appears to be an increasing sense of hesitation in the minds of both Bench and Bar in regarding *Subramania Ayyar* v. *Muthia Chettiar* (1) as representing sound law;

2. Other High Courts have put a different construction on section 53 of the Transfer of Property Act;

(1) 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 760; 33 M. L. J. 705.

3. In a case that has since come before the Privy Council a plea of this description was allowed to be raised in defence of the suit ;

4. There are no words in section 53 which make it imperative that a person defrauded, defeated or delayed should put forward his claim to have the transfer avoided in a regular suit and not otherwise, and

5. There are independent reasons for doubting the correctness of the conclusion of the learned Judges who decided *Palaniandi Chetti* v. *Appavu Chettiar* (2) upon which the Full Bench case in *Subramania Ayyar* v. *Muthia Chettiar* (1) was based.

I will now proceed to amplify the above reasons. On the first point I will merely refer to the opinions expressed by Abdur Rahim, J., in *Cheruthazhath Abdulla Haji* v. *Cheriyandi Ibrayan Kutti* (3) ; by Krishnan, J., in *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamad* (4) and by Sadasiva Aiyar and Napier, JJ., in their reference to the Full Bench on the former occasion at page 613* of *Subramania Ayyar* v. *Muthia Chettiar* (1). I will only add that I share in the doubts expressed by the above-named learned Judges.

Next, *Abdul Kader* v. *Ali Meah* (5) is a direct decision to the contrary on the point that a creditor who has obtained a decree and taken out execution is competent to raise a plea under section 53 of the Transfer of Property Act that the alienation made by his debtor is voidable and should be avoided, and the learned Judges quote the English case of *Clough* v. *London* and *North Western Railway Co.* (6) and two other decisions of the same Court in support of this proposition. The case of *Clough* v. *London* and *North Western Railway Co.* (6) is an authority for allowing a voidable transaction to be avoided on the ground of fraud by any unequivocal act including a statement in a plea by defendants in an action. This Calcutta case was considered in the Full Bench case in *Subramania Ayyar* v. *Muthia Chettiar* (1) and dissented from without full discussion of the reasons which influenced the learned Judges of the Calcutta High Court in coming to their conclusion.

In *Baroda Prosad Banerji* v. *Gajendra Nath Banerji* (7) it was held that when a transaction is voidable it was open to the injured party to declare his Will to rescind the transaction by way of defence to an action brought to enforce the transaction against him. In *Bhikabhai Mulibhai* v. *Panachand Olhavji* (8) the defendant was allowed to set up the defence that a mortgage transaction was intended to defeat and delay creditors upon a suit brought by the mortgagor for a declaration that the defendant was not entitled to attach the properties.

Again, in *Ghunsham Das* v. *Uma Pershad* (9), the Privy Council confirmed the decree of the Judicial Commissioner of the Central Provinces in a suit in which certain creditors who had attached before judgment their debtor's property raised in defence a plea that the plaintiff's mortgage was executed collusively as a device to defeat creditors. If there had been such an easy way of obtaining a reversal of the Judicial Commissioner's decision as that of objecting to the plea being raised as a defence to the suit, it is likely that that ground would have been argued before the Judicial Committee.

In *Lakshmi Doss* v. *Roop Laul* (10), a case of a voidable deed the defendant was allowed by a Full Bench of this Court to set up as defence that the deed was invalid even at a time when a suit to declare its invalidity would have been time-barred. And in *Thathu Naik* v. *Kondu Reddi* (11), two Judges out of three composing the Full Bench held that it was open to the defendants to have a sale set aside by way of answer to the plaintiff's claim on the strength of the sale to recover possession of the mortgage property which he had

(2) 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 290.

(3) 50 Ind Cas. 959 at p 962.

(4) 51 Ind. Cas. 714; 36 M. L. J. 231 at p. 237; 25 M. L. T. 47; (1919) M. W. N. 39; 9 L. W. 138; 42 M. 142.

(5) 14 Ind. Cas. 715; 15 C. L. J. 640; 16 C. W. N. 717.

(6) (1872) 7 Ex. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189.

(7) Ind. Cas 289; 9 C. L. J. 381 at p. 393; 13 C. W. N. 857.

(8) 52 Ind. Cas. 682; 43 B. 707; 21 Bom. L. R. 770.

(9) 50 Ind. Cas. 264; 36 M. L. J. 483; 17 A. L. J. 410; 15 N. L. R. 68; 21 Bom. L. R. 472; 23 C. W. N. 817; (1919) M. W. N. 513; 10 L. W. 511 (P. C.).

(10) 30 M. 169 (F. B.); 17 M. L. J. 19; 2 M. L. T. 4.

(11) 1 Ind. Cas. 221; 32 M. 242; 5 M. L. T. 249.

*Page of 41 M.—[*Ed.*]

bought in auction in execution of his mortgage-decree.

As to the two reported cases, about the correctness of which we feel doubt, I may say at once that I do not wish to attempt to challenge the other principle established by *Palaniandi Chetti* v. *Appavu Chettiar* (2), *viz.*, that if a regular suit is brought by a creditor to declare a conveyance made by his debtor to be invalid, the decree obtained by him would enure for the benefit of all other creditors, and it follows from this that such suits should ordinarily be brought in a representative character on behalf of all the creditors in order to avoid the same question being raised again and again by different creditors of the same debtor, although I prefer the opinion of Krishnan, J., in *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhinal* (1), that it should be a matter within the discretion of the Court to direct, at the instance of the defendant, that a suit by a single creditor should be amended so as to make it a suit on behalf of all creditors, and not that all suits should be dismissed if not brought in a representative character. It seems to me that, even if this principle of representation be accepted in its fullest significance, it does not follow as a necessary corollary that a creditor, who is not already bound by a decision of the same question in a prior suit, should be debarred from setting up the invalidity of the transfer when he is made a defendant in a suit brought by the alienee just because he is a defendant.

In *Palaniandi Chetti* v. *Appavu Chettiar* (2) one of the learned Judges, Coutts Trotter, J., did not go beyond what was decided in *Ishvar Timappa Hegde* v. *Devar Venkappa Shanbog* (12), which is an authority for the proposition that if a creditor sues he should do so in a representative capacity. The other learned Judge, Seshagiri Aiyar, J., reluctantly allowed the validity of the objection that an assignment by a debtor is good and valid until it is set aside in a proper proceeding. He quoted *Vyse* v. *Brown* (13) and *Glegg* v. *Bromley* (14), as authorities for this, but he did not define a proper proceeding as confined in meaning to a regular suit, nor did he lay down that the person desiring to avoid the assignment must occupy the rule of plaintiff in such a suit. The above two cases are not, as I understand them, authorities for such a proposition. He relied, further, on a case decided by the Privy Council in *Phul Kumari* v. *Ghanshyam Misra* (15) which decided a question of Court-fees and incidentally seems to have decided that the effect of the successful suit under section 283, Civil Procedure Code, (now Order XXI, rule 63) to set aside a summary order passed on a claim petition was to place the parties in the same position as they had occupied before such order was made. The learned Judge did not notice that if the theory advanced in *Palaniandi Chetti* v. *Appavu Chettiar* (2) was accepted a counter petitioner who succeeded in defeating the claim would be in a worse position than if he failed, because he would have no right to appeal in the form of a suit under Order XXI, rule 63, against an order passed in his favour and if the claimant appealed in that form he could not set up in defence a plea based on section 53, Transfer of Property Act. In *Muthukumara Chetty* v. *Anthony Udiyan* (16) my learned brother pointed out that a party who was entitled to avoid a transaction might do so by other means than by getting a decree of Court. For instance, he might do so by an unequivocal act of repudiating the transaction—See page 877*. The decision of the Full Bench in *Subramania Ayyar* v. *Muthia Chettiar* (1) did not result in any reasons being added to strengthen the view taken by the two learned Judges who decided *Palaniandi Chetti* v. *Appavu Chettiar* (2). As this is a point of law which is constantly recurring, I think it advisable that another Full Bench should finally pronounce on the point whether we should follow the view taken in *Palaniandi Chetti* v. *Appavu Chettiar* (2) and in *Subramania Ayyar* v. *Muthia Chettiar* (1).

SADASIVA AIYAR, J.—I agree with the proposal of my learned brother to refer the question again to a Full Bench. I may be permitted to add a word of explanation. During the course of the arguments, I expressed rather strongly my reluctance to

(12) 27 B. 146; 5 Bom. L. R. 19.

(13) (1884) 13 Q. B. D. 199; Cab. & E. 223; 33 W. R. 168; 48 J. P. 151.

(14) (1912) 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825.

(15) 35 C. 202; 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22 (P. C.).

(16) 24 Ind Cas 120; 38 M. 867; 29 M. L. J. 617; 15 M. L. T. 361

*Page of 38 M.—[*Ed.*]

again refer the question to a Full Bench as I was a party with Napier, J., to the reference on which *Subramania Ayyar* v. *Muthia Chettiar* (1) was decided and I had, since the date of the Full Bench decision, loyally followed it surrendering as I was bound to do my view on the question. But as my learned brother thought that, even the English procedure and practice on which the decision in *Polaniandi Chetti* v. *Appavu Chettiar* (2) was based, seemed not to support the view taken in that case, (I am myself very diffident to express any opinion on what the practice and procedure of English Courts is or has been on any matter) and as, in a later Privy Council decision, no objection to the plea of voidability on the ground of fraud raised by the defendants (creditors) seems to have been taken by the fraudulent alienee based on the ground that the creditors were not legally entitled to put forward such a plea in defence and could only have the alienation set aside in a suit brought by them as plaintiffs. I got over my reluctance to join in this reference. According to *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamad* (4) read with *Subramania Ayyar* v. *Muthia Chettiar* (1) the decree-holder who was able at once to defeat the claim petition of a fraudulent alienee gets a mere barren victory which could be at once turned into a defeat if the alienee brings his suit to set aside the order on the claim petition on the ground that the alienation has not been set aside in a regular suit and so the merits of the alienation should not be gone into, while if the decree-holder was unsuccessful in the claim proceedings he has the statutory right under Order XXI, rule 63, (admitted by Sir W. B. Ayling, J., and Krishnan, J, in his favour in *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamad* (4) to bring his suit against the claim order and could have the *merits* of the fraudulent alienation gone into and decided in that suit. This anomaly is also a ground for re-consideration of *Subramania Ayyar* v. *Muthia Chettiar* (1). No doubt, on questions of procedure it is undesirable to unsettle precedents but as no titles to property are likely to be disturbed and as the result of overruling *Subramania Ayyar* v. *Muthia Chettiar* (1) would only be to defeat what is almost wholly a technical plea, to simplify procedure, to shorten litigation, and to favour creditors sought to be defrauded (honest creditors and decree-holders being favourites of the law), I do not think that the objection is a serious one.

This second appeal came on for hearing on the 6th and 7th April 1920, in pursuance of the Order of Reference to a Full Bench upon perusing the grounds of appeal, the judgments and decrees of the lower Courts and the record in the case and the said Order of Reference.

Messrs. *K. Bhashyam Iyengar* and *V. K. Srinivasa Iyengar*, for the Appellant.—The Full Bench decision in *Subramania Ayyar* v. *Muthia Chettiar* (1) needs to be revised. That has been followed in succeeding cases by the Judges with much reluctance and hesitancy. See *Cheruthazhath Abdulla Haji* v. *Cheriyandi Ibrayan Kutti* (3), *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamad* (4). The Calcutta High Court has held the contrary view in *Abdul Kader* v. *Ali Meah* (5). Where the creditor has, by an unequivocal act, expressed his intention to avoid, there is no reason why he should be restricted to a suit to do so. A plea to an action by the unsuccessful claimant is enough. See also *Baroda Prosad Banerji* v. *Gajendra Nath Banerji* (7) and *Bhikabhai Muljibhai* v. *Panachand Odhavji* (8). In *Ghunsham Das* v. *Uma Pershad* (9) the Privy Council has tacitly approved of the maintainability of such a plea because they confirmed the lower Court's decree which was based on such a plea. Under Order XXI, rule 63 the scope of the suit is to determine the title of the parties. If the transfer by the judgment-debtor is held to be a fraudulent transaction, the transferee has no right under his transfer and cannot claim to free the property from the trammels in execution. Then the decision must be in favour of the creditor what is necessary is only that the creditor should have exercised his option to treat the transfer as void. Section 53, Transfer of Property Act, does not expressly say that a suit is his only remedy.

Mr. *A. Krishnaswamy Aiyar*, (with him Messrs. *C. S. Chedambaram Pillai* and *Marthandam Pillai*) for the Respondent.—There is no reason to disturb the considered ruling of the Full Bench in *Subramania Ayyar* v. *Muthia Chettiar* (1)

The non-recognition of a separate suit as the only remedy of the creditor to avoid a fraudulent transfer will lead to several hardships. In cases where the transfer is valid as to part of the consideration, the decree in a suit under Order XXI, rule 63 cannot adequately protect the claimant's interest, while it recognises the rights of the creditor. There will be no means of dealing with any equities in favour of the claimant in any decree than might be passed.

The scope of the suit under rule 63 is not more extended than that the enquiry under rules 59 and 63. In both alike the question of possessing will be considered. And in the suit no plea can be allowed as to the binding nature of the transfer to the claimant until the creditor established that it was not binding on him in a suit of his own.

A suit under rule 63 is virtually related to the order or the claim petition. In *Phul Kumari* v. *Ghanshyam Misra* (15) the Privy Council treat it as a form of appeal related to a prior decree. Therefore, the creditor's remedy is in an independent suit where all aspects of the question could be fully considered and determined.

Under section 53 of the Transfer of Property Act the creditor cannot rely on the exercise of his option in defence until he has succeeded in a suit.

As the attachment of immoveables is by a prohibitory order issued to the judgment-debtor, there can be no valid attachment of property fraudulently transferred Unless the prohibition is directed to the transferee the usual attachment form would be futile.

OPINION.

WALLIS, C. J.—The decision of the Full Bench in *Subramania Ayyar* v. *Muthia Chettiar* (1) affirmed the decision in *Palaniandi Chetti* v. *Appavu Chettiar* (2), that a conveyance offending against the provisions of section 53 of the Transfer of Property Act can only be avoided in a suit properly instituted for that purpose, and that, consequently, in a suit by an unsuccessful claimant under Order XXI, rule 63 of the Civil Procedure Code it is not open to the attaching decree-holder to plead that the transfer by the judgment-debtor to the claimant was fraudulent. This ruling has since been questioned in two cases in this Court, *Cheruthazh th Abdulla Haji* v *Cheriyandi Ibrayan Kutti* (3), and *Kottarathil Puthiyapurayil Pokker* v. *Kolathil Parkum Chandrankandi Kunhamad* (4), as observed in the Referring Order of Spencer, J., where many of the Indian decisions are cited. The question has now been very fully argued before a Bench of five Judges, and after carefully considering all the arguments addressed to us I have come to the conclusion that the view taken by the two learned Judges of the Calcutta High Court in *Abdul Kader* v. *Ali Meah* (5) is right, and that there is nothing to prevent a creditor who has been defrauded, defeated or delayed from exercising the option given him by section 53 of the Transfer of Property Act of avoiding the conveyance otherwise than by the institution of a suit for that purpose. If the framers of the Transfer of Property Act, who were, of course, thoroughly familiar with the English decisions on the subject, had intended that the creditor should only exercise this option by instituting a suit, I make no doubt that, in a measure which was intended to be self-contained and to be administered in many places where English decisions are not readily available, they would have said so expressly. As they have not done so, we are, in my opinion, bound to apply the law that voidable transactions may be avoided by any open or unequivocal declaration of an intention to avoid them as laid down by the House of Lords in *Oakes* v. *Turquand* (17), and in numerous other cases.

I prefer to rest my opinion on the language of the section which we have to administer, but at the same time, I do not think that the English decisions, when properly understood, afford any support to the contrary view. The practice of requiring a creditor suing in Chancery to set aside a deed of fraudulent transfer to sue on behalf of all the creditors was, in my opinion, only another application of the well-known maxim that he who seeks equity must do equity. As observed by Mr. Kerly in his History of Equity, at page 145, even after the two Statutes of Elizabeth extended the powers of the Common Law Court to defeat fraudulent conveyances, recourse continued to be had to Chancery to set aside settlements in fraud of creditors *Naylor* v. *Baldeon* (18). This was no doubt owing to the

(17) (1867) 2 H. L. 325; 36 L. J. Ch. 949; 16 L. T. 808; 15 W. R. 1201.

(18) 1 Ch. Rep. 69.

superior facilities then possessed by the Court of Chancery for eliciting the truth in such cases owing to its power to examine the defendant and to grant discovery, which the Common Law Courts would not do. It is unnecessary to consider whether the Court of Chancery invariably required a judgment-creditor as a condition of obtaining relief to sue on behalf of all the creditors. In so far as it did so, it was merely an application of the well known equitable rule which was also applied in the more recent case of *Reese River Silver Mining Co.* v. *Atwell* (19). It was there argued that there was no case in which a creditor had been allowed to bring such a suit when the debtor was still alive without first obtaining a judgment against him, but this contention was overruled, and a creditor who had not obtained judgment was allowed to sue, but, at the same time, leave was given to amend the bill (or plaint) by making it on behalf of all the creditors" a decision followed by Jenkins, C. J., in a similar case *Ishvar Timappa Hegde* v. *Devar Venappa Shanbag* (12). That is not the question before us, as the suit with which we are concerned is the statutory suit under order XXI, rule 63.

This and the other Chancery cases cited in *Palaniandi Chetti* v. *Appavu Chettiar* (2), in my opinion, throw no light on the question whether under the Statutes of Elizabeth it is not open to a creditor to avoid a fraudulent conveyance without suit or action if he can do so effectively and is prepared to face the risk of having to pay damages should the conveyance ultimately be found not to have been fraudulent. That he can do so appears from two decisions cited by Sterling, J., in *Mouat, In re, Kingston Cotton Mill Co.* v. *Mouat* (20) where the creditor's rights at law and in equity are distinguished. In the very early case of *Bethell* v. *Stanhope Co.* (21) where the testator shortly before his death had made a fraudulent gift of his goods to his daughter but had remained in possession of them, it was held that they were assets in the hands of his administrator, and that when the donee afterwards took them it was a trespass against the administrator, and in *Shears* v. *Rogers* (22) Littledale, J., observed, "creditors had a right to the property which the deed purported to convey, and might enforce that right at law. The assignment was void as soon as the creditors elaimed to treat it as such, though not until then."

The judgment-creditor's right to take in execution goods which have been made the subject of a conveyance offending against the Statute of Elizabeth without bringing a suit to set aside the conveyance has also been recognised in a number of cases begnining with the early case of *Turvil* v. *Tipper* (23) where it was held that an alienee from the judgment-debtor under a fraudulent conveyance could not maintain an action of trespass against the Bailiff of a Manor Court for seizing the goods, which were the subject of the conveyance, in execution against the judgment-debtor Later cases, went further, and held that the Sheriff or Bailiff was not only entitled to seize in execution goods which had been fraudulently transferred by the judgment debtor but was bound to do so. In *Lovick* v. *Crowder* (24) Lord Tenderden said: "Now, if a party be in possession of the goods apparently the property of the debtor, the Sheriff, who has a *fieri facias* to execute, is bound to inquire whether the party who is in possession is so *bona fide*; and if he find the possession is held under a fraudulent bill of sale, he is bound to treat it as null and void, and levy under the writ" The same rule was laid down by Baron Parke in *Imray* v. *Magnay* (25) in which a fraudulent judgment had been suffered by the debtor: "The judgment is by the Statute (13 Eliz.) made void against creditors, but by implication it is void against a Sheriff, who acts in right of a creditor; as a deed is, which is fraudulent, against creditors: *Turvil* v. *Tipper* (23). And it is now of frequent occurrence, that the Sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors.

(19) (1869) 7 Eq. 347; 20 L. T. 163; 17 W. R. 601.

(20) (1899) 1 Ch. 831; 68 L. J. Ch 390; 80 L. T. 40; 47 W. R. 506.

(21) (1601) Cro. Eliz. 810; Owen 132; 2 And. 173.

(22) (1832) 3 B. & Ad. 362; 1 L. J. K. B. 89; 110 E. R. 137.

(23) (1627) 1 at. 222; 2 Roll Rep 493.

(24) (1828) 8 B & C. 134; 2 M. & Ry. 84; 6 L. J. (o s.) K B 248; 108 E R 992.

(25) (1843) 11 M. & W. 267; 2 Dowl. (N. s.) 531; 12 L J, Ex 188; 7 Jur. 240; 63 R. R. 592; 152 E. R. 803.

and is responsible in an action for a false return at the suit of the creditor ; and the Statute seems to us to put both (the judgment and the conveyance) on the same footing." In *Bennett* v. *Lawrence* (26) doubts were expressed as to how far the Sheriff was bound to take notice that a judgment or conveyance was fraudulent but *Imray* v. *Magnay* (25) was subsequently affirmed in *Christopherson* v. *Burton* (27). It is unnecessary to pursue the question of the Sheriff's liability. What is material is that the decisions of these eminent Judges proceeded on the view that the Sheriff in execution may do what the creditor could do himself, *viz*, avoid the fraudulent conveyance without a suit. As regards *Vyse* v. *Brown* (13) all that was decided was that the defendant, who was the executor under a Will by which the judgment-debtor became entitled to a legacy which he was said to have fraudulently alienated, could not be said to be a debtor to the judgment-debtor in the amount of the legacy so as to entitle a creditor of the judgment-debtor to take garnishee proceedings. In *Glegg* v. *Bromley* (14) it was held that the assignment there in question was not in contravention of the Statute of Elizabeth, and no question as to how such settlements could be avoided appears to have arisen. These decisions appear to have no bearing on the present question.

It is the less necessary to import restrictions into section 53 of the Transfer of Property Act because the Legislature in India has made what it considers sufficient provision for the rights of the other creditors in the provisions of the Code relating to the realization and distribution of assets in execution by allowing judgment creditors who come in before the realization of the assets to share in them.

The actual question referred to us is, whether it is open to an attaching decree holder to plead in defence to a suit by the alienee whose claim has been rejected that the transfer to him was fraudulent under section 53. For the reasons already given, I am of opinion that it is open to the judgment-creditor by virtue of section 53 of the Transfer of Property Act to attach as the property of the judgment-debtor property which has been fraudulently transferred to the claimant with intent to defeat or delay creditors. If he knows of the transfer when he applies for attachment, the application is sufficient evidence of his intention to avoid it ; if he only hears of the transfer when a claim petition is preferred under Order XXI, rule 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid and entitles him to succeed in the subsequent suit under rule 63 which has next to be considered.

When the claim is preferred, it becomes the duty of the executing Court to investigate it unless of opinion that it was designedly or unnecessarily delayed. What is to be investigated at this stage is provided by rules 60 and 61 and is not the creditor's right to attach, but the question whether the judgment-debtor was in possession (as defined in the rule) of the attached property at the date of the attachment. If he was, the attachment is to continue and execution to proceed, subject to the result of the suit which the claimant may institute within one year to establish his right ; and according to the decision of the Full Bench in *Mochi Raju Venkataratnam* v. *Vadrevu Ranganayakamma* (28) the result is the same under the present Code when the claim is rejected on the ground that it was designedly or unnecessarily delayed. On the other hand, if the judgment-debtor is found not to have been in possession as defined in the rule, the attachment is to be raised and execution against the attached property suspended until the judgment-creditor has established his right to attach in a suit under rule 63. If the provisions of rules 60 and 61 be pursued, the question whether the claim should be allowed or disallowed in the first instance will depend on whether the judgment-debtor or the transferee was in possession as defined in rule 60 at the date of the attachment. I am not satisfied that it was intended to lay down a different rule in *Ramu Aiyar* v. *Palaniappa Chetty* (29),

(26) (1850) 15 Q. B. 1004; 20 L. J. Q. B. 25; 14 Jur. 1067; 117 E. R. 798.

(27) (1848) 5 Ex. 160; 18 L. J. Ex. 60; 77 R. R. 572; 154 E. R. 798.

(28) 48 Ind. Cas. 270; 41 M. 985; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335 (F. B.).

(29) 8 Ind. Cas. 117; 35 M. 35; (1910) M. W. N. 589; 8 M. L. T. 381; 21 M. L. J. 756.

but if it was I am unable, with great respect, to follow that decision.

The resulting suit under rule 63 is by the unsuccessful party to the claim petition "to establish the right which he claims to the property in dispute." Whether this suit be instituted by the attaching decree-holder or by the transferee claimant, it must equally be decided in favour of the former, if the transfer is shown to have been fraudulent because, in consequence of the fraudulent character of the transfer and its avoidance by the judgment creditor, the result is that the transferee has not the right which he claims to hold the property free from attachment in execution by the judgment creditor. This view is entirely in accordance with the policy of these provisions of the Code, as explained by the Privy Council in *Sardhari Lal* v. *Ambika Pershad* (30), which is to secure the speedy settlemant of questions of title raised at execution sales. We have, however, been referred to the later decision of the Privy Council in *Phul Kumari* v. *Ghanshyam Misra* (15). All that was decided in that case was that a suit by the unsuccessful party to establish his right under section 283, now Order XXI, rule 63, of the Code of Civil Procedure was, "a suit to alter or set aside the summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court" within the meaning of Article 17 of Schedule II of the Court Fees Act. Their Lordships proceeded on the ground that a suit under section 283, rule 63, was not only the appropriate but the only means of setting aside the order passed on the claim petition and held that this was sufficient to bring the suit within the terms of the Article. They, no doubt, referred in one place to the suit under section 283 to establish the right of the unsuccessful party to the claim petition as an "action of appeal" and to the plaint in such a suit as "a plaint for review of a summary decision," but this language must be read with reference to the question before them. The effect of the judgment in a suit under section 283, now rule 63, as stated by the Privy Council in *Sardhari Lal* v. *Ambika Pershad* (30) and as appears from the provisions of the Code which I have examined, is to settle, as between the attaching decree holder and the claimant the question of title arising in execution, with the result that the order on the claim petition (which in the judgment of *Phul Kumari* v. *Ghanshyam Misra* (15) is referred to as a decree) is either set aside or confirmed. All that their Lordships decided in the later case was that this latter result was enough to bring the suit within the operation of Article 17 of Schedule II of the Court Fees Act.

On the whole, I have come to the conclusion that, on the language of section 53 of the Transfer of Property Act, the question referred to us must be answered in the affirmative, and I am confirmed in this view by the conclusion to which I have come that the law is the same in England with regard to transfers offending against the Statute of Elizabeth.

OLDFIELD, J.—The cases we have to consider are those in which the claimant, having failed to obtain an order under Order XXI, rule 60, Civil Procedure Code, brings the suit authorised by rule 63 "to establish the right which he claims to the property in dispute." We are asked to decide whether the attaching creditor, defendant in such a suit, can plead that the transfer on which the claimant relies offends against section 53, Transfer of Property Act, or whether he must reserve that plea for separate proceedings to be instituted by him for its avoidance.

Of the arguments, by which the latter alternative is supported, that based on the alleged difficulty of combining in the decree in a suit under rule 63 a recognition of the creditor's right with the protection, to which the claimant's interest is entitled, can be dealt with shortly. For, firstly such a decree will not declare generally that the transfer is void, but only, what section 53 permits, that it is not binding as between the creditor and the claimant; and, next, there will be nothing to prevent recognition of such right as the latter may establish by showing that, as regards a portion of the consideration, the transfer to him was valid. The Court can meet either contingency as it would in a suit by

(30) 15 C. 521 at p. 523; 15 I. A. 123 at p. 127; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 931 (P. C.).

the creditor, the one by a direction regarding the disposal of the balance of the sale-proceeds after the creditor's decree has been discharged, and the other by allowing him to proceed against the property only after he has paid any amount to which the claimant is legitimately entitled. I turn to the two more substantial contentions relied on, that the scope of the suit under rule 63 being no greater than that of the investigation under rules 59 and 60, only the possession which would be decisive in the latter, can be considered in the former and that no plea regarding the character of the claimant's transfer as binding on the creditor can be considered, until or unless the latter has negatived that character by obtaining a decree.

The first of these contentions is involved in some confusion, because it is no doubt true that Subordinate Courts in fact are not dealing with claims only with reference to possession and are erroneously considering the character of the title on which the claimant relies; and they are supported in doing so by the head-note to *Ramu Aiyar* v. *Palaniappa Chetty* (29). If that were really the result of that decision, I should with, all deference, doubt its correctness. But, in fact, it decided only that the rejection of a claim by an order, which was based on a finding as to possession and which was not attacked within a year by a suit, was final as against the claimant's right, even as based on his title; and if there are some observations in the judgment arising from the reference in that order to title as well as and in connection with possession, it does not follow from them that the learned Judges meant more than that the adjudication as to the latter became final by implication also as to the former. More certainly would have been inconsistent with the marked distinction between the references to possession in rules, 59, 60 and 61 in connection with the preliminary order under the two last mentioned, and the reference in rule 63 to the establishment in the subsequent suit of the right claimed by the plaintiff But as the investigation is restricted to the question of possession, that distinction is sufficient to negative the applicability of a similar restriction to the last stage of the proceedings; nor can any support for such application be found, as Mr. Krishnasami Ayyar contends, in the reference by the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* (15) to the suit under rule 63 (or the provision previously corresponding therewith) as simply "a form of appeal related to a prior decree," which constituted the cause of action. For their Lordships were not dealing in that case with any question of the substantive rights of the parties or the contentions open to either of them, but only with a question of Court-fees, in connection with which the character of the relief asked for by the plaintiff would be decisive.

This failing, there remains the more substantial contention that the defendant-creditor cannot rely on any exercise of his option under section 53, Transfer of Property Act, in defence or unless he has brought and succeeded in a suit. On this point, I respectfully accept the statement of the English law in the judgment just delivered and turn to the Indian authorities. There is no doubt that, generally, the exercise of the option to avoid a contract can be pleaded by the person entitled to exercise it in defence as, for instance, in cases under sections 19 and 20, Indian Contract Act. *Vide Orr* v. *Sundra Pandia* (31), *Lakshmi Dass* v. *Roop Laul* (10), *Raja Rajeswara Dorai* v. *Arunachellam Chettiar* (32) and *Rangnath Sakharam* v. *Govind Narasiva* (33), and it has not been shown to be material that the person concerned under section 53, Transfer of Property Act, is not the executant of the contract, or that his plea involves his right to avoid it, not absolutely, but only as between him and the party to it, who has claimed. There is, therefore, nothing contrary to principle in the authorities relied on by Spencer, J., in the order of reference; and *Rajani Kumar Dass* v. *Gaur Kishore Shaha* (34) may also be mentioned in connection with another argument already referred to as an instance of a case in which partial effect was allowed to the plaintiff's transfer. Most of these decisions were no doubt given, not in connection with the claim procedure, but in ordinary suits brought on a transfer without

(31) 17 M. 255; 6 Ind. Dec. (N. S.) 176.
(32) 19 Ind. Cas. 596; 38 M. 321; (1913) M. W. N. 453; 13 M. L. T. 469; 24 M. L. J. 592.
(33) 28 B. 639; 6 Bom. L. R. 592.
(34) 35 C. 1051; 7 C. L. J. 586; 12 C. W. N. 761.

a previous order rejecting a claim by the plaintiff. But that cannot affect their weight in the present discussion, in view of the very comprehensive scope of the special remedy allowed in rule 63 and the description of its purpose by the Judicial Committee in *Sardhari Lal* v. *Ambika Pershad* (30) as the speedy settlement of questions of title arising at execution sales. It is, as these decisions show, essential only that the attaching creditor, pleading section 53, Transfer of Property Act, in defence, shall have exercised his option in some unequivocal way; and that he will have done, if not in all cases by his attachment, at least when he afterwards opposes the transferee's claim with full knowledge of it in the proceedings under rule 59. In these circumstances, I agree with the answer proposed by the learned Chief Justice.

SADASIVA AIYAR, J.—Whenever English decisions are quoted before us, I, no doubt, receive much instruction and guidance when the decisions deal with questions of general jurisprudence, with the common law rights of the Crown and the subjects, and with the application of universal maxims of justice, equity and good conscience to a given state of facts. But when such English decisions are quoted as deal mainly with forms of action, with the practice as to the impleading of particular parties in particular actions, with procedure in execution, with the distinctions between actions at common law and at equity, I have always felt myself going beyond my depths, even when acute and able lawyers like Mr. A. Krishnaswami Aiyar handle such case with confidence, and I am free to confess that I am often inclined to exhibit signs of impatience when I so feel myself unable to appreciate the relevancy of arguments based on such cases.

In the present case, I am glad that I need feel no anxiety that my imperfect knowledge of English procedure and precedents might have led me into serious error, as my Lord the Chief Justice has fully dealt with the English decisions quoted before us and has shown that they lend little or no support to the respondent's contention.

On the question of the interpretation to be placed on the language of the provisions contained in Order XXI, rules 58, 59, 60 and 63, the matter has been dealt with fully by Krishnan, J., in *Kottarathil Puthiyapurayil* v. *Balathil Parkum Chandrankandi Kunhamad* (4) by Spencer, J., in his referring order and by my Lord in the judgment now pronounced by him; and I have nothing to add except to say that, with the greatest respect, I dissent from the observations found in *Ramu Aiyar* v. *Palaniappa Chetty* (29) as regards the scope of Order XXI, rules 59 and 60. That when inquiring in summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of (what I may call) "emergent" disputes, the Court may be prohibited from going into complicated questions of title or investigating complicated questions like fraud, trust and so on, while giving the party defeated in the summary inquiry the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit, is not at all a strange or uncommon provision of the Statute law. (See section 9 of the Specific Relief Act, the possession chapter of the Criminal Procedure Code, and the analogous provisions in the Succession Certificate Act, the Estates Land Act, etc.)

I am, therefore, clear that the Court is bound to order the release of an attached property if it finds possession in the claimant *on his own account*, even if there is title and disposing power remaining in the judgment-debtor. Such a release is, however, not an adjudication that the decree-holder had not got the right under section 60, Civil Procedure Code, to attach or that he could not successfully nullify the release orders in a suit brought under Order XXI, rule 63. Under section 60, of the Civil Procedure Code, the property liable to attachment need not be in the possession of the judgment debtor, because all saleable property, moveable or immoveable, *belonging* to the judgment debtor or over which or the profits of which he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by any other person in trust for him or in his behalf, can be attached. Order XXI, rules 59 and 60, however, seem to make it clear that even if a trespasser is in actual possession of such property (the evidence to prove and the character of such actual possession varying, of course, with the nature of the property attached), the Court is bound to release the property to the extent

of such possession subject to the right to attach being established in a suit under Order XXI, rule 63. In such a suit, the plaintiff decree holder, might, of course, prove that the claimant was really not in possession notwithstanding that the Court which inquired into the claim petition held the contrary (and, therefore, the summary order releasing the attachment was wrong) but he can also prove that the judgment-debtor, notwithstanding the trespass by the claimant, had not lost his rights and that the property could, therefore, be attached under section 60.

Mr. Krishnasawami Aiyar, as I understood him, did not dispute the proposition that a third person against whom a transaction is voidable can avoid it by an unequivocal declaration, or by unequivocal conduct disclosing that he knew of the transaction and had treated it as avoided by him [see *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (35)]. If, when a person is bound to avoid it by bringing a suit in a Court to set it (transaction) aside (owing to a statutory law expressly or impliedly prescribing such a course as the only means of avoiding it or by his having been himself a party to the transaction sought to be avoided), and he does not do so within the time allowed by law for such a suit, he could after the expiry of such a period, plead the voidability by way of defence, is a moot question on which I prefer to reserve my opinion, notwithstanding the decision in *Lakshmi Dass* v. *Roop Laul* (10). But no such question arises in this case.

A rather far-fetched argument was based on the decision of the Privy Council in *Phul Kumari* v. *Ghanshyam Misra* (15) that, for purposes of the Court-fees, a suit under Order XXI, rule 63, should be held to be a suit to set aside the order on the claim petition, as it is of the nature of an appeal in the form of a suit. That argument has been adequately dealt with (if I may be respectfully permitted to do so) by my Lord and I need say no more on that point.

Two other arguments which Mr. Krishnasami Iyer put forward with his usual resourcefulness might be shortly noticed. On the language of Order XXI, rule 54, which says that the attachment of immovables in execution should be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, etc., he argued that the Legislature impliedly intended that no valid attachment could be made of property which had been fraudulently (but not nominally) transferred as the prohibition by the attachment order addressed to the judgment-debtor alone who had no power to make a further transfer would be futile in such a state of facts and the form of the order prescribed for such a case would have been a probibition to the fraudulent transferee from making any further transfer by himself. This ingenious argument is based on the assumption that the Legislature, whilst enacting a general provision as to the form in which an order of attachment should be issued for the purpose of securing due publicity, intended that the general form should take into account and contain appropriate words to cover all possible contingencies and all possible complications of facts which may arise, such as the case of the creditor being entitled to avoid the transfer (by the judgment-debtor) to a fraudulent transferee under section 53 of the Transfer of Property Act and the consequent result that, so far as the creditor's remedies are concerned against the transferred property, the transfer is void though the judgment-debtor would himself be unable to transfer it again whether an attachment order is or is not issued prohibiting him from doing so.

A general and single form of order for proclamation to the public was provided which would be applicable to the facts of most cases and the Legislature enacted that when an order is passed in such a form it shall constitute a valid attachment of the property in execution in all cases and under all circumstances after the order is proclaimed in the prescribed manner.

The other argument was that the Civil Procedure Code contained no special provisions which would place a fraudulent transferee (whose transfer was avoided by a decree-holder acting under section 53 of the Transfer of Property Act) in the position of the judgment-debtor himself, so that notices of attachment, notices for settlement of sale proclamations, etc., may be issued to the

(35) 34 C. 329 (P. C.); 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 67.

fraudulent transferee instead of to the judgment debtor, or in addition to the judgment-debtor, and so that the balance of of sale proceeds remain after the sale of the attached property might be paid to the fraudulent transferee instead of to the judgment debtor and so that he might get the benefit of sections 310 and 310A of the Civil Procedure Code as to setting aside sales by payment within 30 days and so on. There is also no provision made for the fraudulent transferee when another decree-holder applies for rateable distribution under section 73 to intervene and prove to the Court that that particular creditor was estopped by his conduct from treating the transfer as voidable by him also and as entitling him to rateable distribution. I am wholly unable to appreciate the argument that the failure of the Legislature to carefully look after the interests of the fraudulent transferee is a reason for holding that the decree-holder sought to be defrauded by him cannot avoid fraudulent transfer except by a suit in which he is the plaintiff or cannot bring a suit except in a repre sentative capacity, or except in such a manner as to enable the Court to convert it into a creditor's administration suit, or cannot set up in defence to a suit by a fraudulent transferee that the decree-holder had avoided the fraudulent transfer by an unequivocal act or declaration ; though the plain words of the Statute law and the principle of general jurisprudence give him such rights. I must admit that I was not at all moved by the tale of the alleged hardships and inconveniences (which would result according to Mr. Krishnaswamy Aiyar) to the fraudulent transferee by the absence of such express provision in the Civil Procedure Code. On the other hand, my sympathies are with the honest creditors and decree-holders who are the favourites of the law.

It must be admitted that it was unquestionably assumed in this High Court and in all the *Mofussil* Courts before the decision in *Palaniandi Chetti* v. *Appavu Chettiar* (2) (as pointed out in that decision itself) that the decree holder, when he is the defendant in a suit brought under Order XXI, rule 63 could in defence plead that he had avoided the fraudulent transfer either under section 53 of the Transfer of the Property Act or under general principles of jurisprudence embodied in the Statute of Elizabeth and that hence plaintiff's suit should be dismissed. Much inconvenience and hardship would result to the decree-holder if the law allowed a fraudulent transferee plaintiff to successfully raise a purely technical demurrer to such a plea of the decree-holder defendant.

The cases in which the judgment-debtor's transferee who failed in his claim petition and came in as the plaintiff in a suit under Order XXI, rule 63, may be classified as follows :

(*a*) Where the transferee is a mere nominal transferee :

(*b*) Where he is a fraudulent transferee in possession :

(*c*) Where he is a fraudulent transferee not in possession.

A creditor decree-holder who is in most cases a stranger cannot reasonably be expected to know of his own knowledge whether a transfer by his judgment-debtor is only fraudulent or is wholly nominal or partly nominal and partly fraudulent and whether the transferee is in possession, and, if in possession, whether he is so for himself or for the judgment debtor. He would, therefore, usually both in the claim petition and in the suit which afterwards arises out of the order against the claimant be obliged to raise and be justified in raising alternatively all the pleas open to him, and the Court which decided the claim against the claimant might, in its conclusion on each of the three points, be either right or wrong. In the suit also, the Court of first instance may decide in favour of the plaintiff transferee or against him and may decide these three points rightly or wrongly (the right decision being, of course, assumed to be that he was merely a fraudulent transferee and not a more nominal transferee) and there might be appeals and second appeals before the questions are finally decided rightly. That the decree-holder who *bona fide* pleads that the transfer is a nominal one in the alternative and who cannot be sure whether and when the defeated claimant would bring his suit and whether there would be appeals and second appeals if the transferee fails in the first stages of the suit, that he should finally, after a great delay, be obliged to set aside the transfer by obtaining a formal decree of Court in a suit of his own

before he could proceed with his execution by attachment and sale of the fraudulently conveyed property would, in my opinion, be a much more serious hardship on the decree holder for no fault of his than the minor hardships and inconveniences to the fradulent transferee mentioned by the respondent's learned Vakil. As shown in one of the later decisions, he would be in a much worse position for his success in the summary claim proceedings than if he had lost in those proceedings.

Finally, I agree both with the answer proposed by my Lord to the question referred to the Full Bench, and with the propositions of law laid down in support of that answer in his judgment.

SPENCER, J.—As the judgments of my Lord and of the two other learned Judges which have just been delivered are in favour of the view that I took in my Order of Reference, I have nothing to add beyond expressing my concurrence with them.

SESHAGIRI AIYAR, J.—Ever since the decision in *Palaniandi Chetti* v. *Appavu Chettiar* (2) was pronounced, there has been a growing feeling in the profession that it should be re-considered. Almost every one of my learned colleagues felt great disinclination to accept it as good law. It certainly has upset the practice which has hitherto obtained in such matter. I myself said in the decision that my conclusion was reluctantly come to. In the last paragraph of that judgment, I referred to the judgment of the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* (15), as compelling me to take the view I did. In these circumstances, I am not unwilling to re-consider my decision.

I still hold that the judgment of the Judicial Committee, if it is regarded as a considered pronouncement, fully justifies my view. Their Lordships say distinctly that a wrong idea about the nature of the suit under Order XXI, rule 63, is prevalent and that that idea is responsible for the view taken regarding the amount of Court-fee in such suit. They then point out what, in their view, is the true scope of suits of this description. The majority of the Full Bench have come to the conclusion that this decision should be confined to matters relating to Court-fees and should not be further extended. I have felt doubts whether it is permissible for us to read a judgmen of the Judicial Committee in the way suggested. But there have been precedents in this Court, wherein the *dicta* of the Judicial Committee have been restricted to the real matter in controversy in litigation. There is also the classic pronouncement of Lord Halsbury that a judgment of the highest Tribunal is only authority for the point actually decided and that the decision should not be divorced from the facts on which it was based. For all these reasons, I do not feel it necessary to adhere to the view which I took in *Palaniandi Chetti* v. *Appavu Chettiar* (2). Upon one matter I feel little doubt after hearing the full argument addressed to us now, and that is that the scope of Order XXI, rules 58 to 63, should be restricted to an enquiry into the question of possession and should not be relied on for investigating titles to property. I feel considerable doubt, however, upon the interpretation to be placed on the language of rule 63. Even supposing that we do not accept the letter of the ruling of the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* (15), it seems to me that a suit instituted by a party against whom an adverse order has been passed in a claim proceeding should be confined to litigating the title as between himself and the successful claimant. I am not, as at present advised, prepared to hold that the limitation placed upon the summary enquiry should be wholly ignored in dealing with the suit following the enquiry. The view that the result of the summary enquiry only furnishes an opportunity for ventilating every possible right in respect of the claims of parties to the enquiry seems to go further than is warranted by the language of the rules.

Even taking this view, the question still remains whether the language of section 53 of the Transfer of Property Act should be read as contemplating suits by the person who alleges that the alienation is in fraud of his rights.

Mr. Krishnasami Ayyar did not dispute the proposition that a party who is entitled to come to Court as a plaintiff to impeach a voidable transaction is ordinarily entitled to put it forward as a defence when he is attacked. The observations in *Oakes* v. *Turquand* (17) that an open and unequivocal declaration of intention to avoid will have

as good an effect as an attack by way of suit is as applicable to India as to England. In that view, is there any reason for construing the words 'that every transfer of immoveable property * * * * * is voidable at the option of any person so defrauded, defeated or delayed', as compelling the defrauded to institute a suit? I see no sufficient reason for insisting on this view. As I said before, the only real difficulty is in interpreting the decision of the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* (15). If the result of the suit under Order XXI, rule 63, is to place the parties in *status quo ante* by removing the fetters placed on execution during the claim proceedings, then it stands to reason to hold that as on the date of the removal of the impediment, the transaction between the vendor and the vendee was valid *inter se*; there was no interest of the judgment-debtor available for attachment on that date and none came into existence by virtue of the decision in the suit, but if the other view that the suit under rule 63, although based upon the result of the claim proceedings, is an independent action which is not restricted in any way by the previous enquiry is to prevail, the decisions in *Palaniandi Chetti* v. *Appavu Chettiar* (2) and *Subramania Ayyar* v. *Muthia Chettiar* (1) cannot be supported.

This is my answer to the reference.

M. C. P.

Reference answered.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS CASE NO. 11 OF 1920.

April 26, 1920.

Present :—Mr. Heald, A. J. C.

THE BURMA OIL CO., LTD.—APPLICANTS

versus

BAIJNATH SINGH AND ANOTHER—RESPONDENTS.

Interpretation of Statutes—Act depriving subject of right of recourse to ordinary Courts—Words occurring in same context in different places—Upper Burma Land and Revenue Regulation (III of 1889), ss. 24 (2), 53 (2) (ii)—"Claims" in s. 53 (2) ii), meaning of—Disputes between private individuals, whether within section.

The language of Acts which deprive the subject of the right of recourse to the ordinary Civil Courts must not be extended beyond its least onerous meaning unless clear words are used to justify such extension [p. 960, col. 2; p. 96 , col. 1.]

When the same word is used in the same context in two sections of the same enactment, it is reasonable to suppose that it is used in the same sense in both [p. 96 , col. .]

The word "claims" in section 53 (2) (*ii*) of the Upper Burma Land and Revenue Regulation means, claims as against the State and does not include disputes between private individuals. The claims referred to in this section are neither more nor less than the claims mentioned in section 24 (2) of the Regulation [p. 962, col. .]

Section 53 (2) (*ii*) of the Upper Burma Land and Revenue Regulation, therefore, does not bar the jurisdiction of the ordinary Civil Courts over disputes between private persons regarding the ownership or possession of State land or any lien upon or other interest in such land or the rents, profits, or produce thereof. [p. 962, col. 2.]

Messrs. *Lentaigne* and *Swinhoe*, for the Applicants.

Mr. *Higginbotham*, for the Respondent.

JUDGMENT.—Petitioners' learned Advocate says that on this application he desires to raise two questions only,—

(1) whether the word "claims" in section 53 (2) (*ii*) of the Upper Burma Land and Revenue Regulation (III of 1889) can be read as including disputes between private individuals or must (as he contends) be interpreted as excluding such disputes and as meaning only 'claims as against the state,' and

(2) whether the enactment of section 53 (2) (*ii*) of the Regulation was *ultra vires* of the Legislature.

He admits that if the first of these two questions be decided in his favour the second will not arise in this case because the present litigation involves only a dispute between private persons, and such a dispute will not be excluded from the cognizance of the ordinary Civil Courts unless the word "claims" in section 53 (2) (*ii*) is to be interpreted as including such disputes.

It is a well recognised principle of judicial interpretation that the language of Acts which deprive the subject of the right of recourse to the ordinary Civil Courts must not be extended beyond its least onerous

meaning unless clear words are used to justify such extension, and this principle must be borne in mind in deciding what meaning must be attached to the word "claims" in the section under consideration since that section expressly limits the right of recourse to the ordinary Civil Courts.

The relevant parts of the section are as follows:—"Except as otherwise provided by this Regulation—

'(1) A Civil Court shall not have jurisdiction in any matter which * * * * a Revenue Officer is empowered by or under this Regulation to dispose of * * * * and in particular

"(2) A Civil Court shall not exercise jurisdiction over any of the following matters, which shall be cognisable exclusively by Revenue Officers, namely,—

* * * * * *

"(*ii*) any claims to the ownership or possession of any State land or to hold such land free of land revenue or at a favourable rate of land revenue or to establish any lien upon, or other interest in, such land, or the rents, profits, or produce thereof."

That section was adapted from section 158 (2) of the Punjab Land Revenue Act (1887) and somewhat similar provisions occur in section 56 of the Lower Burma Land and Revenue Act (1876) and in section 41 of the Lower Burma Town and Village Lands Act, 1898.

Both the Lower Burma Land and Revenue Act, and the Upper Burma Regulation have been differently interpreted by the Courts at different times, but a Full Bench of the Chief Court of Lower Burma has recently decided [*Maung Nau* v. *Ma Shwe Hmat* (1)] that the word "claims" as used in section 56 of the Lower Burma Act means, claims against Government and not disputes between private persons.

It does not, of course, follow that because "claims" is so interpreted in the Lower Burma Act it must be similarly interpreted in the Regulation, since the wording of the two enactments is different, and some of the arguments on which the interpretation in the Lower Burma case was based do not apply to the Upper Burma Regulation. It is necessary, therefore, to consider the matter independently.

In the earliest reported cases in this Court in which the question was raised [*Maung Tha Zin* v. *Ma In* (2), *Maung Aung Byi* v. *Maung Yan Byo* (3)], it was held, on general grounds, that the Civil Courts have jurisdiction to decide disputes between private individuals relating to State lands, but the particular wording of section 53 (2) (*ii*) was not considered.

In several cases in 1897-98 [*Maung Tha Aung* v. *Maung San Ke* (4), *Maung Nut* v. *Ma Mi* (5), *Maung Ke* v. *Maung Po Ni* (6)] it was held that where one private person claimed possession of, or an interest in, State land as against another, section 53 (2) (*ii*) barred the jurisdiction of the Civil Courts.

It was probably on the strength of those rulings that the Financial Commissioner amended his Notification No. 384 of 1914 (Page 83, Upper Burma Land and Revenue Manual, 1911,) so as to include "claims between private individuals" as well as "claims against the State."

The same interpretation of section 53 (2) (*ii*) of the Regulation was adopted by this Court in all the reported cases [*Ma Lok* v. *Maung San Ya Tha* (7), *Maung Nyun* v. *Maung Kywe* (8), *Mi Ma Gyi* v. *Ngu Shwe Zin* (9), *Mi Min Dwe* v. *Ma Mu Kin Kyimyin* (10)], up to 1916, but in that year the learned Judicial Commissioner came to the conclusion [*Sonilal Sheoshankar* v. *Delawar* (11)], that that section does not bar the jurisdiction of Civil Courts except as regards claims made under section 24 (2) of the Regulation. He based that conclusion on a consideration of the wording of section 53 itself, but he also suggested that it was probable that the claims referred to in section 24 were claims against the State and not disputes between private individuals. It seems to me that that suggestion gives the clue to the

(1) 30 Ind. Cas. 772; 8 L. B. R. 227; 8 Bur. L. T. 191.

(2) U. B. R. (1892-1896) II, 327.
(3) U. B. R. (1892-1896) II, 634.
(4) U. B. R. (1897-1901) II, 207.
(5) U. B. R. (1897-1901) II, 209.
(6) U. B. R. (1897-1901) II, 211.
(7) U. B. R. (1897-1901) II, 443.
(8) U. B. R. (1902-1903) II, Civ. Pro. 1.
(9) U. B. R. (1904-1906) II, Land and Revenue Regulation 1.
(10) U. B. R. (1904-1906) II, Land and Revenue Regulation 5.
(11) 39 Ind. Cas. 367; 2 U. B. R. (1916) 151; 11 Bur. L. T. 42.

solution of the whole difficulty. It is obvious that section 53 (2) (*ii*) relates back to section 24 (2). Section 24 gives Revenue Officers power to dispose of certain "claims", and section 53 (2), in summarising the matters which Revenue Officers are empowered by or under the Regulation to dispose of, naturally includes the claims mentioned in section 24. The words used in describing the claims in the two sections are identical except that section 24 described the lands to which the claims referred as land "declared" and "deemed to be" State, while section 53 (2) (*ii*) called the land merely "State land." The wording of section 53 (2) (*ii*) was undoubtedly taken direct from section 24 (2) and when the same word was used in the same context in two sections of the same enactment, it seems reasonable to suppose that it was used in the same sense in both. But the word "claims" as used in section 24 must clearly be restricted to "claims as against the State" since the claims mentioned in that section are claims contesting declarations by the State that the land is State land, and the period of limitation provided by that section would be entirely inappropriate to disputes between private individuals. I have no doubt, therefore, that the word "claims" in section 53 (2) (*ii*) also means "claims as against the State" and does not include disputes between private individuals and that the "claims" referred to in section 53 (2) (*ii*) are neither more nor less than the claims mentioned in section 24 (2). The wider interpretation which has been put on section 53 (2) (*ii*) has, I think, been due partly to reading that section alone, without considering its relation to section 24 (2), and partly to the interpolation of the words "which shall be cognisable exclusively by Revenue Officers" in section 53 (2). Those words, which do not occur in the corresponding section of the Punjab Act, do not, in my opinion, add anything to the meaning of the section and if the Regulation had been carefully drafted would have been unnecessary. They were, I think, obviously added by a diffident draughtsman *ex abundanti cautela* to guard against possible omissions to state expressly elsewhere in the Regulation or Rules that Revenue Officers were empowered to dispose of each and every one of the matters mentioned in the section as particular instances of matters which Revenue Officers were empowered by or under the Regulation to dispose of.

It would appear, therefore, from a consideration of sections 24 and 53 (2) (*ii*) together that the word "claims" in those sections must be interpreted as meaning only "claims as against the State," and not as including disputes between private persons, and this conclusion is corroborated by the fact that in section 30 of the Regulation where the contest is between private persons the word used is not "claim" but "dispute," that in the Lower Burma Land and Revenue Act the same distinction between "claims" and "disputes" is made in a similar context, and that in the Lower Burma Town and Village Lands Act it is expressly stated that the "claims" excluded from the jurisdiction of the Civil Courts are "claims as against the Government."

Although, therefore, at first sight, it might appear that the word "claims" in sections 53 (2) (*ii*) of the Regulation was wide enough to include claims arising between private individuals as well as claims against the State, nevertheless I am constrained to hold that it cannot bear that meaning and that it must be restricted to claims against the State.

I hold, accordingly, that section 53 (2) (*ii*) does not bar the jurisdiction of the ordinary Civil Courts over disputes between private persons regarding the ownership or possession of State land or any lien upon or other interest in such land or the rents, profits, or produce thereof.

On this finding the question whether the enactment of section 53 (2) (*ii*) of the Regulation was *ultra vires* of the Legislature does not arise so far as the present litigation is concerned, but I may perhaps note, with reference to the arguments on the subject in this Court, that what their Lordships of the Privy Council said in the *Secretary of State* v. *Moment* (12), which is always cited in this connection, was that the effect of section 56 of the Government of India Act of 1858 "was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any

(12) 18 Ind. Cas. 22; 7 L. B. R. 10; 13 M. L. T. 53; 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 24 M. L. J. 459; 40 I. A. 48; 40 C. 391 (P. C.).

case in which he could have similarly sued the East India Company," and that, although their Lordships seem to have gone beyond the previous decisions in holding that a subject could sue the Secretary of State for damage done by Government not as a private Corporation succeeding to the rights and liabilities of the East India Company but as representing the Crown, they have not decided that it is beyond the powers of the Government of India or the Local Government to bar the jurisdiction of the Civil Courts provided that provision is made, as it is made in the Upper Burma Land and Revenue Regulation, for recourse to Revenue Courts or Officers as a substitute for recourse to the ordinary Civil Courts.

Order accordingly.

CALCUTTA HIGH COURT.
APPEALS FROM APPELLATE DECREES
NOS. 296 AND 297 OF 1918.
June 15, 1920.
Present:—Mr. Justice Teunon and
Mr. Justice Newbould.
IN No. 296 OF 1918
MATIWOR RASUK (RASUL IN *Vokalutnana*) ALIKAR RASUL AND OTHERS —APPELLANTS
versus
DHANU MOLLA, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES, HOSENUDDI AND OTHERS— RESPONDENTS.
IN No. 297 OF 1918
MATIWOR RASUL AND OTHERS— APPELLANTS
versus
BANGO BEPARI AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES SUNDER ALI AND OTHERS— RESPONDENTS.

Judgment, contents of—Evidence, oral, omission to make special reference to, whether vitiates judgment— Butwara *map and* chitta, *admissibility of—Evidence Act (I of 1872), s. 35—Bengal Estates Partition Act (VIII of 1876), s. 54.*

The omission in a judgment to make any special reference to the oral evidence adduced by the parties to a case is not in itself sufficient to show that, as a matter of fact, the Court did not consider the evidence of the witnesses who were examined in the case. [p. 964, col. 2.]

The *batwara* maps and *chittas* prepared under section 54 of the Bengal Estates Partition Act, VIII of 1876, are admissible in evidence independently of section 35 of the Evidence Act where some evidence introducing the maps and *chittas* is given; and if thereafter they are admitted without objection from either of the parties to a case, it is not open to the parties, in second appeal, to say that they have not been sufficiently proved. [p. 964, col. 2.]

Appeals against the decrees of the Officiating Subordinate Judge, Mymensingh, dated the 4th of July 1917, modifying that of the Munsif, Second Court at Bajitpur, dated the 8th of August 1916.

FACTS appear from the judgment.

Babus *Dwarka Nath Chackerbutty* (with him Mr. *A. K. Fazlul Haque*, Babu *Atindranath Mooherjee*, M. *Choudhuri Muhammad Isa*), for the Appellants.—These two appeals arise out of two suits for recovery of *khas* possession and declaration of title. The subject-matter of these two suits consist of four plots of land. The lower Appellate Court has found that the suit was barred by limitation in so far as plots Nos. 1 and 4 are concerned; and it has further found that there has been adverse possession from the year 1306 so far as other plots are concerned. The lower Court coming to this finding has relied upon the Collectorate partition maps and *chittas*.

My first submission would be that the Collectorate partition maps and *chittas* are inadmissible in evidence under section 35, Indian Evidence Act.

Refers to *Perma Roy* v. *Kishen Roy* (1), *Nanda Lal Pathak* v. *Chanurpat Das* (2).

The learned Subordinate Judge has not taken into consideration the oral evidence adduced by the parties. I submit there has not been adverse possession at all.

Babu *Jogesh Chandra Rai* (with him Babus *Ramani Mohon Chetterjee* and *Gopal Chandra Das*), for the Respondents.—I submit that the objection raised here is not tenable in law.

In neither of the Courts below the objection was raised against the *chittas*. It is being raised here for the first time. No ground has been taken in the grounds of appeal on this point. Moreover, these *chittas* are all old documents according to

(1) 25 C. 90; 13 Ind. Dec. (N. S.) 61.
(2) 18 Ind. Cas. 143; 17 C. L. J. 462; 17 C. W. N. 779.

section 90, Evidence Act, as they were prepared in 1879.

Refers to *Bhola Roy* v. *Jung Bahadur Singh* (3), *Dinenath Chanda* v. *Nawabali* (4), *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (5).

Mr. *Haque* replied.

JUDGMENT.—These two appeals arise out of two suits brought by the plaintiffs for recovery of *khas* possession of certain parcels of land on declaration of their title thereto. The two suits bore Nos. 2284 and 2490 of 1913. In each suit the subject-matter consisted of four plots or parcels of land. Both the Courts below have found that in Suit No. 2490 plots Nos. 2 to 4 and part of plot No. 1 and in Suit No. 2284 plots Nos. 2 and 4 and parts of plots Nos. 1 and 3 appertain to plaintiff's state Dighirpar. That is a finding of fact which has not been challenged before us.

The next question that arose in the suits was the question of limitation. In the Court of first instance it was held that, in respect of the plots over which the plaintiffs' title had been established, there was no bar of limitation, the finding of the Court of first instance being that the adverse possession of the defendants had begun in the 1309. In the Court of first appeal the learned Subordinate Judge has found that the plaintiffs' suit was barred by limitation except as regards part of plot No. 1 in Suit No. 2490 and plot No. 4 in Suit No. 2284. As regards the other plots the Subordinate Judge has found that the defendants have been in adverse possession from the year 1306. In coming to his finding on this question of adverse possession the learned Subordinate Judge relied on the *batwara* map and *chittas* prepared under section 54 of the Estates Partition, Act VIII of 1876, when the estate of the defendants was under partition by the Revenue Authorities, first in 1879 and again in 1893. He also relied upon the collection papers of the Zemindar defendants which show that the tenant defendants were tenants under Hem Chandra Chowdury, the owner of the estate, contiguous to Digbirpar—from at least 1298. He has also relied upon two Kabuliyats, Exhibits F and G, and a conveyance, Exhibit H.

The contentions before us are, *first*, that the Collectorate partition maps and *chittas* are not admissible in evidence and, *secondly*, that the learned Subordinate Judge has failed to take into consideration the oral evidence adduced by the parties.

With regard to the oral evidence it seems the case that no special reference has been made to it, but the omission to make such special reference is not in itself sufficient to show that, as a matter of fact, the Subordinate Judge did not consider the evidence of the witnesses who were examined in the cases. We have no reason to suppose that he did not consider that evidence.

With regard to the Collectorate partition *chittas*, we have been referred to the cases reported as *Perma Roy* v. *Krishen Roy* (1) and *Nanda Lal Pathak* v. *Chanurpat Das* (2). In those cases it has been held that such measurement papers are not admissible in evidence under the provisions of section 35 of the Evidence Act. But in the present cases some evidence introducing the maps and *chittas* was given, so that the present cases are rather analogous to the cases reported in *Bhola Roy* v. *Jung Bahadur Singh* (3) and *Dinanath Chanda* v. *Nawabali* (4). As a matter of fact, of the *chittas* and the measurements introductory evidence, as we have said, was given, and thereafter they were admitted without objection on either side. It is not open to the defendants now to say that they have not been sufficiently proved. If they had taken the objection at the time, then it would have been open to the plaintiffs to give such further evidence as might be required. In fact, the judgments of both the Courts below indicate that the defendants as well as the plaintiffs both relied upon these measurement papers and maps and no objection as to their admissibility is to be found in the grounds of appeal preferred to this Court. We think, therefore, that in relying upon the statements found in those *batwara* papers indicating that certain plots were cultivated and certain other plots were lying waste the learned Subordinate Judge was within his rights.

For these reasons, we dismiss the appeals with costs, the hearing fee being divided half

(3) 22 Ind Cas. 728; 19 C. L. J. 5 at p. 7.
(4) 49 Ind. Cas. 984.
(5) 29 C. 187 (P. C.); 29 I. A. 24; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224.

and half between the two sets of respondents who have appeared.

The cross-objections are not pressed and are accordingly dismissed, but without costs.

Appeals dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 968 OF 1920.

December 2, 1920.

Present:—Mr. Justice Wilberforce.

KANHAYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

NUR MUHAMMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 12—Appeal, limitation for filing—Time spent in obtaining translation of judgment, whether can be excluded—Delay caused by applying for translation, whether sufficient cause for extension of limitation.

The time spent in obtaining a copy of the translation of the judgment appealed against cannot be excluded in computing the period of limitation for an appeal under section 12 of the Limitation Act.

The delay caused in filing an appeal by applying for a translation of the judgment appealed against due to ignorance or to carelessness cannot be excused under section 5 of the Limitation Act, as an appellant guilty of such delay cannot be said to have acted *bona fide*, *i. e.*, with due care and attention.

Second appeal from the decree of the District Judge, Karnal, dated the 28th January 1920, affirming that of the Subordinate Judge, Second Class, Rohtak, dated the 31st October 1919.

Dr. *Nand Lal*, for the Appellants.

Mr. *Nanak Chand* for Mr. *Gullu Ram*, for the Respondents.

JUDGMENT.- The appeal in this case to the lower Appellate Court was time-barred and even at the date of the judgment of the lower Appellate Court no copy of the original judgment had been put in. The only excuse of the appellant was that he had applied by mistake for a translation of the judgment and that the delay was due to the preparation of this translation. The lower Appellate Court rightly held that the time occupied in preparing the translation could not be deducted under section 12 of the Limitation Act. The appeal was, therefore, dismissed.

Against this decision a second appeal has been preferred and it is firstly urged that the lower Appellate Court did not consider the exercise of the discretion which it possessed under section 5 of the Limitation Act. It is true that there is no specific mention of section 5 or of any suggestion that a concession should be made thereunder to the appellant. The omission, however, of such mention does not of itself raise a presumption that the provisions of the section were not considered. The appellant was represented by Counsel and it is most probable that this Counsel asked for indulgence under section 5. If the lower Appellate Court considered the point, there is admittedly no ground for a second appeal. Counsel urges that the case should be remanded for a consideration of this matter, but even if it were granted that the question was not considered, I do not think that a remand is necessary as, the matter being a legal one, it can be disposed of by this Court.

The only question on the merits is, whether the delay caused by applying for a translation of the judgment due possibly to ignorance or possibly to carelessness, is a sufficient cause within the meaning of section 5. In my opinion, an appellant guilty of such delay cannot be said to have acted *bona fide*, *i. e.*, with due care and attention.

I, therefore, dismiss the appeal with costs.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL CASE No. 231 OF 1919.

January 9, 1920.

Present:—Mr. Heald, A. J. C.

DULABDASS AND ANOTHER—APPELLANTS

versus

MA WIN—RESPONDENT.

Contract Act (IX of 1872, ss 104, Excep. 1, 230 231—Sale of goods by person in possession—Purchase in good faith—Title, whether passes—Principal and

DULABDASS v. MA WIN.

agent—Agent acting for undisclosed principal—Suit against both agent and principal, whether maintainable.

A person contracting with an agent for an undisclosed principal is at liberty to sue either the agent or the principal or both under the contract. [p. 967, col. 1.]

Exception 1 to section 108 of the Contract Act applies practically to any sale of any moveable property by any person in any kind of possession, so long as that possession is by consent of the owner and the transferee acts in good faith. [p. 970, col. 1.]

Plaintiff purchased in good faith a diamond ring from defendant's agent which the defendant had entrusted to the latter and paid the price to the agent. The agent was subsequently convicted of breach of trust in respect of the ring at the instance of the defendant. Plaintiff sued defendant for delivery of the ring or for its price :

Held, that the case was covered by the First Exception to section 108 of the Contract Act and that the plaintiff had obtained a good title to the ring and her suit must succeed. [p. 971, col. 1.]

Mr. *A. C. Mukerjee*, for the Appellants.

Mr. *H. M. Lutter*, for the Respondent.

JUDGMENT.—The respondent, Ma Win, sued the appellant, Dulabdass, to recover a diamond ring or its value, Rs. 2,673. Her case was that on the 13th of October 1914 she bought the ring for Rs. 2,673 from one Ma Chon whom she believed to be owner of the ring and who delivered possession of it to her, giving her a receipt for the price ; that in November 1914, the Police, while investigating a criminal charge against Ma Chor, took possession of the ring and sent it to the Criminal Court as an exhibit ; that the Magistrate convicted Ma Chon and delivered the ring to Dulabdass, and that she, being owner of the ring, was entitled to recover it or its value from Dulabdass.

Dulabdass in his written statement said that Ma Chon was a mere broker of his who had no right to sell the ring ; that she was convicted of criminal breach of trust in respect of the ring so that respondent's transaction with Ma Chon gave her no title to the ring ; that although he entrusted the ring to Ma Chon and received it back from the Criminal Court, he was not owner but was only an agent of the owner with limited authority ; that he had returned the ring to the owner, and that the respondent could not recover either the ring or its value from him.

The respondent then amended her plaint so as to implead the second appellant, Magnanlal Pranjivan and Company, to whom the ring was said to have been delivered by Dulabdass.

The second appellant filed a written statement alleging that he, too, was merely an agent of the real owner of the ring ; that he had delivered the ring to the real owner, and that respondent could not recover either the ring or its value from him. He also, like the first appellant, alleged that Ma Chon had no right to sell the ring and that respondent acquired no title to it by her transaction with Ma Chon.

The Trial Court, after hearing the evidence, came to the conclusion that respondent bought the ring from Ma Chon in good faith believing that Ma Chon had power to sell it, that Ma Chon was an agent of the owner of the ring and was in possession of the ring by the consent of the owner, and that, therefore, the respondent acquired a good title to the ring by her transaction with Ma Chon and was entitled to recover either the ring or its value from both the appellants.

Appellants file a joint appeal on the following grounds, namely :—

(1) that respondent had no cause of action against them because they were not owners of the ring and were not in possession of it but were only agents of the owner, to whom they had returned the ring ;

(2) that in any case they could not be jointly liable ;

(3) that Ma Chon's possession of the ring was not such as to enable her to give respondent a good title to it ;

(4) that it was not proved that the respondent acted in good faith in her transaction with Ma Chon ;

(5) that the lower Court failed to frame proper issues ;

(6) that the lower Court failed to give due weight to their evidence ;

(7) that the lower Court ought not to have referred to the record of the proceedings of the Criminal Court ;

(8) that the lower Court was influenced by the decisions in other cases concerning articles disposed of by Ma Chon, and

(9) that the decision of the lower Court was contrary to law and to the weight of evidence and the probabilities.

I have read the record and heard the learned Advocates on both sides at considerable length.

The first and second grounds of appeal are met by a consideration of the principles embodied in sections 230 and 231 of the Contract Act. Respondent bought the ring from Ma Chon believing her to be a principal; but, according to the appellants, Ma Chon was merely an agent with limited powers. But if she was an agent, she was agent of an undisclosed principal and when respondent had paid the money and failed to get back the ring, she was entitled to sue either Ma Chon or the first appellant or both. Similarly, since the first appellant again claims to have been the agent of an undisclosed principal, namely, the second appellant, respondent instead of suing the first appellant alone was entitled to sue both the first and the second appellants and that is what she did. The fact that the second appellant claims to be agent of still another undisclosed principal does not affect respondent's right of suit as against him. It merely gives her a right to sue his principal also if she chooses and she has chosen not to exercise that right. She undoubtedly had a right to sue both the appellants, and, if they have to pay, they may have their remedy against their principal, but that remedy does not concern respondent.

I hold, therefore, that there is nothing in the first two grounds of appeal.

The third ground is admittedly based on the Madras case of *Seshappier* v. *Subramania Chettiar* (1) which has already been considered both by my learned predecessor and by the Judicial Commissioner himself in connection with other transactions of Ma Chon's. In Civil Appeal No. 146 of 1916 my learned predecessor distinguished that case on the grounds (1) that it dealt with pawning and not with sale and that the language of section 178 of the Contract Act is different from that of section 10; (2) that in that case it was clear that the person who pawned the jewel got possession of it by means of an offence, and (3) that in that case it was not clear whether or not the transaction on which the suit was based was effected in good faith. The learned Judicial Commissioner before whom the case came in review went further and said that it appeared to him that the Judge who decided the Madras case went beyond the provisions of the law contained in sections 10[2] and 178 of the Contract Act in holding that in such cases the purchaser must prove that by some act or omission the true owner has forfeited his right to recover possession.

A number of cases have been cited before me as showing that the learned Judicial Commissioner was wrong and that the word "possession" is used in sections 108 and 178 of the Contract Act in a special sense.

The earliest of these cases is *Greenwood* v. *Holquette* (2), in which it was held that the possession of the hirers of a piano on a hire purchase agreement was not such possession as would validate a sale of the piano by the hirers to an innocent purchaser. The learned Judges who decided that case said that the words "notwithstanding any instructions of the owner to the contrary" in Exception 1 to section 108 of the Contract Act, "appear to show that the possession, which is meant by the first part of the Exception, is a possession which is unqualified, and not to be restricted otherwise than by the owner giving instructions to the person who has it. It is the kind of possession which a factor or an agent has, where the owner of the goods, although he has parted with the possession, may give instructions to the person in possession what to do with the goods..... It is such possession as an owner has, and in such a case it seems to have been intended that the person selling contrary to his instructions should give a title to the buyer, if the buyer acted in good faith. We think the Exception does not apply where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose. In such a case the owner has no right to give instructions. The nature of the possession and the powers of the person having it are determined by ..... the contract under which possession was taken."

The next case cited is that of *Shankar Murlidhar* v. *Mohan Lal Jaduram* (3) in which a person entrusted with the custody of cattle sold them and the

(1) 23 Ind. Cas. 174; 38 M. 783; 15 M. L. T. 221; (1914) M. W. N. 319.

(2) 12 B. L. R. 42; 20 W. R. 467.

(3) 11 B. 704; 6 Ind. Dec. (N. S.) 433.

owner was allowed to recover them from an innocent purchaser. In that case the learned Judge said that, "though the general rule of a person's not being able to transfer a right not belonging to him is qualified by Exception I to section 108.....yet it is plain that 'possession by consent of the owner' in that section is far from extending to every case of detention of chattels with the owner's consent. The Exception has particular relation to the cases of persons allowed by owners to have the *indicia* of property or possession under such circumstances as may naturally induce others to regard them as owners and constituting some degree of negligence or defect of precaution imputable to the true owners."

The next case is that of *Seeger* v. *Hukma Keesa* (4), in which a husband was held entitled to recover jewellery belonging to him but kept in the possession of his wife and pledged by her without his knowledge. In that case the learned Chief Justice said that, 'to create a pledge under section 178 of the Indian Contract Act the pledger must be in juridical possession.....that mere custody will not suffice," and that the words of the section "mark a clear distinction between possession and custody."

In the case of *Naganada Davay* v. *Bappu Chettiar* (5), the owner was allowed to recover an article of jewellery which he had hired out and which the hirer had pledged. In that case one of the learned Judges said: "The word 'possession' in the section (178) is clearly not intended to cover all cases in which the goods, etc., are in the physical control of the pledger, because the 'possession,' in the first part of the section, is distinguished from the custody of them in the last paragraph of the same section."

The case of *Seshappier* v. *Subramania Chettiar* (1), has already been mentioned. In that case, the owner of an article of jewellery gave it to a person to find a purchaser for it on an understanding that the sale was to be made by the owner himself and not by the agent. The person who took the jewel pledged it and the owner was allowed to recover it, the learned Judge remarking "that sections 108 and 178 of the Contract Act.....proceed on the principle that *prima facie* the rights of the legal owner should be protected unless he has done something to induce innocent purchasers or pledgees into the belief that the intermediate possessor is the true owner: mere *bona fides* on the part of the purchaser or pledgee is not enough, he will have to prove that by some act or omission the true owner has forfeited his right to recover possession."

The next case is that of *Roop Chand Jankidas* v. *National Bank of India* (6), in which certain share certificates with blank transfer deeds which belonged to the Bank and were in the custody of their Head Clerk were sold by him and were held to be recoverable by the Bank from an innocent purchaser on the ground that the word "possession" in Exception I to section 108 of the Contract Act did not include dishonest possession, such as the Clerk's was when he sold the certificates.

After going through all these cases carefully, I agree with the learned Judicial Commissioner that the interpretation which they put on sections 108 and 178 of the Contract Act strains the plain meaning of those sections.

Taking the cases seriatim I note as follows: —

I do not agree with the learned Judges who decided *Greenwood* v. *Holquette* (2) that the use of the words 'notwithstanding any instructions of the owner to the contrary" suggest any inference that, in every case covered by the Exception, the possession must be such that the owner is in a position to give instructions. No such inference can possibly arise on any logical method of interpretation.

Similarly, the distinction drawn in *Shankar Murlidhar* v. *Mohan Lal Jadurum* (3) between possession and custody in respect of the *indicia* of property is unreal. Every person who has detention of a chattel has the "*indicia* of property" in that chattel and although, by reason of extraneous circumstances, such as the fact that he is not a person who is likely to be owner of such a chattel, the inference arising from his having those "*indicia* of property" may be weakened or destroyed, nevertheless, so far as the chattel itself is concerned, he has all the "*indicia* of property" which

(4) 24 B. 458; 2 Bom. L. R. 403; 12 Ind. Dec. (N. S.) 837.

(5) 27 M. 424 at p. 425; 14 M. L. J. 69.

(6) 48 Ind. Cas. 975; 22 C. W. N. 1042; 46 C. 312.

possession of any sort can confer. Further, there is, in my opinion, no foundation whatever in the section itself for the learned Judge's suggestion that, before the Exception can come into operation, there must be any degree of negligence or defect of precaution imputable to the true owners beyond that involved in their consent to another person's possession.

Coming to the case of *Seaper* v. *Hukma Kessa* (4), I am entirely unable to see that the fact that the word "custody" as used in the second proviso to section 178 suggests any inference that the word "possession" as used in the earlier part of the section means anything different from what possession ordinarily means. It might, however, be held that a wife's custody of her husband's property, while it is in his house, is not her possession but his, and this is probably what is meant in this particular case by saying that the wife's possession was not "juridical," it being regarded as analogous to the possession of a tenant or a borrower in Roman Law.

Similar remarks apply to the case of *Naganada Dovay* v. *Bappu Chettiar* (5), but in that case I am entirely unable to grasp the distinction which is sought to be made between possession and juridical possession. It seems to me clear that in English Law the hirer of an article has "possession" and not that bare custody which a wife may be regarded as having in respect of her husband's goods or which the Clerk of a Bank has in securities which are in the possession of the Bank but are in his care.

The remarks made above on the case of *Shankar Murlidhar* v. *Mohan Lal Jaduram* (3) apply with equal force to the case of *Seshappier* v. *Subramania Chettiar* (1). I do not think that there is any foundation in the section itself the view that the purchaser has to prove anything beyond the owner's consent to the intermediate possession and his own *bona fides*, including, of course, the absence of circumstances raising a presumption that the person in possession had no right to sell.

Regarding the case of *Roop Chand Jankidas* v. *National Bank of India* (6), all that need be said is that the Clerk in that case was clearly not by the consent of the owner in the particular possession, which enabled him to dispose of the securities and, therefore, the case did not fall within the purview of Exception I to section 108 of the Contract Act.

The decisions in nearly all these cases seem to me to be unconvincing attempts to show that sections 108 and 178 of the Contract Act do not really mean what they say, and that the word "possession" was used in them in a restricted sense. It is common knowledge that the section does not exactly reproduce the provisions of the English Law and that it was the subject of much controversy at the time when the Contract Act was passed. The Commissioners, who originally drafted the section, said, "with regard to goods sold by a person who has no right to sell, the general rule of English Law is, that the owner of the goods retains the ownership notwithstanding his having lost the possession of them and their having been sold to a third person. But from this rule there is an exception in the case of goods sold in open market . . . . It cannot be denied that the subject is difficult. We have to consider, on the one hand, the hardship suffered by an innocent person who loses in this way his right to recover what was his undoubted property. But, on the other hand, still greater weight appears to us to be due to the hardship which a *bona fide* purchaser would suffer were he to be deprived of what he bought. The former is very often justly chargeable with remissness or negligence in the custody of the property. The conduct of the latter has been blameless. The balance of equitable consideration is, therefore, on the side of a rule favourable to the purchaser; and we think that sound policy with respect to the interest of commerce points to the same conclusion. We have, therefore, provided that the ownership of goods may be acquired by buying them from any person who is in possession of them, if the buyer acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them." That was clearly a very wide extension of the English Law and it did not commend itself to the Select Committee who, therefore, omitted the reference to "goods" in Exception I and thus confined

the operation of the Exception to the case of goods transferred by certain mercantile documents, the transfer of which had, by mercantile usage, come to be regarded as effecting a transfer of the goods to which the documents referred and was so recognised in English Law. If that amendment had been accepted the provisions of the section would have corresponded with those of the English Law with the omission of the exception in favour of goods sold in open market and of goods sold by a former owner who had remained in possession. But the learned Legislators who passed the Act did not approve of the omission and, therefore, re-inserted the word "goods" in the Exception. The collocation of that word, with the list of mercantile documents which immediately follows it in the Exception, possibly diverted attention from the extremely wide definition of "goods" which had been given in section 76 of the Act and may have led the Legislature to imagine that they were doing little more than giving effect to the Exceptions which were already recognised in English Law, and to overlook the fact that, as passed, the First Exception to section 108 applied practically to any sale of any moveable property by any person in any kind of possession so long as that possession was by consent of the owner and the transferee acted in good faith. It seems inconceivable that the Legislature intended to enact a provision from which it would follow that, if I hand over my bicycle to a friend's servant to be taken to my friend or to the keeper of a bicycle shop to be repaired, I should not be able to recover it in case the servant or shop-keeper subsequently proved dishonest and sold the machine, and, therefore, ever since the Act was passed, the Courts have found it necessary to devise pretexts for excluding from the scope of the Exception cases which were covered by its express terms but which, they assumed, could not possibly have been contemplated as falling within its application. The line which the Courts have taken has been to impose various restrictions on the meaning of the word "possession." In this they have followed the lead given in the case of *Greenwood* v. *Holquette* (2) which has come to be regarded as a leading case on the subject. It is, I think, unfortunate that that case was not argued by Counsel. If it had been, I think that the whole course of the subsequent decisions would have been different. It would, in my opinion, have been better if the Courts instead of trying to strain the meaning of the words so as to exclude cases which presumably were not intended to come within the scope of the sections had expressly recognised the fact that the wording of the sections was wider than could possibly have been intended and had pointed out the difficulties which arise with a view to their being amended by legislation. It is to be noted that the Chief Court of the Punjab has not followed the other High Courts in explaining away the meaning of the word "possession" in these sections. In the case of *Framjee* v. *McGregor* (7) it held that Exception I of section 108 applied to a case where an owner of horses left the horses in the possession of the person from whom he bought them and that person sold them again to an innocent third party and, although Sir Frederick Pollock in his Commentary on the Contract Act characterised that decision as "too absurd for discussion", it must be remembered that that learned Commentator was an English Lawyer and that the provisions of section 25 (1) of the English Sale of Goods Act specifically provide that where a person, having sold goods, continues in possession of the goods the delivery or transfer by that person to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same. To a lawyer, familiar with that enactment and imbued with the principles of law on which that section was based, the decision of the Punjab Court might well appear absurd, but to any one reading section 108 of the Contract Act as it stands and giving its ordinary meaning to the word "possession" I do not think that the absurdity would be apparent. The same Court also held in the case of *Abdul Hassan Khan* v. *Rangi*

(7) 27 P. R. 1902; 81 P. L. R. 1902.

Lal (8) that a pledge may by the hire-purchaser of a bicycle who had not completed payment of the instalments was valid and, although Pollock clearly disagrees with that decision also, he is constrained to admit that in such a case the hire-purchaser has "juridical possession," and that the terms of the Contract Act, whatever its framer may have intended, support the decision.

Reverting to the present case, I have no hesitation in holding that it is one which, on any view of the law, would fall within the provisions of Exception I to section 108.

Ma Chon admittedly bought and sold diamonds on her own account and also sold larger stones for various diamond merchants on commission sale. It is admitted that, so long as the fixed price was obtained, she had power to conclude the sale of stones sold on commission. She was undoubtedly in possession of the stones in suit by consent of the owner through his various agents and sub-agents, it being the ordinary course of business in that particular trade that agents employ sub-agents. Further, the price paid for the stones in dispute in this case was above the fixed price and, therefore, the sale by her transferred title apart from the provisions of section 108 since she was an agent with full powers so far as this particular transaction was concerned. It is clear, therefore, that there is no basis whatever for the 3rd ground of appeal.

As for the 4th ground, I entirely agree with the lower Court that respondent acted in good faith. Ma Chon was a woman in a good position, being the wife of a responsible Municipal Officer. She had dealt in diamonds for many years and was admittedly trusted by the diamond merchants themselves. The full price was paid for these particular stones and there is nothing whatever to indicate collusion of any sort between respondent and Ma Chon or any want of entire good faith on respondent's part.

As for the 5th ground, I see no reason to believe that the appellants were prejudiced by the form of the issues framed or that they had not full notice of the case they had to meet.

(8) 37 P. R. 1902; 23 P. L. R. 1902.

The 6th ground is entirely without foundation and has not been argued in this Court.

As for the 7th ground, all that need be said is that both the appellants in their written statements craved leave to refer to the proceedings of the criminal case, and that if the Court did refer to those proceedings it did so at their express request.

The 8th ground is entirely baseless. The lower Court had an undoubted right to refer to and follow earlier decisions of this Court so far as the circumstances of the cases were similar and there can be no doubt that the circumstances of other sales of stones by Ma Chon were in many respects similar to those of the present sale.

The 9th ground is the usual omnibus ground which means nothing in particular and need not be discussed.

Taking the case as a whole, I am satisfied that the decision of the lower Court was correct and, therefore, I dismiss the appeal with costs.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2354 OF 1916.

December 13, 1920.

Present :—Mr. Justice LeRossignol and Mr. Justice Wilberforce.

THE FIRM SHAMAS DIN-MEHR BAKHSH AND COMPANY OF AMRITSAR THROUGH SHAMAS DIN—PLAINTIFF—APPELLANT

versus

AGHA MUHAMMAD KHALIL SHIRAZI, OF MADRAS—DEFENDANT RESPONDENT.

Sale of goods—Principal and agent—Goods sent in excess of quantity ordered—Goods sent of inferior quality—Agent, whether can recover price of goods—Principal, whether bound to accept part performance.

An agent on general grounds is entitled to re-imbursement and indemnity by his principal, but only on the condition that he has acted within the scope of his directions. [p. 973, col. 1.]

SHAMS DIN-MEHR BAKHSH v. AGHA MUHAMMAD KHALIL.

A promisee is not bound to accept part performance of a contract. [p. 973, col. 1.]

Defendant sent an order for 25,000 hides of a particular quality to plaintiff, his agent. Plaintiff sent 37,000 hides of different qualities, of which only a small number corresponded with the quality ordered. Defendant refused to take delivery of the consignment:

Held, (1) that the plaintiff had not substantially complied with defendant's order; [p. 973, col. 1.]

(2) that the defendant was not bound to accept that portion of the consignment the quality of which corresponded with the quality ordered; [p. 973, cols. 1 & 2.]

(3) that the plaintiff was not entitled to recover anything from defendant. [p. , col. .]

First appeal from the decree of the Subordinate Judge, First Class, Amritsar, dated the 15th May 1916.

The Hon'ble Mr. *Fazl-i-Hussain* and Mr. *Muhammad Rafi*, for the Appellant.

Messrs. *Abdul Qadir*, *Abdul Razaq* and *Duni Chand*, for the Respondents.

JUDGMENT.—In this case the plaintiff-appellant, a firm of Amritsar, sued the defendant-respondent, a firm of Madras, for Rs. 19,497-8 being charges and costs of 149 bundles of sheep skins purchased at Amritsar by the plaintiff acting as commission agent for defendant and despatched to Madras where defendant took delivery but subsequently refused to accept the goods on the ground that they were substantially divergent in quality and quantity from the goods ordered.

The District Judge has dismissed the suit holding that the plaintiff firm was not acting as commission agent for the defendant firm; that 37,000 skins despatched by the plaintiff were greatly in excess of the number ordered, and that the skins sent were of inferior quality.

The plaintiff firm has appealed to this Court.

That the plaintiff was acting throughout not as principal but as agent for the defendant is perfectly clear from the correspondence between the parties which preceded and followed the despatch of the goods, but we see no necessity for dealing with this evidence in detail, for it is quite clear from the plaint and pleas that that position was accepted by the parties, and the lower Court's finding that there was no agency is quite unjustified. The defendant did not deny it and in his pleas impliedly admitted it and consequently no issue was struck on the point.

The only questions for decision that remain are whether the plaintiff, in regard to the quantity or quality of the goods, was negligent or guilty of fraud, and if so, to what relief, if any, he is entitled.

The order sent by the defendant to the plaintiff was for one waggon load of mixed sheep skins, free of hair, or in the alternative, one-half waggon of the above quality and one-half waggon of good No. 2, but each denomination was to possess a certain property, namely, 100 skins were to weigh, $1\frac{1}{4}$ maunds; but a margin of two seers on either side was allowed.

It is clear that "mixed sheep skins," free of hair, "weighing $1\frac{1}{2}$ maunds per 100 skins" is a well-known quality in the trade which includes skins of four sizes, but no defective skins and that "good No. 2" is a second quality consisting of the same classes of skins as the former, except that skins of the biggest size are absent and skins of one class lower, but free from holes and cuts, are included.

As to quantity, it is clear from the only other similar transaction between the parties, which preceded that in dispute by only a few weeks, that the parties by one waggon load meant about 25,000 skins (*vide* letter from plaintiff to defendant, Exhibit D 17, on page 17 of the paper-book) and even on the 16th of September 1912 plaintiff wires to defendant that he is despatching on the morrow some 26,000 odd skins (*vide* telegram D-5, on page 19).

In Exhibit D-1 (page 16) referring to the despatch of 25,000 skins in one waggon plaintiff asks defendant to order another waggon load and that is how the order in dispute was elicited.

From the foregoing it is clear that the defendant expected to receive, and plaintiff knew his expectation, approximately 25,000 skins. What did plaintiff send? He sent 123 bundles of skins in one full waggon and subsequently 26 other bundles in two separate consignments, *i.e.*, over 37,000 skins.

What was the quality of those consignments? 105 of the bundles weighed not $1\frac{1}{4}$ maunds as ordered but only $1\frac{1}{8}$ maunds, whilst 44 of the bundles weighed only 35 seers each.

Inasmuch as the weight of each bundle of 100 skins determines the average size of those skins, it is obvious that the failure

of the plaintiff to fulfil the order of the defendant in the matter of weight involved his failure to fulfil the order in the matter of the average size of the skins. With regard to the 45 bundles which weighed only 35 seers, it is obvious that no attempt at all was made to comply with the terms of defendant's order.

With regard to the quality of the skins irrespective of the element of size, the evidence on the record which seems to be perfectly reliable is to the effect that the bundles one and all contained a high proportion of defective and totally worthless skins and that, in spite of the fact, that in giving his order the defendant had informed the plaintiff that he required only good class medium skins, not for sale in the Madras market, but for tanning purposes in defendant's own tannery.

In these circumstances, we have to decide whether the plaintiff's fulfilment of defendant's order was fraudulent, or if not fraudulent, whether it amounted to a substantial compliance with the terms of that order.

Having regard to the fact that the plaintiff is not merely a commission agent in skins but also deals very extensively in them on his own account and, as his own correspondence shows, keeps a large stock of them, we have great difficulty in avoiding the conclusion that his despatch of the goods above described to defendant was tainted with fraud, but it is unnecessary for us to go so far, for we are clearly of opinion that his action does not amount to anything approaching a substantial compliance with the terms of the order.

In these circumstances, to what relief, if any, is plaintiff entitled? An agent on general grounds is entitled to reimbursement and indemnity by his principal, but only on the condition that he has acted within the scope of his directions. We have considered whether the plaintiff is entitled to any portion of the sum in suit and whether the defendant, who on receipt of the goods immediately telegraphed his disapproval and repudiated the transaction, was bound to accept that portion of the consignment which complied with the conditions of his order and to pay for that portion only. Inasmuch, however, as a promisee is not bound to accept part performance of a contract and as, also, acceptance by the defendant of a portion of the consignment would have led to trouble and complications, and as also, the plaintiff had his own agent in Madras who might have disposed of the goods on his behalf, we do not see that the defendant was in any way bound to accept any portion of the consignment. On the other hand, it is in evidence that plaintiff had been in the habit of selling goods in Madras either through the defendant or through his own agent and had plaintiff taken delivery of the goods as soon as they were repudiated by the defendant and sold them either on his own or on the defendant's account, he would not have lost anything more than he deserved to lose.

For these reasons, we concur in the conclusion of the Court below and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 501 OF 1919.

February 12, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

SHUNMUGHA UDAYAR *alias* SHANMUGHA VADHIAR—PLAINTIFF—APPELLANT

versus

KANDASAMI ASARY—DEFENDANT—RESPONDENT.

Malicious prosecution—Damages, suit for, maintainability of, against informer—Burden of proof, wrong allocation of, by Trial Court—Correct appreciation of evidence in appeal—Appeal, second—Finding of fact, whether binding.

A suit for damages is maintainable against a person who supplied the information on which a prosecution was launched, though he may not have himself figured as the complainant in the Criminal Court. [p. 975, col. 1.]

Where a Trial Court misdirects itself as to the burden of proof, but the Appellate Court appreciates the evidence from a correct standpoint, the finding of fact arrived at by the Appellate Court must be accepted in second appeal. [p. 975, col. 1.]

Second appeal against the decree of the Court of the Temporary, Subordinate Judge, Cuddalore, in Appeal Suit No. 124 of 1917 (Appeal Suit No. 13) of 1917, on the file of the District Court, South Arcot), preferred against the decree of the Court of the

Additional District Munsif, Villupuram, in Original Suit No. 25 of 1916 (Original Suit No. 617 of 1915, on the file of the Court of he District Munsif, Tindivanam.

FACTS.—Suit to recover Rs. 500, being the damages sustained by the plaintiff by reason of a malicious prosecution against him by the defendant. The allegations in the plaint were that defendant, falsely and maliciously and without reasonable and probable cause, sent a petition to the District Magistrate, as the result of which security proceedings were started against the plaintiff under section 110 E, Criminal Procedure Code, for habitually committing offences involving breach of the peace, the virtual prosecutor being the defendant himself and the proceedings terminated in the discharge of the plaintiff. The defendant pleaded that the allegations in his petition to the District Magistrate were true, and that he had reasonable and probable cause for apprehending injury by the plaintiff. He further pleaded that, besides sending the petition, he had no hand in the Police investigation and, therefore, not being the actual prosecutor, he was not liable for damages. The District Munsif found that the defendant had reasonable and probable cause in presenting the complaint (petition) and it was not done out of malice or spite; and that "the plaintiff on whom the burden lay heavily of proving that he was innocent and the criminal proceedings were instituted against him out of malice and without reasonable and probable cause has not satisfactorily proved the existence of these ingredients which are essential in a suit of this nature." On the defendant's plea that he was not the prosecutor the District Munsif's finding was as follows:—"The evidence adduced by the plaintiff that defendant was taking an active part in the prosecution of the security case is very meagre and unreliable. The burden lay on the plaintiff to show that the defendant, although the charge-sheet was laid by the Police, actually prosecuted the case by taking an active part in it. In my opinion, the plaintiff has not discharged the burden. It is admitted that defendant did not engage a Pleader for prosecuting the case and, apart from the testimony of plaintiff, there is no evidence that defendant actually instructed the Police Sub-Inspector who conducted the prosecution. From the evidence on record I am inclined to think that the defendant did not take active part in the proceedings that took place subsequent to his complaint. Defendant preferred the complaint to the District Magistrate and the matter must have been referred to the Police for inquiry and the Police, after enquiry, laid charge-sheet before the Joint Magistrate of Tindivanam. In these circumstances, I consider that defendant was not the actual prosecutor and is not liable for damages. I, therefore, find that the proceedings against plaintiff were not instituted by the defendant maliciously and without reasonable and probable cause and the defendant is not liable for damages." On appeal, the Subordinate Judge of Cuddalore confirmed the lower Court's finding on all the above points. After finding that defendant did not act maliciously or without reasonable and probable cause in forwarding the petition to the District Magistrate, the Subordinate Judge observed: "I have to observe that, in the light of the recent ruling in *Gopalakrishna Kudva* v. *Bangle Narayana Kamthy* (1), the plaintiff must be considered to have given *prima facie* proof of his innocence by showing that the prosecution ended in his discharge by the Magistrate who tried the security case." On the plea that the defendant was not the actual prosecutor, the Subordinate Judge remarked, "I hold that, beyond sending the petition (Exhibit A) to the District Magistrate praying therein that proceedings under sections 107 and 110, Criminal Procedure Code, may be taken against the plaintiff and eight others, the defendant did not subsequently take any part in the proceedings or assume the conduct of the case . . . . . I think, that the contention of the respondent's Pleader that a distinction should be made between a complaint or information laid for an offence being brought home to an accused for his conviction and a petition for an investigation and taking of proceedings under the security sections of the Criminal Procedure Code has some force in it. . . . . The question in each case will be whether the defendant really initiated the prosecution or, even though he may not have initiated it, whether he, subsequent to the initiation took an active part in the prosecution or

(1) 45 Ind. Cas. 803; 34 M. L. J. 517; 23 M. L T. 341; 7 L. W. 604; (1918) M. W. N. 454.

assumed the conduct of it. Following the principle of the rulings in *Kandasami Asari* v. *Subramania Pillai* (2) and *Narasinga Row* v. *Muthaya Pillai* (3), I hold that, in the present case the defendant did not really initiate the prosecution but that the Police initiated it." The Subordinate Judge, therefore, held that plaintiff had no cause of action and dismissed his suit with costs. The plaintiff preferred a second appeal to the High Court.

Mr. *R. Kuppaswami Aiyar*, for the Appellant.

Mr. *V. K. Venkatarama Aiyar*, for the Respondent.

JUDGMENT.—The lower Courts were wrong in relying on *Narasinga Row* v. *Muthaya Pillai* (3) for their conclusion that the defendant was not the prosecutor in the criminal case and hence not liable as such. [See *Periya Goundan* v. *Kuppa Goundan* (4).]

But they have concurrently found that there was reasonable and probable cause for the prosecution. The District Munsif might have misdirected himself on the question of burden of proof as regards one of the points involved (namely, that plaintiff was innocent of the charge of being liable to be called upon to furnish security) but the Subordinate Judge points out that error of the Munsif, quoting *Gopalakrishna Kudva* v. *Bangle Narayana Kamthy* (1), and has considered the evidence from his own correct standpoint and concurred in the Munsif's finding.

We must accept the finding of the lower Appellate Court on this point. So accepting, we dismiss the second appeal with costs.

M. C. P.

Appeal dismissed.

(2) 13 M. L. J. 370.
(3) 26 M. 362; 12 M. L. J. 389.
(4) 52 Ind. Cas. 782; 42 M. 880; 37 M. L. J. 234; 10 L. W. 235; 26 M. L. T. 140; (1919) M. W. N. 577.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 726 OF 1919.

December 14, 1920.

Present:—Mr. Justice Ross.

DEBENDRA PRASAD SUKUL —DEFENDANT No. 1—APPELLANT

versus

Babu SURENDRA PRASAD SUKUL AND ANOTHER—PLAINTIFFS AND *Babu* BIRENDRA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—User of joint property—Interference with user of co-sharer, whether permissible.

A co-sharer cannot materially alter the condition of the joint property without obtaining the sanction of his co-sharers. [p. 977, col. 1.]

Plaintiff used certain land which he owned jointly with defendant for the purpose of the access of the sweeper to the privies in his house which belonged exclusively to him. Defendant built a wall across the joint land and put an end to this user of the plaintiff;

Held, that the defendant was not entitled to obstruct the user of the plaintiff in this manner, and that the plaintiff was entitled to an injunction directing the defendant to remove the obstruction. [p. 976, col. 2.]

Appeal from a decision of the District Judge, Muzafferpur, dated the 5th August 1919, affirming a decision of the Munsif, Muzafferpur, dated the 26th April 1919.

Messrs. *Khurshaid Husnain* and *Ray T. N. Sahai*, for the Appellants.

Messrs. *Fakhruddin* and *Sambhu Saran*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit between two cousins who formerly belonged to a joint family. A partition took place in 1885 and 1886 by which the family residence was divided; the plaintiff-respondent was given a portion of the house, to the west of which lay some land which was left joint. On a part of this land the defendant, apparently with the consent of the co-sharers, built his house, the remainder lying waste and unoccupied. This waste land is described in the map annexed to the plaint as "*Sehan* and flat". To the east of this, and on the west of the plaintiff's house, were two privies belonging to the plaintiff; and, according to the plaintiff's case, the sweeper had access to these privies over this waste land. A screen wall was erected to the west of the privies by the plaintiff in the middle of which an opening was left. The defendant

has now built a verandah on the west side of this open land and has closed the opening in the screen wall and has built another screen wall between two privies of his own lying to the south-west of the premises, the result of which is that access to the plaintiff's privies through the open land has been completely cut off.

The plaintiff brought this suit for the removal of these obstructions. The Munsif passed a decree ordering the defendant to remove the screen wall which he had erected and to make an opening in the plaintiff's screen wall sufficient to admit of access by that way. On appeal to the District Judge the decree of the Munsif was upheld.

Two points were urged in this appeal. It was contended, in the first place, that the case in the plaint is a case of easement and that no easement has been proved. On behalf of the respondent it was admitted that the plaint was not artistically drawn, that the word easement which there occurs ought not to have been used, and that the case is not a case of easement at all. In the second place, it was argued for the appellant that if the case is treated, as it has been treated, as a case of user of joint land the plaintiff is not entitled to a decree, because he is seeking to establish a user of joint land which is not for the purposes of the joint land but for the purposes of his exclusive land on the east thereof, and that, if it is repugnant to the feelings of the plaintiff that the sweeper should go through his inner appartments, it is repugnant to the feelings of the defendant that the sweeper should pass through his house, and that consequently the reason which has been advanced in support of the decree can equally be urged against it. The latter portion of the argument has no force. The land was undoubtedly used by the plaintiff's sweeper as a means of access to the plaintiff's privies before it was enclosed by the defendant, and the defendant, well-knowing that practice, enclosed the land and if, in doing so, he infringed the plaintiff's rights, he cannot plead any inconvenience to himself if the original state of things is restored.

The real question in the case is, whether the plaintiff's rights have been infringed. The appellant relies most strongly on the decision in *Anant Ramrav* v. *Gopal Balvant* (1) where, after observing that the exercise of the Courts' jurisdiction to grant relief by way of injunction in disputes between members of a Hindu family must be attended with very great difficulty, Sargent, C. J., said that he did not think that there would be any practical objection to doing so in those particular cases in which, as between tenants in common, the Courts grant that form of relief; and that, following the practice of the Courts of Equity, that would be confined to acts of waste, illegitimate use of the family property and acts amounting to ouster. Reference was also made to the case of *Dwijendra Narain Roy* v. *Purnendu Narain Roy* (2), where it was laid down that the test is whether the defendant has made use of the joint property in a way consistent with the continuance of joint ownership and possession. The respondent contends that this is a case of ouster and that his access to the joint land has been completely cut off. It is true that this view of the case is not set forth with any great clearness in the plaint. The suit is not expressly framed as a suit arising out of the ouster of the plaintiff, but placing a benevolent construction on the pleadings I think it may be taken that this is what was meant. The plaintiff exercised his undoubted rights of ownership and possession over this piece of waste land by using it for the purposes of the access of the sweeper to the privies in his house and in so doing he exercised ownership in a manner which was innocent and inoffensive, until the defendant altered the condition of the land. As the result of the defendant's building on it, the land has ceased to be available to the plaintiff for this purpose. In the case of *Lloyd* v. *Musammat Bibee Sogra* (3) it was laid down, "that it is impossible to contend, with any semblance of reason or justice, that any one co sharer in an undivided property has a right to possess himself of any portion of it to the exclusion and without the authority of his co sharers and to deal with it.....as he will, without their sanction". And, similarly, in *Sheo Pershad Singh* v. *Leelah Singh* (4) it was

(1) 19 B. 269; 10 Ind. Dec. (N. S.) 182.
(2) 5 Ind. Cas. 171; 11 C. L. J. 189.
(3) 25 W. R. 313.
(4) 20 W. R. 160; 12 B. L. R. 188.

held that a co-sharer cannot materially alter the condition of the property without obtaining the sanction of his co-sharers. This is what the defendant has done and his act amounts to ouster of the plaintiff from the land in the sense that he is no longer able to use it in the only way in which it is of any use to him.

In my judgment, therefore, the decrees of the Munsif and of the District Judge are right and should be maintained. The appeal is dismissed with costs. The cross appeal was not pressed and is dismissed.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2112 OF 1917.

December 22, 1920.

Present:—Mr Justice Chevis and Mr. Justice Abdul Raoof.

RAM SARUP, MINOR, SON AND REPRESENTATIVE OF BIR BHAN DECEASED, UNDER THE GUARDIANSHIP OF *Musammat* PARJI, HIS MOTHER—DEFENDANT—APPELLANT

versus

JAGAT RAM—PLAINTIFF—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 37, object of—Companies Act (VII of 1913), s. 231—Fraudulent preference by company - Person who is not creditor, whether can impeach transfer.

The object of section 37 of the Provincial Insolvency Act is to protect the interests of the whole body of creditors over whom an undue preference has been given in favour of other creditors. [p. 978, col.]

The same principle applies to a transaction which is sought to be impeached under section 231 of the Companies Act, so that a disposition of a company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of the creditors [p. 978, col .]

Therefore, a person who is not a creditor of a company, but is a debtor, cannot impeach a transfer made by the company on the ground of undue preference. [p. 978, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, First Class, Ludhiana, dated the 18th June 1917.

Mr. *Manohar Lal*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The defendant in this case, Lala Bir Bhan, had dealings with the Industrial Bank of Ludhiana and executed two promissory notes in their favour, one for Rs. 3,055, dated the 28th August 1913, and one for Rs. 2,964-9-5, dated the 17th September 1913. In these pro-notes he promised to pay to the Industrial Bank or their order within their office at Ludhiana. The first pro-note provided for interest at the rate of 9 per cent. and the second one for interest at the rate of $8\frac{1}{4}$ per cent. per annum.

It appears that the Bank was in financial difficulties and had several creditors, one of whom was the present plaintiff, Lala Jagat Ram, and in part payment of his claim the Bank through their Managing Director, sold both the pro-notes to him. The plaintiff now sues the defendant, claiming the principal sums due under the pro-notes and interest at the rates given in them. The Bank was made a *pro forma* defendant but the name of the Bank was afterwards struck off at the request of the plaintiff. The lower Court has decreed the principal amount due and interest at the contracted rates up to the date of institution of the suit and interest at 6 per cent. per annum from the date of institution till the date of jndgment. The defendant appeals, pleading that the suit should be dismissed, and the plaintiff has put in cross-objections asking for interest at the contracted rates till the date of realisation. Several grounds of appeal have been given up in this Court, Mr. Manohar Lal admitting that he cannot support the pleas that the defendant made payment towards the pro notes, that the rate of interest agreed upon was only 0-8-0 per cent. per month, or that the Managing Director had no power to transfer the pro-notes to the plaintiff. In fact, the only point that has been argued is that as the Bank went into liquidation within three months of the execution of the pro-notes, the transfer in favour of the plaintiff should be regarded as a transfer made with a view to giving the plaintiff preference over the other creditors of the Bank and that the transaction is, therefore, invalid and should be disregarded by the Court. Section 231 of the Indian Companies Act lays down that any transfer which would, if made by

an individual, be deemed in his insolvency a fraudulent preference, shall, if made by a company, be deemed, in the event of its being wound-up, a fraudulent preference of its creditors and be invalid accordingly. The aforesaid section also provides that, "for the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court, and a resolution for winding up in the case of a voluntary winding up shall be deemed to correspond with the act of insolvency in the case of an individual." Turning to section 37 of the Insolvency Act we read that, "every transfer of property made by a person unable to pay his debts as they become due from his own money in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after a date thereof, be deemed fraudulent and void as against the Receiver and shall be annulled by the Court." On the strength of these sections Mr. Manohar Lal argues that the transfer was made in favour of the plaintiff with a view of giving him a preference over the other creditors of the Bank and should be regarded as of no effect. The two sections above quoted must, in our opinion, be read together and when interpreting what is meant by the words in section 231 "be invalid accordingly" we think we must be guided by, what seems to us, the clear object of section 37 of the Insolvency Act. In section 37 the words are "be deemed fraudulent and void as against the Receiver." The object of this section seems clearly to be to protect the interests of the whole body of creditors over whom an undue preference has been given in favour of other creditors. Accordingly, it has been held in *Willmott* v. *London Celluloid Co.* (1) and *Willmott* v. *London Celluloid Co.* (2), that a disposition of a company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of the creditors. See also Lindley on Companies, 6th Edition, Volume II, page 901. The same view has been held in *Mohandas Thakurdas* v. *Tikamdas Hotchand* (3).

Mr. Manohar Lal himself admits that one creditor alone could not impeach the transfer on the ground of undue preference. It seems clear to us that if one creditor alone could not invoke the aid of section 231 of the Companies Act to impeach the transaction, *a fortiori* a person who is not a creditor of the Bank but only a debtor, cannot do so. This is the only point which has been argued before us, and the appeal accordingly must fail.

As regards the cross-objections, we can see no reason why interest should not be allowed up to the date of realisation. We decline, however, to enhance the rate beyond that of 6 per cent. per annum which is the usual rate of interest allowed by the Courts in such cases.

The appeal is dismissed with costs. The cross-objections are so far accepted that the sum decreed will bear interest at 6 per cent. per annum from the date of institution of the suit till realisation.

Appeal dismissed.

(1) (1886) 31 Ch. D. 425 at p. 434; 55 L. J. Ch. 449.

(2) (1887) 34 Ch. D. 147 at p. 150; 56 L. J. Ch. 89; 55 L. T. 696; 35 W. R. 145.

(3) 37 Ind. Cas. 250; 10 S. L. R. 123.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 426 AND 427 OF 1914.

May 1, 1919.

Present :—Sir John Wallis, KT., Chief Justice and Mr. Justice Sadasiva Aiyar

Raja KEESARA VENKATAPAYYA *alias* VENKATA APPA RAO AND OTHERS—PLAINTIFFS NOS. 2, 3, 5 AND 6—APPELLANTS

versus

Raja NAYANI VENKATARANGA RAO AND OTHERS—DEFENDANTS, NOS. 2, 4 TO 6—RESPONDENTS.

Impartible Estate—Munagala Zemindari, ½ Kistna

District, whether impartible—Succession—Primogeniture, rule of—Limitation Act (IX of 1908), Sch I, Arts. 127, 144—*Adverse possession*—Zemindari *Estate, widow and daughter in possession of—Possession, nature of—Art.* 127, *applicability of—Registration Act (XVI of 1908), s.* 17 (3)—*Authority to adopt executed outside British India—Registration, whether necessary.*

The Munagala *Zemindari* in the Kistna District is impartible, and succession thereto is regulated by the rule of primogeniture. [p. 983, col. 1.]

The succession of the widow of a Zemindar to his estate and of her daughter after her amounts to a denial of the claim of the junior branches of the family that the estate is either joint family property or owned by the family as tenants-in-common, and the possession of the daughter from the date of her succession is adverse to, and exclusive of, the claims of the other branches of the family within the meaning of Article 144 of Schedule I to the Limitation Act. Consequently, a suit for the partition of the estate, if brought beyond the period prescribed by that Article, would be barred by limitation. [p. 985, cols. 1 & 2.]

Article 127 of Schedule I to the Limitation Act, which covers suits by a person excluded from joint family property to enforce a right to a share therein, has no application to such a suit. [p. 985, col. 1.]

An authority to adopt executed in a Native State by a person domiciled therein is not inadmissible in evidence in a suit in British India by reason merely of its non-registration, as the Registration Act has no application to documents executed outside British India. [p. 986, col. 2.]

Appeal against the decrees of the District Court, Kistna, at Masulipatam, in Original Suits Nos. 50 and 45 of 1895.

Messrs. *K. Srinivasa Aiyengar, P. Somasundaram* and *P. Narayanamurthi*, for the Appellants.

The Hon'ble The Advocate-General, Messrs. *V. Lakshminarayana, K. Koti Reddi*, Hon'ble Mr. *T. Rangachariar*, Messrs. *S. Varadachariar, A. Krishnaswami Iyer* and *O. Rama Rao*, for the Respondents in Appeal Suit No. 426 of 1914.

JUDGMENT.

WALLIS, C. J.—These are appeals from decrees in two suits which were tried together and disposed of by one judgment, Original Suit No. 30 of 1893 and Original Suit No. 38 of 1895, in the Subordinate Court of Ellore, re-numbered Original Suits Nos. 45 and 56 of 1895 in the District Court of Kistna.

In the first suit the plaintiffs sued at first as members of an undivided family to recover the Zemindari of Munagala from the 1st defendant, the Court of Wards, and the 2nd defendant, the alleged adopted son of the daughter of the last male owner, who died in 1854, on the ground that they had wrongfully taken possession of it on the death of the daughter in 1892. At a late stage, they filed an additional written statement in which they claimed, no doubt with reference to the plea of limitation, not as members of an undivided family, but on the footing that the joint family had become divided in status, and that in law all the family properties including this had been all along in their possession as tenants-in-common.

The other suit for practically the same reliefs was filed by the members of the family who claimed to be the next reversioners if the estate was impartible. For some reason which is not explained, possibly because of deaths among the parties and delay in bringing in the legal representatives, these suits were not disposed of by the District Court until March and April 1904, when the then District Judge dismissed the first suit without trial on the ground that the plaintiffs had entirely altered their cause of action in the additional written statement, and the second suit because the plaintiff had already claimed the same relief in the other suit. The judgments of the District Judge in the two suits were set aside and the suits remanded by the High Court, by orders of December 1909. Both suits were then tried and disposed of by Mr. F. A. Coleridge, District Judge of Kistna, by a common judgment on the 14th April 1914, more than twenty years after the filing of the first suit, and the appeals came on for hearing before us nearly five years after that judgment. The only explanation for these lamentable and almost unprecedented delays at every stage appears to be that many parties died and much time was taken in bringing in their legal representatives and serving them.

The District Judge tried the case very carefully and dealt fully with the various questions which arise in a very lengthy judgment which might, as he explains, have been shorter if he had not been writing against time so as to dispose of the case himself instead of leaving it to his successor. He has shown, in a careful examination of the evidence, that the plaintiffs have endeavoured to support their case by a number of spurious documents manufactured for the purposes of the case, and I may say at once that his conclusions in this respect have not

been disturbed by the arguments addressed to us. I do not, therefore, propose to go over this ground again.

There are three important issues in the case, whether the estate is impartible, whether the 2nd defendant was duly adopted by the daughter of the last Zemindar, and whether the suit is barred by limitation. The District Judge has found on all these points for the defendants and has accordingly dismissed the suits.

The District of Kistna, in which Munagala is situated, forms part of the Northern Circars, which was at first under the Hindu Rajas, and then formed part of the Kingdom of Golconda which was conquered by Aurungzeb at the close of the seventeenth century. Subsequently, the Circars were included in the Subah of the Deccan and were governed by the Nizam until the middle of the eighteenth century, when they passed for a time into the hands of the French. Then, after Col. Forde's successful operations, Lord Clive obtained a Sanad from the Imperial Court at Delhi assigning them to the East India Company

Mr. James Grant, in his Political Survey of the Northern Circars, which was submitted to Warren Hastings in 1784 and is re printed as an appendix to the Fifth Report, Volume III, page 1 of the new Calcutta Edition, gives a full account of the condition of the country from the time of the Golconda dynasty which was overthrown by Aurangzeb in 1687. There is no reason to doubt that at the time the District or Pergunah of Munagala was in the possession of the last survivor of a very ancient Reddi family who held it as Deshmuk or Chaudhari under the ruling power. Mr. Grant's view as to the position of these Deshmuks and Chowdaris is very similar to that taken by Mr. Stirling in 1821 in his report on Cuttack on which the Privy Council based their judgment in *Rama Kanta Das Mahapatra* v. *Shamanand Das Mahapatra* (1). They were generally in the position of renters who, in consideration of the revenue, military and police services, were allowed certain *Satarum* or rent free lands in different parts of the district together with a fixed share of the collections. Sometimes the hereditary renter might be the head of a once ruling family, and, even when he was not, the office tended to become hereditary in the family of the holder, but the tenure was liable to be put an end to by the ruling power. The fact that the office was hereditary and held for some generations by the senior member of the family was held insufficient in the case last mentioned to prove a special custom of impartibility among the descendants of the holder with whom the British Government effected a settlement, so as to derogate from the statutory rule that, in the absence of custom, the estate was to be descendible according to the ordinary rules of inheritance.

Their Lordships observed: "They show, indeed, that the office of Chowdhari was held for many generations by a member of the family and that to the holder of that office certain lands were assigned as a part of his remuneration. But the grant was of an office only, and to an individual, to be held during good behaviour. It was clearly revocable at the pleasure of the sovereign, by whom it might be conferred, not merely on the eldest son, but upon any member of the family, or, indeed, on anybody. In the nature of things, the office could only be held by one person at a time, and, as Mr. Stirling points out, such offices were "generally heritable;" but these considerations, though they may suggest a presumption, are not sufficient to establish a right. For this purpose the evidence must be clear and unambiguous, which, in this case, it is not. Besides, it is hard to see how a family custom of succession to an estate not absolutely owned by the family could ever have existed." *Rama Kanta Das Mahapatra* v. *Shamanand Das Mahapatra* (1).

This decision, which was based on the facts of the particular case, must, however, be applied with caution, because a decision of this Court based on very similar grounds as regards the Zemindari of Devarakota, which is also in the Kistna District, was reversed by the Privy Council in *Mallikarjuna* v. *Durga* (2). Their Lordships considered it unnecessary to go back further than 1766, the date of the cession to the East

(1) 1 Ind. Cas. 754; 36 C. 590; 6 A. L. J. 364; 13 C. W. N. 581; 9 C. L. J. 497; 11 Bom. L. R. 530; 19 M. L. J. 239; 36 I. A. 49; 6 M. L. T. 81 (P. C.).

(2) 13 M. 406; 17 I. A 134; 5 Sar. P. C. J. 547; 4 Ind. Dec. (N. s.) 995.

India Company. They referred to the fact that before the Permanent Settlement the rights of the Zamindar had been recognised by the Company as opposed to the view of the High Court that changes of possession of the Zamindari were simply acts of administration, and, later in their judgment, they laid stress on the fact that the permanent Sanad issued under Regulation XXV of 1802 was a recognition of such hereditary right.

They said that Ankadu, the grantee, "thus acquired a permanent property in the land at a fixed assessment, but there was no grant of the land, and the rule of succession to it was not altered. The Estate remained entire, and there is no evidence of any intention of the Government to alter the nature of the tenure." In effect, they held that, even before the Permanent Settlement, the Zemindars had an hereditary estate to which the custom of succession by primogeniture could and did attach.

From 1766 the proprietary right of the Zemindar of Munagala does not seem to have been questioned. The name of Keesara Lutchey is to be found in the list of Zamindars in the Northern Circars in the Minutes of Consultation of the Government of Fort Saint George for 1766, Exhibit X. The Company, no doubt, dealt with her as the mother and guardian of the minor, Keesara Venkataramanah, the fourth Zemindar, in the pedigree A-1, to whom the Cowle, Exhibit D, was granted. The fact that the Company at the outset dealt with the mother of the minor as head of the family is a strong evidence both of their recognition of his proprietary interests and of the custom of impartibility in the family. Exhibit D 1, dated 12th April 1771, was granted in 1771 by the Governor of Fort Saint George fixing the assessment for three years for the Pergunah of Munagala then in his possession. In Exhibit X (*a*), which is an extract from the Minutes of Consultation of 31th August 1774, he is included in a list of Zamindars with whom tribute had been settled. Exhibit A is a pedigree of the "Keesarvar family of Moonagalah Pargunah" presented to Government at the time of the Permanent Settlement. Venkata Narasimah, aged 44, is shown as the "present Desmook." Exhibit XII, dated 21st January 1803, is a letter from the Collector reporting his death and stating that he had left a son, Kodandaramiah, "to whose succession to his father's estate I perceive no objection." The letter referred to the receipt of a permanent Cowle or Sanad for delivery to the Munagala Zamindar, and reported the Zamindar's death in order that the necessary alteration might be made. The son's name was accordingly substituted in the permanent Sanad, Exhibit XI, which recognised him as Zamindar and authorised him "to hold in perpetuity to your heirs, successors and assigns at the permanent assessment herein named the Zamindari of Moonagalah." As observed in the Devarakota case, there was no fresh grant but the proprietary right of the Zamindar was recognised and confirmed at a fixed assessment. In my opinion, in this, as in the Devarakota case, there was before the Permanent Settlement an hereditary property in this Zamindari to which the custom of primogeniture could attach, and I think that on this ground the case is distinguishable from the more recent decision in *Rama Kanta Das Mahapatra* v. *Shamanand Das Mahapatra* (1). If it were to be held that, prior to the Permanent Settlement, the Zamindars were only Deshmuks with no proprietary interest in the Zamindari and that the Sanad bestowed the Zamindari as private property on Kodandaramiah and his heirs descendible according to the ordinary rules of succession and, therefore, partible, this would be fatal to the claims of the plaintiffs who are not descended from him but claim as his collaterals. In that case the Zamindari was his self acquisition, and the 2nd defendant, if his adoption be proved, would be entitled to succeed as daughter's son of the last male owner. On the other hand, if the Sanad only confirmed a previously existing proprietary interest, then it must be held, on the authority of *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (3), that the Sanad enured for the benefit of the family according to their interests, and did not deprive them of a right of partition if the estate was joint and partible. There is no reason to doubt that in the seven-

(3) 13 M. I. A. 333; 13 W. R. P. C. 21; 20 E. R. 571; 2 Suth. P. C. J. 302; 2 Sar. P. C. J. 546

teenth century Munagala was held by the head for the time being of an ancient family as Deshmook or Chaudhari under the Golconda kings, and it may possibly be that the family itself was descended from former rulers. According to the tradition, which there is no reason to doubt, on the death of the last of the Reddis shortly before 1693 his widowed daughter-in-law secured it for her own family known as the Keesara family to which the parties belong. Exhibit IX of the year 1693, not 1725 as the District Judge supposed, is a written summons in Persian and Telugu. The Persian part bears the seal of the servant of the Emperor Aurangzeb or Alamgir (the name appears in the Telugu portion as Buda Chidanand) and calls on Keesara Mukund, the common ancestor of the parties, as Zemindar, to present himself with an armed force. The Telugu part is to the same effect but states that the Sardar is coming to punish the rebel Asway Row. This document appears to prove that Mukund was the recognised Zemindar of the District in 1693. According to the plaintiffs he was the second of the three brothers to whom their sister, the widowed daughter-in-law of the last Reddi, transferred half the Zemindari in 1690. The other half, they state, had been alienated by the last Reddi himself in 1684 and was bought back by the three brothers in 1705. The Zemindari was thus the joint acquisition of the three brothers and always remained joint family property. The originals of these deeds are not forthcoming but Exhibit BB series, a list of useful documents connected with the estate in the possession of the Court of Wards in 1893, includes such documents which are not now forthcoming. As secondary evidence, the plaintiffs produced from the Oriental Manuscripts Library a book of transcriptions from manuscripts deposited in the collection which included these three documents and also an incomplete *kyfiat*, Exhibit C3, forwarding them to some authority, probably the Collector as agent of the Court of Wards. The contents show that the *kyfiat*, if genuine, was written between 1816, when an *amin* was put in possession of the estate, and 1818, when it was handed over to the ward on his attaining majority. The District Judge was under the impression that the manuscripts copied into his book came from the well-known Mackenzie collection, but this is negatived by the date. Colonel Mackenzie, as appears from the introduction to the printed catalogue of his manuscripts in Madras, left the Northern Circars where he had collected manuscripts in 1807. He afterwards served in the expedition to Java, and made the collections there which are now in the India Office. He did not return to the Circars, and cannot have collected these documents. It has, therefore, not been explained how the copies which were transcribed into the book produced got into the Oriental Manuscripts Library here. Exhibit C of the year 1687 purports to be a transfer by the last Reddi of half of his Chaudhari Mirasi of the Munagala Pergunah for pags. 500 and provides that the transferees Siddalooru Venganna and Ramanna and their posterity are to discharge in perpetuity the office of Chaudhari. It appears that in the Bombay Presidency lands attached as endowments to offices and the offices themselves were often the subject of transfer, see *Adrishappa* v. *Gurushidappa* (4), but it is not shown that it was so on this side of India, where the general rule is that both the offices and the endowments are inalienable. It is not suggested that the transferees got into office under this grant. Exhibit IX shows that Mukunda was the Zemindar in 1693 and Exhibit C, on which the plaintiffs rely, is a copy of a deed of gift of 1690 by the daughter-in-law reciting that the Desaigiriship was in her enjoyment and transferring it to her three brothers, Keesara Peddi Reddi, Keesara Mukunda and Royappah.

It is not easy to reconcile this with the summons of 1693, Exhibit IX, which shows that the second of the three brothers was the recognised Zemindar although, according to C-2, the eldest brother Peddi Reddi survived until 1705. C-2 which is dated in that year purports to be a transfer by the representatives of Siddalooru Venganna and Ramanna to the three brothers, Peddi Reddi, Mukunda and Royappah, of the share of the Chaudhariship of Munagala which Venganna and Ramanna had purchased, not as in C-1 from the last

(4) 4 B. 494 (P.C.); 7 I. A. 162; 4 Sar. P. C. J. 154; 3 Suth. P. C. J. 757; 4 Ind. Jur. 421; 3 Shome L. R. 208; 7 C. L. R. 1; 2 Ind. Dec. (N. S.) 838.

Reddi, but from Nagappa Garu and another who, according to this deed, possessed a share in the Chaudhariship. According to the statement in the *kyfiat* Exhibit C-3 the Siddalooru family, not only never enjoyed the office but were expelled from the country for adhering to rebels and were living in exile at Conjeevaram, near Madras, when the three brothers, one of them the recognised Zemindar, arranged to pay Pagodas 2,000 for their unsubstantial rights and sent this sum to them in exile at Conjeevaram. It seems an extraordinary story, and I am not prepared to place much reliance on these documents which are first heard of in connection with a dispute between the Court of Wards and the family, between the years 1816 and 1818, as evidence that the Zemindari became the joint family property of the three brothers. It is wrothy of observation that all the pedigrees begin with Mukunda and do not include the name of his alleged brothers, Peddi Reddi and Royappah.

As to the custom of impartibility in this family, I agree with the District Judge that it is established by the evidence. The pedigree, Exhibit A, appended to the Collector's Report of 1824, Exhibit F, shows that the succession was according to the custom of primogeniture, the names of the successive Zemindars or Deshmooks being inserted in circles marked yellow to distinguish them from the other members of the family. As I have already pointed out, in 1786 the Company dealt with Lutchey, the mother of the minor Zemindar, and this is also evidence of recognition of the custom. Exhibit XII shows that at the death of Venkatanarasimha in 1803 his brother Booloka was alive, and it may be gathered from the letter that he did not claim as the eldest member of the joint family, that the permanent Sanad should be in his name but was willing to superintend the conduct of his young nephew Kodandaramiah to whom the Sannad was given.

Kodandaramiah died in 1814, and the estate was taken charge of by the Court of Wards under Regulation V of 1804 without objection, which had no authority to take charge unless the estate belonged to the minor. Exhibit XIII reports that the surviving cousin of the deceased declared the minor was the rightful inheritor and that his rights were fully acknowledged by the cousin of the deceased. Exhibit XIII (*a*) contains a pedigree (torn) and a statement taken from them. With reference to Kodandaramiah, the Istimrar Zemindar, the pedigree states that, although he was younger than his four uncles, the Sanad was bestowed upon him according to the former usage of their Samasthanam. This is the clearest recognition of impartibility. The statement says that, on his death-bed, Kodandaramiah commended the junior members to obey Venkataramiah who was the eldest of his uncles and they stated that according to usage the Zemindari should be in the name of Kodandaramiah's minor son, and that "the right of the Zemindar should be vested in him," and they could manage for him. This was signed by Nos. 2, 17, 27 and 34 in the pedigree. The eldest Dayadi accepted the office of Manager under the Court of Wards but, beyond paying the Kists, failed to account for the collections. The Collector also reports that it was set up that the property in the Nizam's territories belonged to another branch of the family, and he vainly attempted to obtain particulars about it through the Resident at Hyderabad. All he could ascertain was that the Keesara family had for a very long time enjoyed the Russoms and Savarams of a Zemindari of 13 villages in the Cumbummet Havelly or Perganah under the title of Deshmook, Exhibit I (*b*), dated 7th October 1915. As he could not get the member of the family in the management to account, the Collector removed him from office and put in an *Amin*, Exhibit XIV (*b*), 4th June 1816. It was at this stage that the *kyfiat*, Exhibit C-3, if genuine, was submitted in which it is sought to lay a foundation for representing the property as belonging to the whole family and the documents C, C-1 and C-2 were put forward in support of this case, while, at the same time, it was not denied that the estate had been ruled by Mukundappa. There are numerous inaccurate statements in the document. It is clearly an incomplete copy of the original, if any, and is, in my opinion, open to considerable suspicion having regard to the time when it came into existence. The estate was handed back to the Zemindar with the outstanding balance on his attaining majority on 5th January

1818, Exhibit XIV (*c*) and the junior members do not seem to have taken any exception to this.

In 1824 the Collector of Kistna presented a report on the Zamindaris in his District and his report on this Zamindari is the strongest evidence in favour of the plaintiffs. It is based on the old pedigree in the office, no doubt, Exhibit A-3, the one put in connection with the permanent Sanad and a new one "recently furnished by the present Zamindar together with the required explanation." After repeating the story of the acquisition by Mukunda and his two brothers, "it states that it is in the enjoyment of the descendants of Mukundappa as the two persons died without issue. Vankatanarasimha Rao, the present Zamindar, is the sixth person from the said Mukundappa. Although there were second sons in every generation of this family, yet it appears that no division of the Taluq was ever made between them, but the profits derived from it were enjoyed by all reserving only to the head of their family the title of Deshmook or Zemindar." Having regard to the facts that no such claim as this was put forward in 1803 or again in 1814, and to the fact that the estate balance was handed over to the Zamindar on attaining his majority in 1818 I cannot help doubting whether this information was not supplied to the Collector by the junior members of the family rather than by the Zamindar. This suspicion is enhanced by what took place on his death in 1835. He adopted a boy on his death-bed and by his Will, Exhibit H 2, appointed the boy's natural father as his guardian. The Will directed him to continue to provide for the four families, the descendants of the Istimrar's uncles. Exhibit H-1 is an *arji* addressed by the Zamindar to the Collector in which he asked that the Zamindari should be placed in the management of the Court of Wards and enclosed a *bhootad* list or list of allowances to be paid which, in my opinion, included the payments to be made to the junior branches for maintenance. The list is not forthcoming but some particulars of it are to be found in Exhibit H. The report, Exhibit H-3, makes arrangements for the management and estimates that a balance will be available for the Zamindar on attaining majority. It does not appear that on this occasion the family put forward any such claims as are stated in Exhibit F. Exhibits X I and XVI (*a*) show the difficulties which arose, and that the boy's natural father was placed in management under Regulation V of 1804. The fact that, on the occasion of the minorities in 1814 and 1835, the Court of Wards took possession on behalf of the minor without objection from the members of the junior branches is strongly against the plaintiffs' case, because, if it was joint family property, the senior adult male would have been entitled to manage. When the minor came of age in 1849 he was necessarily under the influence of his natural father who belonged to one of the junior branches. The properties in the Nizam's Dominions had been outside the Court of Wards' jurisdiction during his long minority and disputes appear to have at once arisen about them. In these circumstances, he joined in Exhibit K which provided for the management both of the Zamindari and of the Hyderabad properties by the Zamindar and a member of one of the junior branches for a period of fifteen years on what I will take to be terms of equal sharing. Exhibit K was modified by certain other agreements during his lifetime. At the time of his death there were disputes about to be referred to arbitration and, as appears from Exhibit R, dated 29th January 1855, at the time of his death he was contending that the villages had been obtained from him by fraud, intimidation, and intrigue. Exhibit K was only for 15 years and the Zamindar died about five years after its execution. On his death in 1854 his widow was put in possession by the Revenue Authorities as next heiress, apparently according to the opinion of the *Pundits* that the nearest heir to the estate of a person divided from his co-heirs was his widow, Exhibit R, and set up an authority to adopt under a Will. One of the junior members then filed a suit to recover his one-tenth share of the estate treating it as partible. This was traversed in the re-joinder put in by the widow, the 1st defendant, which has been exhibited as Exhibit XIX. The widow entered into a *razinamah* with the junior branches which was embodied in a decree, Exhibit W, after

the objections of her mother-in-law, the 2nd defendant, had been overruled. The decree provided that the *Gnatis* should assent to the adoption by the widow pursuant to her husband's Will of Venkataraghava Rao, son of one of the *Gnatis*, that an annual allowance should be paid to each of the five branches and the balance of the collections should be deposited in Court on account, as I understand, of the Estate until the adopted boy attained majority.

It was argued before us that the impartibility of the Estate was acknowledged by this consent decree and that it barred the present suit. There would have been more force in this contention if the decree had directed that the balance should be deposited in Court on behalf of the minor until he attained majority. Possibly that was the provision in the original *razinamah* which is not forthcoming but it is by no means so clear in the consent decree. Whatever be the effect of the consent decree it did not, in my opinion, affect the possession which the widow had taken as heiress of her husband.

The boy who claimed to have been taken in adoption sued the widow to recover possession of the Zemindari in Original Suit No. 2 of 1863 in the District Court of Guntur. The widow died in the same year and her daughter, the alleged adoptive mother of the 2nd defendant in this suit, was brought on the record in place of the widow and also took possession of the Zemindari which she enjoyed till her death in 1892, the boy's suit having been finally dismissed by this Court on 3rd August 1872, Exhibit A X.

Now, the succession of the widow of the late Zemindar and of her daughter after her was a clear denial of the claim of the junior branches that the estate was either joint family property or owned by the family as tenants in common. The possession of the daughter from 1868 onwards was, in my opinion, clearly adverse to the claim of the junior branches that it was joint family property. Their case now is that the different branches had become divided by the suit of 1857 or earlier, and, if this is so, they are not, in my opinion, governed by Article 127 which covers suits by a person excluded from joint family property to enforce a right to a share therein. This Article, in my opinion, applies to suits by one or more members of a joint family against other members to enforce a right to share therein against other co-parceners, and does not apply to a suit brought after partition by some members of the family against others when they have become tenants in-common and the exclusion is, therefore, not from joint family property within the meaning of the Article. Neither condition is to be found here. The suit is not against another member of the joint family but against the 2nd defendant claiming through his mother as heir to the last Zemindar, and the plaintiff does not now claim to be entitled to a partition as a member of a joint family, but as one of several tenants-in-common. If the suit can be regarded as brought by the plaintiff as the heir of one of the tenants-in-common against the 2nd and other defendants as heirs of the other tenants-in common, then the suit must be governed by the Article 144. In this view the possession of the Zemindar's daughter from 1868 to 1892 must, in my opinion, be regarded as adverse to and exclusive of the claims of the other branches of the family and adverse to them from the first within the meaning of Article 144. She did not enter as a tenant-in-common with the members of the junior branches, but as heiress to her father and entitled as such to succeed to the impartible Zemindari. The case of the junior branches from 1868 to 1882 was, not that the Zemindari was partible but that the succession went not to the widow and daughter of the late Zemindar but to the senior Dayadi, and it was only in 1882 that they altered their position and renewed the claim that the estate was partible, a position they varied during the course of the suit by alleging that it was not partible joint family property, but as property enjoyed after partition by the family as tenants-in-common. The 2nd defendant's mother did not enter as heiress to one of several tenants-in common but notoriously as heiress to her husband and her possession was never that of one tenant-in common holding on behalf of herself and the other tenants-in-common, but adverse from the first to the claims of the junior members as tenants-in common and none-the-less so because of irregular payments made to them for maintenance. Such payments in those days having regard

to the notions then prevailing in Southern India as to the nature of impartible Estates and the interests therein of the junior members of the family were attributable to their position as junior members of the family and quite consistent with the claim to hold the Estate as an impartible Zemindari adversely to the rest of the family. For the foregoing reasons, I see no reason to differ from the conclusion of the District Judge that the estate is impartible and that the suits for partition are barred by limitation. These findings do not, however, dispose of the case, because the plaintiff in the 2nd suit is the nearest Dayadi and the nearest heir of the late Zemindar if the 2nd defendants' adoption be not established, and he would be consequently entitled to succeed on the death of the Zemindar's daughter, if his rights have not become barred by limitation. Now, the rights of this plaintiff and the other members of the family as co-parceners or tenants-in-common or as preferential heirs to the Zemindar's widow and daughter have, in my opinion, become barred and extinguished under the Limitation Act, but the widow and daughter having taken as preferential heirs to the other members of the family I do not think the rights of the other members of the family to succeed on failure of the daughter's line have been affected. It is, therefore, necessary to consider whether the 2nd defendant's adoption is established. There is really no dispute about the factum of the adoption, and the only question is whether the authority to adopt is duly established. The first question which arises is, whether the provisions in section 17 of the Indian Registration Act which requires authorities to adopt not contained in a Will to be registered has any application to an authority to adopt given in Hyderabad outside British India by a subject of that State domiciled there. If not, such an authority is not a "document required by section 17 to be registered" within the meaning of section 49 of the Act, and is not affected by the provisions of that section. Now, the limits of legislative authority are territorial and the Indian Legislature in particular has authority to legislate only for British India and British subjects in Native States. *Prima facie*, therefore, its enactments are not to be construed to apply to acts done outside British India even by British subjects. The authorities on the subject of the territorial effect of Statutes are collected in the late Mr. Craie's Statute Law, 2nd Edition, pages 393—425, and I will only refer to *Cooke* v. *Charles A. Vogeler Co.* (5), *Dulaney* v. *Merry & Son* (6) and *Suffle* v. *Attorney General for Ireland* (7), where it was held that an Irish Statute enacting that, where one of the parties to a marriage was a Protestant, the marriage if celebrated in a particular manner, *viz*, "by a Popish priest" shall be null and void, had no application to the marriage so celebrated in Austria of a Protestant domiciled in Ireland. The Indian Legislature might, of course, enact that an authority to adopt, wherever and by whomsoever made, should not be recognised in India for any purpose unless it had been registered in British India pursuant to the provisions of the Indian Registration Act, and we should be bound to give effect to that provision, as effect was given in the *Sussex Peerage case* (8) to the provision of the Royal Marriage Act that no descendant of the body of George II should be capable of contracting matrimony without the previous consent of His Majesty, and that any marriage of any such descendant without such consent first had and obtained shall be null and void. There is, however, a strong presumption against attributing to it any such intention

The instruments of which registration is compulsory under the Act are enumerated in section 17, and the effects of failure to register are to be found in section 49. The documents which were required to be registered by the earliest Registration Acts all related to immoveable property, meaning, of course, immoveable property situated in British India; and it may be taken that the Legislature has sufficiently manifested its intention that none of the enumerated documents affecting immoveable property situated in British India should be valid unless so registered even if executed outside British India, as held

(5) (1901) A. C. 102; 70 L. J. Q. B. 181; 84 L. T. 10; 17 T. L. R. 153; 8 Manson 113.
(6) (1901) 1 Q. B. 536; 70 L. J. K. B 377; 84 L. T. 156; 49 W. R. 331; 8 Manson 152; 17 T. L. R. 253.
(7) (1912) A. C. 276; 81 L. J. P. C. 158; 106 L. T. 3; 28 T. L. R. 199.
(8) (1844) 11 Cl. & F. 85; 8 Jur. 793; 8 E. R. 1034; 65 R. R. 11.

in *Hicks* v. *Powell* (9), more especially as section 26 provides for the registration of such documents at any time within four months after their first arrival in British India.

Different considerations, however, apply to the provisions of section 17 (3), which were first enacted in 1871, that "authorities to adopt a son executed after the first day of January 1872 and not conferred by a Will, shall also be registered." That is a provision affecting status. The Indian Legislature has no authority to legislate as to the status of the subjects of Native States domiciled in such States and this provision cannot, in my opinion, on the well established rules of construction, be read as extending to an authority to adopt conferred in Hyderabad by a subject of that State domiciled there, whose only connection with British India was that his wife owned property there. Questions of the validity of adoptions made outside British India by persons who are not British subjects may arise in our Courts not only in connection with claims to succeed to immoveable property situated in British India but also in other ways too numerous to mention, and it would, in my opinion, be altogether opposed to the accepted canons of construction to attribute to the Indian Legislature, when it inserted in the Registration Act what is now section 17 (3), an intention to interfere in any way with a question of such adoptions which is a matter outside its competence. For these reasons, I am of opinion that the provisions of the Indian Registration Act did not apply to the authority to adopt the 2nd defendant, and that it is unnecessary to consider the further question whether these provisions were in fact complied with.

On the supposition that they were applicable, much manifestly false evidence has been adduced on behalf of the plaintiffs to show that the authority to adopt was taken to Masulipatam and shown to the Collector shortly after its execution, as well as some not very satisfactory evidence on behalf of the 2nd defendant which the District Judge has accepted, that, though the donee of the authority resided almost continuously in British India after her husband's death, the authority to adopt remained in the Nizam's dominions until shortly before the Registration proceedings. I do not consider it necessary to decide this question or the questions as to the construction of the Registration Act which arise, if it be held applicable to this authority to adopt. As regards these questions of construction, I am inclined to agree with the conclusions of my learned brother whose judgment I have had the advantage of reading.

I also agree with my learned brother, for the reasons given by him, that there is no sufficient reason for differing from the findings of the District Judge that the authority was in fact given and the adoption in fact made.

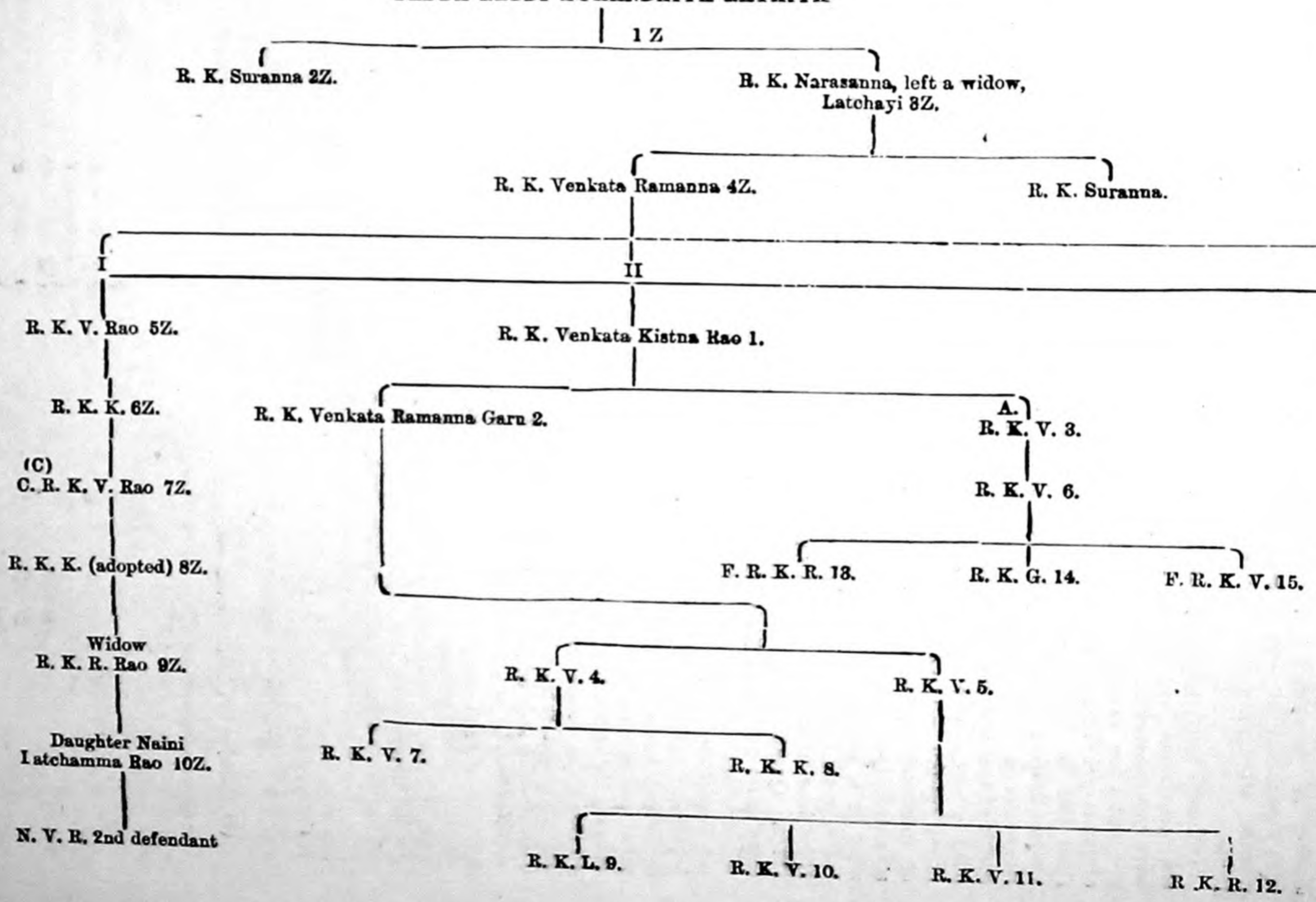
The appeals are dismissed with costs. The case is one of great complexity and, under rule 41 of the Appellate Side Rules, we grant a special fee of Rs. 3,000 to cover the Vakil's fees in both suits.

SADASIVA AIYAR, J.—Appeal No. 426 is against the decree in Original Suit No. 56 of 1895 on the file of the District Court, of Kistna, sitting at Masulipatam. The connected Appeal No. 427 is against the decree passed in the earlier suit Original Suit No. 30 of 1893, filed in the Subordinate Judge's Court of Ellore, but transferred to the file of the District Court above mentioned in 1895.

(9) (1869) 4 Ch. 741; 17 W. R. 449.

GENEALOGICAL TREE OF THE KEESARA FAMILY, ZEMINDARS OF MUNAGALA ESTATE.

O. S. No. 45 of 1895 on the file of the District Court, Kistna.



III

R. K. Bhuloka Rao, 16.

R. K. Ramachandriah, 17.

D
R. K. N. 18.

. K. V. 21.

R. K. R. 19.

R. K. B. 20.

R. K. Venkatanarasimha Rao, 24.

R. K. V. 22.

R. K. V. 23.

R. K. R. 1st plaintiff, 25, (dead).

IV

R. K. Venkatagopala Rao, 26.

R. K. Narasimha Rao, 27.

R. K. V. 29.

R. K. V. 31.

R. K. R. 28.

R. K. V. 30.

R. K. V. 2nd plaintiff, 32,

R. K. L. 3rd plaintiff, 33.

V

R. K. Venkatachalamiah, 34.

R. K. V. 35.

B
R. K. V. 36.

R. K. K. 37.

R. K. V. 38.

R. K. V. 39.

R. K. L. 4th plaintiff (dead), 40.

R. K. V. 41.

R. K. V. 3rd defendant (dead), 48.

R. V. R. 10th plaintiff, 43.

R. K. V. 44.

R. K. S. 13th plaintiff (dead), 45.

R. K. V. 4th defendant 57.

R. K. C. 5th defendant 58.

R. K. V. 14th plaintiff, 52.

R. K. L. 15th plaintiff (dead), 52 (*b*).

V. 6th defendant, 57 (*a*).

R. K. V. 5th plaintiff, 46.

R. K. C. 9th plaintiff, 47.

V. 56.

R. K. N. 6th plaintiff, 53.

R. K. V. 7th plaintiff, 54.

R. K. V. 8th plaintiff, 55.

P. (minor), 16th plaintiff, 59.

R. K. V. 11th plaintiff, 49.

R. K. M. 12th plaintiff, 50.

K. 51.

The earlier suit No. 30 of 1893 was filed in November 1893 and the plaint is dated November 1893 and this earlier suit will be treated as the more important suit and the several parties will be referred to in this judgment by the numbers given to them in the pleadings in this suit as far as possible.

The suit has taken 25-1/2 years from its inception before it could be decided by this Court. The delay has been extraordinary even for a heavy Indian Zemindari litigation in which great delay seems to be accepted as normal. The history of the suits up to April 1914 is given in paragraph 227 of the District Court's judgment. The suit was brought by 13 plaintiffs belonging to the Keesara family residing at Sirapuram in the borders of the Kistna District adjoining Hyderabad territory against five defendants. The 1st defendant was the Court of Wards who have since gone out of the record owing to the 2nd defendant for whom they managed the suit property, namely, the Munagala Zemin Estate, having become a major during the pendency of this litigation. The 2nd defendant is the Zemindar residing at Nadigudam near Sirapuram where the plaintiffs live. The defendants Nos. 3 to 5, (4th and 5th defendants being the sons of the 3rd defendant) are three other members of the Keesara family who were arrayed as defendants because they refused to join the 13 plaintiffs in bringing this suit.

It will be seen that the 2nd defendant is the principal defendant in the suit and may be shortly called the defendant. As might be expected, some of the plaintiffs, namely, plaintiffs Nos. 1, 4, 6 and 7 have died during these 26 years and three additional plaintiffs (Nos. 14 to 16) came in afterwards. The suit, shortly stated, was for recovery of possession of the Munagala Zemindari from the defendant. The suit was dismissed and the plaintiffs are the appellants before us. To understand the main allegations of the plaintiffs on which they based their claim, the following genealogical table and certain indisputable facts might be referred to here.

It will be seen from the genealogical tree (containing more than 60 names) that 10 persons (excluding the defendant) of whom 8 are males and 2 are females, have been marked and numbered separately (with red ink lined circles round the numbers). These have been recogised as the Zemindars and the Zimindarnees of Munagala entitled to be addressed as "Rajagaru" and "Zemindar" while the remaining 50 odd persons numbered separately were treated as entitled to maintenance allowance called "*Bhootad*." The fourth Raja (V. Ramanna) had five sons the eldest of whom was the fifth Rajah, his four younger brothers being Nos 1, 16, 26 and 34 in the genealogical tree. It will be seen that the dignity and status of Rajah or Zemindar was held only by a single member of this Keesara family from the time of the earliest ancestor Mukundappa and that it descended in lineal primogeniture till the 2nd Kothandaramiah (Rajah No. 8). Then it descended to his widow the 9th Rajah Rukkamma Row and then to the 10th Rajahgaru who was his daughter Latchamma Row. Exhibit A-1, a pedigree of the Keesara family prepared in 1824 and obtained from the Masulipatam Collector's Cutcherry, is a genealogical tree which shows the first seven Zemindars marking them Nos. 1 to 7, the numerical figures being enclosed in yellow line circles. The 3rd Rajah was, no doubt, the younger brother of the second Rajah, but the 2nd Rajah's senior line became extinct and so the 3rd Rajah came in. The 4th, 5th, 6th and 7th Rajahs came in as belonging to the eldest line though the 4th had a younger brother, the 5th had four younger brothers, the 6th had four uncles and the 7th had several seniors in age in the junior four branches when they respectively succeeded to the Pergana Estate.

[His Lordship here examines the history of the Zemindari from the time of the first Rajah and states his conclusion as to the nature of the estate as follows :—]

On the 6th August 1835, the 7th Rajah made his Will, Exhibit H-2, in favour of his adopted son, Kothandaramiah No. 2, the 8th Zemindar as follows :—

[His Lordship after setting out the terms of the Will, proceeded as to the Rajahs' minority.]

He, therefore, attained his majority on some day between 7th August 1848 and 5th August 1849. On the 14th April 1849, the Rajah as the second signatory and nine other persons belonging to the Keesara family executed the Samakhya (agreement) Exhibit K, in the presence of the Taluk Tashildar.

[Here his Lordship sets out the circumstances leading up to the execution of Exhibit K.]

Now, let us see what the arrangement itself

is. It clubs the Munagala Zemindari, consisting of about 38 villages, situated within the Company's jurisdiction with three small Taluks containing about 11 villages in the Nizam's dominions belonging to the Keesara family. The income from the British Indian villages was then about Rs. 10,000 annually, whereas the income from the Native State villages seems to have been about Rs. 600 to Rs. 800. (See Exhibits XXIV (*c*) and XXXI and the evidence of D. W. No. 15). The document, Exhibit K, says that the management of the total income for the 15 years between 1st July 1849 and 1st July 1864 should be as follows :—

(1) From the 1st July 1849 to 1st July 1854 the Rajah Zemindar Kothandaramiah of Munagala and Venkatakrishniah of the 3rd branch (No. 15 in the genealogical tree) were to manage the joint income ;

(2) From the 1st July 1854 to 1st July 1859 the Rajah Kothandaramiah and one other man to be selected from six of the signatories to manage ; and

(3) From 1st July 1859 to 30th June 1864 the Zemindar Kothandaramiah again and one person to be selected by the three remaining signatories of Exhibit K. to manage the total income. The document provides that all debts incurred till then should be accepted as payable by these three sets of two managers in each set (the Zemindar being always one of the two managers) so that the Sowcar was quite safe. Rs. 2,750 was to be set apart for the maintenance of the five branches of the family at Rs. 550 for each branch. Nothing is said as to what was to become after the expiry of the 15 years' term, but evidently the parties thought that within that period, the debts of the Sowcar would be wiped out.

Disputes seem to have arisen at once and then the young Zemindar seems to have agreed to allow the four branches each to enjoy one or two villages for *Bhootad*, the income of each set of villages being estimated to amount approximately to Rs. 550 (see Exhibits M, M-2 and M-4).

* * * * *

While these disputes were going on this 8th Zemindar Kothandaramiah No. 2 died on the 22nd November 1854 (see Exhibit R-1). Then the Collector wrote Exhibit R. to the Commissioner for Northern Circars. I shall extract the following passages :—"It appears that Gopamma, the mother of the late Zemindar, and Rukkamma, his widow, aged respectively 45 and 21 years, are at peace with one another and willing and *able to manage the estate* with the assistance of such male members of the family and old servants as have been all along in their interest..... The only off-spring of the deceased Zemindar is a daughter reported to be five years old .....With regard to the debts of the estate it appears that the late Zemindar had in his lifetime made arrangements with Gonaguntala Seetaya, a Sowcar of Joggayyapet, by making over to him the usufruct of certain villages both for the liquidation of the debt and for the annual payment of the whole *peishcush* of the estate."

"With regard to the estate itself, I see no objection to its release from attachment and return of the several villages to those parties under whose enjoyment they were at the time of the death of the late Zemindar, that portion which was in the hands of the late Zemindar being given up to the mother and widow."

"*The opinion of the Pandits of the Sudder Adalet appears to decide that under the Hindu Law the estate of a person divided from his co-heirs who dies leaving no male heirs devolve first upon his widow and then upon his daughter.*" This was in January 1855, evidently in accordance with the above opinion of *Pandits* and treating the Munagala Zemindari as impartible estate which belonged to Kothandaramiah No. 2 who was divided in interest from the other four branches of the family (see the decision of the Privy Council in *Tara Kumari* v. *Chaturbhuj Narayan Singh* (10) the estate was put into the possession of Rukkamma, the widow of Kothandaramiah, in 1855 itself. Thereupon the members of the other four families seem to have brought five suits, Original Suits Nos. 5 to 9 of 1857. We have got some of the records (Exhibits B, XIX, W, and W-1) in two of these suits. Exhibit B. is the plaint in Original Suit No. 9 of 1857. The plaintiffs in that suit belong to one sub-branch out of the two sub branches of one of the five main branches of the family. In the plaint it is alleged that the Nizam's dominion villages are in the enjoyment of the four branches alone and not of the senior branch in whose name the Munagala Zemindari

(10) 30 Ind. Cas. 833; 42 C. 1179 (P. C.); 29 M. L. J. 371; 19 C. W. N. 1119; 18 M. L. T. 228; 2 L. W. 843; 13 A. L. J. 1034; 17 Bom. L. R. 1012; 22 C. L. J. 498; (1915) M. W. N. 717; 42 I. A. 192.

proprietorship is registered. The plaintiffs sue *for their* one tenth share in the 33 villages yielding an income of about Rs. 13,500 gross and Rs. 9,000 net. The last sentence in the plaint says that even as regards the one-fifth share of the senior branch, the plaintiffs and the other members of the other four families are the next *reversioners* as the senior line became extinct for want of male issue. (The widow Rukkamma is impliedly acknowledged to be the widow of a divided member entitled to inherit his estate). In Exhibit XIX, Rukkamma Rao gave a "re-joinder" written statement in which she denied that the other four branches had any share in the proprietorship of the Munagala Zamindari and stated that the other four branches had admitted long ago before the Collector that they were entitled only to *Bhcotad* (maintenance allowances), that the plaintiffs and others have acknowledged that they were living separately, that "when my husband has executed a Will in accordance with the Hindu Law kinsmen who are not entitled have no right to say that it is contrary to law," that the words "Rajah" and "Zamindar" apply only to the "Rajah who is exercising overlordship" and that the plaintiffs owing to lack of such ownership cannot get the titles of Rajah and Zemindar. In fact, the divided status was clearly admitted by both sides and the only question was whether the estate of Munagala was a partible estate or an impartible estate. Then, the widow who had in the meanwhile pretended to have adopted a boy, one of her husband's cousins, compromised all the suits, the principal terms of that compromise being recited in the judgment, Exhibit W., dated March 1858. The terms are that though the other four families were receiving only each Rs. 400 for their "maintenance allowance" till then (the Rs. 550 mentioned in Exhibit K. had been reduced to Rs. 400 under Exhibit T. Series in 1857), it was agreed that the Rs. 400 should be increased to Rs. 500, that the plaintiffs in Suit No. 7 of 1857 (representing one of the two sub-branches of one of the five families) was entitled to Rs. 250 maintenance accordingly, that the widow should spend Rs. 50) for the maintenance of her own first branch, that she should meet the other usual expenses including festivals of deities, establishment charges and so on and that she *should deposit the savings* "till the age of 18 years comes to the adopted son" to the credit of Munagala Purgana. the The original *razinamah* itself is not before us. The recital of the terms in paragraph 5 of Exhibit W., leaves it rather obscure as to whether the other four families had any share in the proprietorship of the Zamindari though the maintenance allowances of each of the branches, namely, Rs. 500, was the same amount as that which the widow Rukkamma herself was to take out of the income for maintenance of the senior branch. The provision, however, that the savings should all be with her till her alleged adopted son attains the age of 18 years and that the whole management of the Zemindari should remain with her seems to negative the idea that the other four divided branches had any claim on those savings or any claim in the Purgana except that of obtaining maintenance out of his income. It seems to follow that they had no proprietorship in the Zemindari though they might have been co-sharers in the sense in which before *Sartaj Kuari* v. *Deoraj Kuari* (11) persons entitled by custom to maintenance allowance from a Zamindari estate as being descended in the junior lines from the common ancestor were loosely talked of as co-sharers though there was really no co-parcenary in the strict sense and no right to claim partition. The other four branches thus did not press their claim to a division of the Zamindari and abandoned their claim to recover past mesne profits which they were entitled to get if they were really proprietary divided co sharers with Rukkamma and her husband (see prayer in Exhibit B., the plaint in which such a claim for mesne profits is made) In the compromise, shares in the savings out of the whole income which may be received by the widow Rukkamma till the alleged adopted son attained majority are not expressly recognised or reserved in favour of the four divided branches. The reasonable construction of the compromise transaction seems to be that the members of the other four divided branches admitted the Munagala Zamindari to be a separate and (not a joint) impartible estate which had descended to the widow of (and then to the son alleged to have been adopted by her to) the previous Zemindar Kothandaramiah. The fact that

(11) 10 A. 272; 15 I. A. 51; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. 182 (P. C.).

the full proprietorship was exercised by Rukkamma Rao at once is shown by Exhibit 3 and 3-A, she as Zemindarni, having taken steps to dispossess her husband's *Gnatis* (who were enjoying some of the lands as *ryots* in the estate) of their *ryoti* land for their non-payment of the rent of *Oist* due to her as Zemindarni. (One of the plaintiffs as plaintiff's witness admits that she dispossessed them for two years).

After this compromise in 1858, Rukkamma Rao treated the estate as her own exclusive property though her husband's divided kinsmen went on intriguing against her. This is what one usually expects where a widow succeeds to an impartible estate and male agnates of her husband are alive. Exhibit XXI shows that in 1865 she published notices in the District Gazette that her husband's *Gnatis* were trying to cause loss to her estate. Shortly before her death, on the 10th May 1868, she wrote letter Exhibit XXII to the District Collector accusing her husband's *Gnatis* of having poisoned her and stating that she has made over the Zemin estate belonging to her "according to Dharma Sastra" to her daughter Latchamma. It will be seen that she ignored the adoption referred to in Exhibit W. She seems to have died the very next day at 4 P. M. The alleged adopted son Venkata Raghava Rao, had filed Suit No. 2 of 1868 in the Civil Court, Guntur District, for recovering the Zemin right

* * * * *

The daughter Latchamma who became the 10th Rajagaru Zemindar having succeeded against the alleged adopted son of her mother by the judgment of the High Court, Exhibit XX, began to manage the estate very ably and gradually raised the income from about Rs. 10,000 to Rs. 50,000 or Rs 60,000.

* * * * *

Meanwhile, Latchamma Rao's husband who was himself a Deshmuki living at Thorur in the Nizam's Territory (about 100 miles distant from Nandigoodem) died on 15th May 1875. About a week before his death he went to a village called Vavilala (about 8 miles distant for his ancestral village of Thorur) for treatment by a native physician there. He had been suffering for about 18 months from rheumatism and rheumatic fever, and dropsical symptoms had set in accompanied by swellings in hands and legs. On the 10th May 1875 at Vavilala (his wife Latchamma being then at Thorur) he executed in her favour the deed of authority Exhibit XXV, attested by four witnesses including his own natural father of the Rapaka family (he having been himself adopted to the Nayini family) of the four attestors one is a Deshmuki and two are Disapandias or Karnams. The fourth is the executants *Purohit* and the writer is Seeniah whose brother was employed under him. On the 11th May 1875, he reported by Exhibit XXVII that he had given on the previous day authority to his wife to adopt. This report was sent to the Aval Taluqdar who corresponds in the Nizam's Dominions to the District Collector. Then he went back to Thorur where his wife was staying and reached the place at about 8 A. M. on the 15th May 1875 gave into her hands Exhibit XXV (the authority to adopt) and died the same day at about 12 noon.

* * * * *

It will be seen that, from the 11th May 1838, when Rukkamma Rao died till 1883 when she made this adoption Latchamma Rao had been enjoying the Munagala Zemindari as heir of her father and as an impartible undivided and separated Zemindari estate for more than 15 years. Her father's Keesara kinsmen could not enjoy peace of mind when a woman who had become by marriage a Nayini was enjoying the estate Though they had abandoned in 1858 their claim to treat it as partible as a "boneless" contention (see Exhibits W. and XX) they seem to have in February 1879 (just before 12 years elapsed from Latchamma's taking possession) tried to induce the Board of Revenue to dispossess Latchamma and give the Zemindari to them but they failed [see Exhibit VII (b)]. Then, in June 1880, (after she had enjoyed for 12 years) they sent the *arzee* Exhibit VII (c) to Government directly. Paragraph 8 of this petition admits that the Zemindari was acquired by a progenitor from the Nizam 200 years ago. (This shows that it is an ancient Zemindari.) In paragraph 13 they admitted that the family became divided, that the Munagala Zemindari should be 'governed' (that is, as if it was a chieftain's estate) by the "first family heir" and that maintenance should be given to the divided junior

members. Paragraphs 24 and 25 andthe 1st paragraph of 30 are as follow: "24. The reason why an ancient Zemindari cannot be partitioned is, that by partition it goes to pieces, becomes completely ruined, and for some reasons it will become destroyed or alienated, etc. That is, it means that a Zemindari is always an undivided estate." "25. While there are male members in the family of the propositus, and when it is clear that it cannot go to female issue or be alienated, the acting Collector of Kistna District by a mistake made over to her the right to the ancient Samasthanam (estate) which ought to belong to us. Therefore, the respect and name of our family became decreased and is destroyed."

"30. The said Latchamma by her acts commenced to cause loss to the estate. The act of giving three villages to a woman named Chinna Butchakka in the second family is one which is outside the scope of her power. Her strength lies in the advice of her servants. She is behaving in an improper manner but not in a virtuous manner. For these reasons we are entitled by 'Dharma Sastra' to obstruct her management and to attempt to remove her." The above seems to contain a clearer admission that this was an impartible estate, that Latchamma's father's *Gnatis* were all divided and that Latchamma had been strong enough to enjoy the property as exclusive heir of her father after her mother's death for more than 12 years notwithstanding that these people were trying to obstruct her management and attempting to remove her. They made a further attempt in 1882 by petitions [Exhibits VII (*d*) and (*e*)] to the Collector and the Board of Revenue to dispossess her."

It was in these petitions of 1882 that they set up for the first time after 1858 that the Zemindari was joint property, notwithstanding that they refer in paragraph 9 of Exhibit VII (*d*) to their former *arice* of 1850 which acknowledged the Zemindari to be a separate impartible estate. In fact, between the date of Exhibit VII (*c*) (June 1880) and the dates of Exhibit VII (*d*) and (*e*) (1882) they seem to have been advised to re assert their hopeless claim of 1857 which they had abandoned in 1858. In May 1852, Rajah Latchamma Rao wrote Exhibit KKK setting out all the facts and stating that from 1855 for 27 years she and her mother as heirs of her father had been in enjoyment (to the knowledge of her father's agnates) of the separate property of their father and that her father's agnates had not only no right at any time, but their alleged claims as co-sharers were hopelessly barred. The Collector in the same year 1882 sent to the plaintiffs the order Exhibit VIII (*f*) directing them to go to the Civil Court if they had any grievances and not to obstruct Latchmma Rao's enjoyment which had continued for 14 years. I shall, at this etage, give my conclusion on the two questions, namely, (*a*) whether the Munagala Zemindari was and is an impartible estate, (*b*) whether the plaintiffs' claim to treat it as a partible estate, in which they had rights as co-sharers became barred and when it so became barred. On the first question, numerous authorities were quoted on both sides. I do not think it necessary to consider them elaborately. It is, in my opinion, a question of fact to be decided on the whole of the evidence in each case. No one circumstance is conclusive. Whether it was an ancient Zemindari is one circumstance to be considered. Whether it was in the nature of a military tenure is another circumstance. Whether there had been a confiscation and re-grant whether the British Government divided the estate and re-granted the divided portions to strangers or to junior members, whether it had passed by sale or gift from the family which first held it to another family are all circumstances to be considered and the final conclusion must rest on the evidence taken as a whole. The course of descent for several generations in the line of primogeniture without partition notwithstanding that there were agnates of the reigning Zemindar belonging to junior branches, is, of course, the most important consideration though even that fact may not be taken as conclusive. The inner conviction of the members of the family as shown by their conduct and their declarations from time to time especially when there was no dispute is, of course, a very valuable test. When such declarations were made by the members of the junior branches against their own interests, they are, of course, of great value. What they tried to put forward when or after an actual

litigation had commenced is of very little value though their subsequent conduct in giving up "hopeless" contentions is of much value. In this case, I have come to the clear conclusion on the evidence as a whole that the District Judge's view based mainly on the important documentary evidence from 1687 to 1882 above set out is correct, namely, that the Munagala Zemindari has been always an impartible Zemindari which has come down in the descent of lineal primogeniture and that it was the separate property of Rukkamma's husband at his death. He had, no doubt, agreed in Exhibit K. that its profits should be mixed up with the relatively very small profits of the divided Hyderabad Deshmuk property belonging to himself and his agnate relations and be held in common for a period of 15 years from 1849 for the purpose of discharging debts incurred during his minority by his natural father and by his other agnates but the ownership of the Munagala Zamindari remained, however, vested in him separately, there being nothing in Exhibit K. which made that estate also partible or divisible property, the arrangement in Exhibit K. having been modified even in his lifetime and having ceased to have any force at his death, which took place long before the expiry of the 15 years' term mentioned in it. It was superseded at once by other arrangements by which the enjoyment of some villages was given to the four branches for their maintenance and the enjoyment of two villages was given to the Sowcar for clearing of his debts. By reason of the decision in Exhibit W. and W 1 and of the enjoyment of Rukkamma and Latchamma, the property became vested in them as heirs to the separate estate of Rukkamma's husband. The fact also that the Court of Wards came in first in 1814 and then again during Rukkamma's husband's minority is wholly against the alleged co-parcenary right of the agnates of the other four branches, the Court of Wards having no power to take possession of an estate if it was the property of an undivided family unless all its co parceners are disqualified by minority, etc., (see section 17 of Madras Act I of 1902, Court of Wards Act, which expressly enacts what was implied in the former Regulation V of 1804 and what was followed in practice by the Court of Wards even before Act I of 1902 was passed. The appointment of managers and guardians can be made under this Act only if the disqualified proprietor is the sole proprietor of the estate taken charge of or if all the co-parcenary proprietors were disqualified). The vague reference in Collector Robert's Report, Exhibit F, to enjoyment by all the branches (though the eldest in the senior branch alone is admitted even in it to be the sole Zemindar) and the reference in some other documents to a sort of co parcenary among the five branches are not, in my opinion, of much value as it is well known that, prior to the well known decision in *Sartaj Kuari* v. *Deoraj Kuari* (11) followed in the *Pittapore case* [*Venkata Surya Mahipati* v. *Court of Wards* (12)], there was an erroneous idea that, notwithstanding that an estate was impartible (and the agnates of the junior branches cannot, therefore, sue for partition), they could be called undivided co parceners and were so styled even in judicial pronouncements (see the way in which this contention about their right as co-parceners and co-sharers was stated as following from judgments of the Privy Council itself by the Allahabad High Court at page 277 of I. L. R. 10 Allahabad 272 [*Sartaj Kuari* v. *Deoraj Kuari* (11)] that Court styling the right of the junior branches to be "dormant co-ownership—see also 9 Madras Law Journal report of the *Pittapore case* [*Venkata Surya Mahipati* v. *Court of Wards* (12)], where it was definitely met and negatived by their Lordships both during the argument and in the judgment, notwithstanding that Mr. Mayne strenuously contended that at least the long course of Madras decisions which prohibited alienation by a Zamindar enjoying an impartible estate, the prohibition being based on the theory of "dormant co-ownership" in his agnates, may not be disturbed so far as Madras estates were concerned. Even if Exhibit F. be construed as an admission by Rukkamma's husband that the Munagala Zemindari was co-parcenary property, the facts that Rukkamma and her daughter inherited it asserting that it was Kothandaramiah's separate property and that they enjoyed it as such for 25 years continuously, their possession being statedly adverse and exclusive created a

(12) 9 M. L. J. Sup. 1; 1 Bom. L. R. 277; 22 M. 383, 3 C. W. N. 415; 7 Sar P. C. J. 481; 26 I. A. 83 (P. C.)/ 8 Ind. Dec. (N. S.) 276.

bar which destroyed the rights of her father's divided agnates and vested in Rukkamma and Latchamma prescriptive rights in the estate (see Freeman on Co-tenancy, sections 228 to 230). In *Meda Vengamma* v. *Mitta Chelamiah* (13) it was held that a Hindu widow could obtain by prescription a woman's estate in property as if it was the separate property of her husband, if the title she asserted (during the time when prescription was maturing) was the title of a widow holding the property as representative of her husband's estate see [also *Bapanayya* v. *Peddichalamaiya* (14)]. I am unable to accept the contention of the plaintiffs that the fact that Rajah Latchamma Rao and Rajah Rukkamma were paying them allowances (*Bhootad*—maintenance) in accordance with the decree Exhibit W. prevented the enjoyment of the ladies being adverse to their claims to be co-sharers thereof. (Nor do I think it necessary to notice the equally untenable contention on the defendant's side that because Latchamma Rao entered in her account books the said payments towards maintenance as presents, she prescribed for a higher estate than that of the daughter of a separate owner who had inherited as his heir). That even the plaintiffs in this case considered their case of partibility and co-parcenary difficult to sustain is shown by their setting up one of them to bring the second suit on the basis of the estate being a separate impartible estate and also by their unscrupulous law agents having created for them documents Exhibits G L series, GG series and entries in Exhibits A A 4 and A A 5. I generally concur with the reasons given by the learned District Judge in paragraphs 89, 95, the last sentence in paragraph 129 and in paragraphs 143 to 51 and I agree for those reasons in holding that these are false documents.

I shall now consider the Issues Nos 7 to 10 in this case which relate to the questions connected with the fact of the defendant's adoption by Latchamma and of the authority to adopt alleged to have been given to Latchamma by her husband and of its validity. The 6th issue is partly based upon the defendant's allegation that, besides the written authority, Exhibit 25, given by Latchamma's husband, he had also given her an oral authority to adopt. That oral authority was, however, found against by the learned District Judge I entirely agree with him as only two witnesses [Exhibits XLII (*e*), XLI (*aa*)] speak to this oral Will which is alleged to have been given at Thorur before Latchamma's husband went to the small village of Vavilala and it is quite unsafe to act on the oral evidence of such ordinary witnesses in an important and heavy case like this.

The other part of the 6th issue relates to the genuineness of the alleged written authority, Exhibit 25.

* * * *

The genuiness of Exhibit 25 being, in my opinior, beyond doubt, its validity and also its admissibility in evidence are attacked on the ground that it was not properly registered. It was, as a matter of fact, registered after a very elaborate enquiry by the Acting Sub-Registrar of Bezwada in December 1892. It was presented to him for registration on the 20th August 1892 by Nayini Raghava Reddi (the defendant's natural father) the defendant then being a minor about 14 years old. The registration is, however, contended to be illegal on two grounds: *firstly*, that this authority to adopt executed out of British India in Thorur was not presented for registration in Bezwada within four months after its first arrival in British India as required by section 26, clause (*b*) of the Registration Act of 1877; *secondly*, that it was not presented for registration by any of the three persons who are entitled to present the same under section 4, (2) of the Registration Act, namely, the donor of the authority to adopt (who died in 1875) or the donee Latchamma who died in 1892 or the adopted son (the defendant) but by the defendant's natural father who was not even his lawful guardian. For the defendant it was argued (*a*) that Exhibit 25 having been executed in the Nizam's Dominions by Nayini Venkataramayya domiciled in the Nizam's territory to his wife Latchamma who, of course, was also domiciled in that territory like her husband, section 17 of the Indian Registration Act, clause (3), which makes the authority to adopt a son compulsorily registrable did not apply at all to Exhibit 25 as section 17, clause (3) must, according to reasonable rules of interpretation, be confined to authorities

(13) 15 Ind. Cas. 17; 36 M. 484; 23 M. L. J. 168; 12 M. L. T. 293.

(14) 9 M. L. J. 33.

given by a person domiciled in British India. (*b*1) Even if section 17 applied to this authority, it, as a matter of fact, came into British India only on 22nd April 892 within four months before it was presented for registration on 20th August, (*b*2) The time limit of four months in sections 23 and 26 does not apply to authority to adopt when presented for registration under section 41 (2) by a person other than the donor of the authority. (*c*) Even if the Sub Registrar erroneously thought that it was presented within four months of its arrival in British India once he effected the registration his irregularity in having registered it was cured by section 87 of the Registration Act. (*d*) The defendant having been a minor the presentation by the guardian for him in his interest is allowed by law. (*e*) His natural father who was his father's nearest agnate male relation and was also his *de facto* guardian was entitled to present it and, even though the defendant had been adopted away, his natural father was entitled in law to act as his guardian in all the steps necessary be taken to have the adoption established and hence, the natural father's presentation on behalf of the defendant is a proper presentation.

On the question of fact (that is, whether the document came into British India at any time more than four months before its presentation for registration in August 1892), I agree with the District Judge in answering the question in the negative.

* * * *

On this finding it is unnecessary to consider the other legal questions argued on both sides except the question of the validity of the presentment for registration by the defendant's natural father assuming that registration was necessary to make it admissible and to give it validity. On this last question, namely, whether section 17, clause (3) applies at all to a document executed out of British India by persons domiciled out of British India, I am inclined to agree with the contention of the learned Advocate-General that section 17 of the Registration Act which makes compulsorily registrable certain documents (compulsorily registrable documents being under section 49 incapable of affecting immoveable property or conferring power to adopt or of being received in evidence unless so registered) was intended to deal only, (*a*) with documents relating to immoveable property situate in British India (clause (1) of section 17) and (*b*) with authorities to adopt executed by a person domiciled in British India (clause 3). As regards the concession given in section 26 to have certain documents, including an authority to adopt, executed out of British India, presented for registration within four months after it is brought into British India, it was, in my opinion, intended to meet the case of a person domiciled in British India travelling abroad (in Europe or America, etc., or even in a Native State on a pilgrimage) and suddenly finding himself in a bad state of health, executing an authority to adopt in favour of his wife to be used by her. The observations in some English Cases [*Cooke* v. *Charles A. Vogeler* (5), *Dulaney* v. *Merry & Son* (6) and *Swifte* v. *Attorney-General for Ireland* (7) seem to me to establish that the Legislature could not have intended to make validity of a power to adopt executed in a Native State by a person domiciled within the Native State depend upon its being registered in British India, or even its admissibility in evidence without registration depend upon its having been registered in British India within four months of its arrival therein. I shall take a case to illustrate what I mean. *A.*, domiciled in the Nizam's territory and holding large properties therein and owning no property in British India, gives his wife authority to adopt in 1875 and dies at once. His wife adopts accordingly a son *B.* in 1875. Two years afterwards, she starts on a pilgrimage to Benares, Rameswaram and other places and carries with her the box containing all her papers including the authority to adopt and returns to her native place after the pilgrimage in 1880. Then, in 1900, her husband's brother *C.* who had settled in Madras as a trader in 1885 dies in Madras leaving no nearer heir than his brother's adopted son *B.* residing in the Nizam's Territory. Can it be argued that the authority to adopt given by *A.* (which validates the adoption of *B.* under the Hindu Law) cannot be proved and is not valid because it was in the adoptive mother's luggage box forming part of her luggage during her pilgrimages in 1877 and had not been registered in British India within four months of that date? Is a person to lose his right as heir because he

could not prophesy that, 23 years after his adoptive father gave his adoptive mother authority to adopt in the Nizam's Dominions, he might have to prove and establish the adoption in a British Indian Court? I think that if the status of a person as an adopted son has been established as valid in the domicile of the adoptive parents, that adoption must be held valid according to the principles of International Law in all other places where there is no express Statute Law to the contrary effect. In Maxwell on Interpretation of Statutes, Chapter VI, the whole question is considered. I shall quote a few passages therefrom. A State "has a right to impose its legislation on its subjects —natural or naturalised—in every part of the world." "On such matters as personal status or capacity it is understood always to do so." "In the absence of an intention clearly expressed or to be inferred either from its language or from the object or subject-matter, or history of the enactment, the presumption is that Parliament does not design its Statutes to operate on them" (that, is, even on its own subjects) "beyond the territorial limits of the United Kingdom. They are, therefore, to be read usually as if words to that effect had been inserted in them." "Every Statute should be so interpreted and applied as not to be inconsistent with the Comity of Nations or with the established rules of International Law. If, therefore the Legislature intended to exceed its jurisdiction, it must express its intention with irresistible clearness to induce a Court to believe that it entertained it. All general terms must be narrowed in construction to avoid it." "In general, Statutes must be understood as applying *to those only who owe obedience to the Legislature which enacts them*, * * that is, its own subjects, ** but that, as regards aliens resident abroad, the Legislature has no concern to protect their interests, *any more than it has a legitimate power to control their rights.*"

I shall now deal with the remaining contentions on the question of the validity of the registration. I am unable to agree with the learned Advocate-General that the plain words of section 23, that all documents other than Wills ought to be presented for registration to the proper officer within four months subject to section 26, do not apply to authorities to adopt and that the language of section 41, clause (2) overrides the language of section 23, and that if the conditions mentioned in section 41, clause (2) are satisfied, the document ought to be registered without reference to the time limits mentioned in sections 23 and 26. The terms of section 27 which *expressly* state that a Will may be presented for registration at any time, clearly preclude the contention that there is a right to present an authority to adopt also for registration at any time. The reasonable meaning of section 41, clause (2) is that, provided the other conditions mentioned in parts 4 and 6 are satisfied, an authority to adopt shall be registered if the Registering Officer is satisfied in respect of the three *additional* conditions mentioned in sub clauses (*a*), (*b*) and (*c*) of clause (2) of section 41.

I shall now come to the contention on the plaintiff's side about presentment. It was argued that, as section 40 only allows the adopted son to present, nobody could present it for him even if he is a minor. In fact, it was argued that even if the adopted son is an infant two years old, it was his hand that ought to present the document to the Sub-Registrar for regsitration. This would reduce to an absurdity the provisions of the Registration Act giving a right to present documents for registration to persons claiming under documents in the case of all documents executed in favour of minors or other persons under disability if the obligors or donors neglect or refuse to present them. Some English cases were quoted as regards the presentation to livings by minors, but I must frankly admit that I was unable to follow the argument. I referred to Simpson on Infants (pages 73 and 74, 3rd Edition) but I find that the guardian's concurrence is necessary when a minor presents to a living—no doubt, the mere act of making a mark and putting a seal by the hand of an infant *guided by the guardian* was held valid in an old case, the ground being that, "there can be no inconvenience because the Bishop is to judge of the qualification of the clerk presented." I do not think that there is any analogy between presenting a document for registration and presentation to a living under the peculiar historical and religious circumstances connected with English Equity and Ecclesiastical Law.

A guardian is a trustee (see section 20 of the

MA ME I v. MAUNG LAUK HNYA.

Guardians and Wards Act) and he is entitled to exercise, *for the benefit of the minor*, all powers and do all acts which the minor could do if he were a major, and such acts have the same legal validity as they would have if the minor did it after he attained majority. (See Trevelyan on Minors, pages 48, 49 and 139 as to guardianship being a trust and the guardian *representing* the minor fully). Presentation of documents for registration by guardians on behalf of minors has always been allowed by registration rules and officers as a matter of practice and it has been held to be valid in Appeal No. 200 of 1918 in this Court decided by Ayling and Napier, JJ., the donee of the authority to adopt (the widow of the donor) was a minor and her guardian's presentation for registration was held to be valid.

Under section 35 (1) (*c*) of the Registration Act, where an executant is dead, his representative can admit execution. But if the heir is a minor, his guardian should appear on his behalf according to rule 472 of the Registration Department Rules.

So also rule 493 says in regard to a question analogous to the one before us, "under general principle of law that a guardian may do all acts which are for the benefit of his ward, a Will may be accepted for registration after the death of the testator from the guardian of a person claiming under it."

Another contention on the defendant's side was, that section 87 of the Registration Act cures the defect of jurisdiction when a Registering Officer registers a document presented to him more than four months after its execution or after its arrival in British India provided that the Registering Officer *bona fide* believed that it had been executed within four months or had been brought into British India within four months. Let us suppose a case in which the Sub-Registrar in good faith reads a document dated in January as dated in June and registers it in October. I do not think this is a mere irregularity which could be cured by section 87.

Next, it was argued that under Hindu Law the natural father of the boy after he had been adopted away, ceases to be his natural guardian. Admitting that this is so, it has been held in a Bombay case [*Nirvanaya* v. *Nirvanaya* (14)] that the natural father would continue to be the proper guardian of his son so far as it is necessary to take all steps to assert and establish his rights to be the heir of the adoptive father as against his rival claimants.

The next question is one of fact, namely, whether the defendant was actually adopted by Latchamma. I think the evidence is simply overwhelming on this point in defendant's favour.

[His Lordship then goes into the evidence on the question.]

If the adoption is true and if the authority to adopt is genuine and if it is a valid authority to adopt as I have found, the plaintiffs have no case. As the 2nd defendant is the sole heir entitled to inherit the property as the daughter's son of Kothandaramiah No. 2, the dismissal of both suits by the District Judge has to be upheld.

In the result, the appeals fail and should be dismissed with costs of the principal defendant.

M. C. P.

Appeals dismissed.

(14) 9 B. 365; 5 Ind. Dec. (N. S.) 243.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 444 OF 1919.

March 31, 1920.

Present:—Mr. Heald, A. J. C.

MA ME I—APPELLANT

versus

MAUNG LAUK HNYA AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Gift by grand-parent to grand-child, nature and object of—Possession, delivery of, whether necessary—Donee, whether can sue donor for possession.

Gifts made by grand-parents to grand-children are an exception to the ordinary rule of Buddhist Law under which an actual delivery of possession is necessary to validate a gift. Such gifts are valid without any transfer of possession. [p. 1001, col. 1.]

These gifts are, however, merely contingent not actual, and the property so given remains absolutely at the disposal of the donors for their lifetime, the rules for such gifts operating not as between donor and donee, but as between the donee and his co-heirs, and affecting only the partition of the estate on the donor's death [p. 1001, col. 2.]

The intention of such gifts is to secure that the grand-children who, being presumably younger, might fare badly in competition with their elder uncles and aunts, shall receive such share of the inheritance as the grand-parents consider fair. [p. 1002, col. 2.]

MA ME I v. MAUNG LAUK HNYA.

Mr. *N. M. Mukerjee*, for the Appellant.

Mr. *Maung Su*, for Respondents Nos. 1 and 2.

JUDGMENT.—Appellant's case was that about 25 years ago, when she was a child of about eight, her grand-parents, U Kyi and Ma Kan, sent for her from Lower Burma after her father's death and gave her the palm-grove, now in dispute, along with other property so as to ensure that she should receive a proper share of their inheritance: that she left all the property so given in the custody of her grand parents and returned at once to Lower Burma; that about ten years ago her grand-mother, without her knowledge or consent, mortgaged the palm-grove to Lauk Hnya and Ma Ein Yin, who are the present second and third respondents, and that she was entitled to recover the grove from her grand-mother on the strength of the gift and from the other respondents on the ground that her grand-mother, having given the property to her, had at the time of her transaction with those respondents no interest which she could transfer to them.

So far as appellant's claim as against her grand mother is concerned, her suit was clearly collusive, since it was admitted that she and her grand-mother had together attempted to redeem the property from Lauk Hnya and Ma Ein Yin, and had been resisted on the ground that the transaction was a sale and not a mortgage. It was admitted also that appellant and her grand-mother on the one side and Lauk Hnya and Ma Ein Yin on the other had referred the dispute between them to arbitration, and it is clear that, when the attempt at arbitration proved abortive, appellant adopted the device of framing her suit as a claim against her grand-mother so as to avoid raising the question whether the transaction by which Lauk Hnya and Ma Ein Yin came into possession of the property was a mortgage or a sale.

The grand-mother, Ma Kan, died soon after the institution of the suit and her daughter, Ma Tun Gywe, who was of course appellant's aunt, being her father's own sister, was brought on the record as her legal representative. She filed a written statement alleging merely that the transaction with Lauk Hnya and Ma Ein Yin was a mortgage, but as that statement was manifestly inadequate she was examined on oath before issues were framed and she then said that on her brother's death, about twenty years ago, her parents gave the palm grove to appellant; that appellant was put into possession of the property but returned it at once to the custody of her grand-parents and returned to Lower Burma, and that about ten years ago her mother, Ma Kan, mortgaged the grove to Lauk Hnya and Ma Ein Yin. She admitted that her mother and appellant had attempted to redeem the mortgage and that Lauk Hnya and Ma Ein Yin then alleged that the transaction was a sale and not a mortgage.

Lauk Hnya and Ma Ein Yin filed a written statement putting appellant to proof of her title, which they expressly denied. They said that Ma Kan was owner of the grove and sold it to them outright for Rs. 80 about the year 1897.

It is clear that on appellant's suit, as framed, she had to prove not only the fact but also the validity of the gift which she alleged.

The Trial Court, after hearing the evidence, came to the conclusion that there was an oral gift and that the change of possession which was alleged to have accompanied it was merely verbal, but held nevertheless that such a gift was sufficient to give appellant a good title to the property, and that Ma Kan, who, by the gift to appellant, had divested herself of all interest, had no power to transfer that property to Lauk Hnya and Ma Ein Yin. The learned Judge, therefore, gave appellant a decree for possession of the property and for costs as against Lauk Hnya and Ma Ein Yin.

Lauk Hnya and Ma Yin appealed, making both appellant and her aunt respondents, and the lower Appellate Court pointed out that, in view of the fact that appellant was a mere child at the time of the alleged gift, it was doubtful whether she was capable either of accepting a gift of immoveable property on her own behalf or of making a valid transfer of possession of such property to her grand parents. The learned Judge also pointed out that the crucial test of the completion of gifts under Burmese Buddhist Law is actual delivery of possession, and that in the present case no such delivery of possession could possibly be held

to have been made. He, therefore, held that the gift was invalid, and he went on to say that, in view of the fact that appellant's grandmother, Ma Kan, was in possession of the property as owner up to the time of the alleged gift and remained in possession as ostensible owner with appellant's consent during the 25 years which have elapsed since that gift. Lauk Hnya and Ma Ein Yin would be in the position of *bona fide* transferees without notice from an ostensible owner so that even if appellant's story of the gift were true and if she could prove that the transaction was a mortgage and not a sale she would still have to redeem their mortgage before she could obtain possession of the property. Appellant's suit was, therefore, dismissed with costs.

Appellant now comes to this Court on second appeal on the following grounds, namely :—

(1) that the gift was valid ;

(2) that the lower Appellate Court was wrong in holding that a minor acting on his own behalf cannot legally either accept a gift of a immoveable property, or transfer possession of such property ;

(3) that the lower Court had no right to decide such questions as to the capacity of a minor without specific issues ;

(4) that delivery of possession was not necessary to validate such a gift as appellant alleged ;

(5) that in any case delivery of possession was proved, and ;

(6) that, even if the gift was invalid, appellant was entitled to redeem the mortgage and ought to have been allowed to amend her plaint so as to claim redemption.

I have read the records and heard appellant's learned Advocate.

The argument on which the first and fourth of the grounds of appeal are based is raised for the first time in this Court and is based on a passage in May Oung's Burman Buddhist Law recently published. That argument is that gifts made by grand-parents to grand-children are an exception to the ordinary rule of Buddhist Law under which an actual delivery of possession is necessary to validate a gift, and that such gifts are valid without any transfer of possession. I have no hesitation in accepting that as a true statement of the Burmese Buddhist Law. In the miscellaneous collection of rules to be found at the end of the 10th book of Manugye where gifts generally are considered with reference to inheritance, the rule about gifts made by grand-parents to grand-children is clearly laid down in the following passage:—

"As for property divided by grand-parents let there be no question whether possession was given or was not given. As the property is given, so let the grand-child have it."

The other texts on the same subject collected in section 130 of Volume I of the Kinwun Mingyi's Digest give the same rule, which is also mentioned in the texts collected in section 256 of the same Volume of the Digest. I think, therefore, that there can be no doubt that the kind of gift mentioned in those passages is valid without transfer of possession.

But it does not follow that such a gift is a gift in the sense in which the word is ordinarily used in English Law or even in ordinary parlance.

Twelve kinds of gifts are mentioned in the passage from Manugye referred to, and for the validity of all but two of them actual transfer of possession is necessary. The two exceptions are, gifts made to a son on his entering the priesthood, which are commonly known as "Shinbyu" gifts, and gifts made by grand-parents. The rules governing "Shinbyu" gifts are clearly laid down in the 10th book of Manugye, and have been judicially recognized in the cases of *Nga Pan U* v. *Mi Kyu* (1) and *Ma Pan Nyun* v. *Ma Hla Ein* (2). In the latter of these two cases it was held that such gifts are merely contingent, not actual, and that the property so given remains absolutely at the disposal of the parents for their lifetime, the rules for such gifts operating not as between donor and donee, but as between the donee and his co heirs, and affecting only the partition of the estate on the parents' death. Such gifts would seem, therefore, to be mainly, if not entirely, a mere apportionment of inheritance and not gifts in any strict sense at all.

The question then arises whether the effect of the only other kind of gift which

(1) S. J. L. B. 30.

(2) 20 Ind. Cas. 665; 8 L. B. R. 190; 8 Bur. L. T. 149.

chattels was absolutely vested in trustees ten years before the bill was filed, for the sole benefit of the defendant." He states further on: "But the voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law, and the present is not the case of a man repenting of an immoral purpose before it is too late and seeking to recall, while the object is yet unaccomplished, a gift intended as a bribe to iniquity. If public policy is opposed (as it is) to vice and immorality it is no less true, as was said by Lord Truro in *Benyon* v. *Nettlefold* (2) that the law, in sanctioning the defence of '*particeps criminis*' does so 'on the grounds of public policy, *viz.*, that those who violate the law must not apply to the law for protection."' Then, referring to a *dictum* of Lord Chancellor Campbell in *Coulson* v. *Allison* (3) and a decree of Vice-Chancellor Stuart in *Wootton* v. *Wootton*, he observes that: "It may be that the door of this Court is not closed against persons repenting of such an unlawful connection and desirous of extricating themselves from fetters which, if relief were refused, might practically bind them to it." The case referred to here is one of mutual settlement made on the occasion of a fictitious marriage, and the observation in this part of the judgment applies to cases of executed transfers for an unlawful purpose in which the Court will interfere to relieve the transferor but only when the unlawful or immoral purpose has not been accomplished and the transferor repents of his action in time. The law as propounded here has been followed in India in many cases but it is sufficient to refer to only some of them [*Sidlingappa* v. *Hirasa* (4), *Petherpermal Chetty* v. *Muniandy Servai* (5), *Ram Sarup* v. *Kishan Lal* (6), *Thosi Muthukannu* v. *Shunmugavelu Pillai* (7) and *Tayaramma* v. *Sitaramasami Naidu* (8).] It is, however, argued by the learned Pleader for the appellant that section 6 (*h*) clause (2), of the amended Transfer of Property Act has made a difference in the law in this country. That section says that "no transfer can be made for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act." The argument based on this clause is that the transfer for such an object or consideration is *ipso facto* void and, therefore, the transferor can come to Court and ask its assistance in getting back the property. I do not think that such a far reaching effect as the annulling of an established rule of law as laid down in *Ayerst* v. *Jenkins* (1) and followed consistently in the Indian Courts could have been intended by this clause. It may be pointed out here that, so far as the amendment goes, that is, the changing of the words "illegal purpose" into "unlawful objection", its sole object was to amend the law on a minor point with respect to an actionable claim. It would have been far from the object of the Legislature to think of modifying the well-established rules of equity as propounded in *Ayerst* v. *Jenkins* (1), by an indirect amendment of this nature. However that may be, the words of this clause do not necessarily bear out the extreme contention of the appellant. That clause does not lay down in what classes of cases the Court will or will not assist a person '*particeps criminis*,' all that it says is that a transfer for an unlawful consideration cannot be made. The language is certainly not very happy, but all that was intended was that the Court will not enforce a transfer which would have the effect of carrying out its unlawful object. That is quite consistent with the well established doctrine of law already referred to. But we do not see that a further inference can be drawn that a person who made such a transfer for an immoral consideration, and who has achieved his object by that transfer can say now "I have achieved my unlawful and immoral object and the Court must give me back the property." That would be going directly against the policy which this very clause seeks to enunciate. We must overrule this contention and the appeal must be dismissed with costs.

OLDFIELD, J.—I agree and only desire to notice one of the grounds of the lower Appellate Court's decision. The lower Appellate Court held that the suit document

(2) (1850) 3 Mac. & G. 94; 20 L. J. Ch. 186; 15 Jur. 209; 87 R. R. 25; 42 E. R. 196.

(3) (1860) 2 D. F. & J. 525; 3 L. T. (N. S.) 763; 129 R. R. 176; 45 E. R. 722.

(4) 31 B. 405; 9 Bom. L. R. 542.

(5) 35 C. 551 (P. C.); 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 12; 4 L. B. R. 266.

(6) 29 A. 327; 4 A. L. J. 306; A. W. N. (1907) 76.

(7) 28 M. 413; 15 M. L. J. 284.

(8) 23 M. 613; 10 M. L. J. 214.

was executed in consideration of future cohabitation between the first defendant and the second defendant, but it went on to hold that such an agreement was not for an immoral purpose, because concubinage is not usually regarded as immoral in the caste to which the parties belong. We do not think that that is a proper test. It is not suggested by the lower Court that there is any question of concubinage in this case being regarded as equivalant to marriage and no reason has been shown why we should so regard it. The lower Court was not at liberty to rely on the sentiment of one section of the community as decisive with reference to a matter of ordinary morality. On such a matter, the law must have regard to the sense of the community as a whole.

M. C. P.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 259 OF 1919.

January 5, 1920.

Present:—Mr. Heald, A. J. C.

MAUNG NGA—APPELLANT

versus

MA PYU—RESPONDENT.

Buddhist Law, Burmese—Divorce, suit for, frame of —Partition, whether must be prayed for, along with divorce.

Suits for divorce under the Burmese Buddhist Law should ordinarily be framed and tried as suits for one or other of the three kinds of divorce permitted by that law, or for one or more of those kinds of divorce in the alternative, and the question of the existence or status of the property to be partitioned between the parties should be left to be decided after the decree for divorce has been given. [p. 1008, col. 1.]

When once it has been decided which of the three forms of divorce is to be granted, there can be no doubt as to which method of partition is to be adopted. [p. 1007, col. 2.]

Mr. *L. Pillay*, for the Appellant.

Mr. *S. Mukerjee*, for the Respondents.

JUDGMENT.—Appellant and respondent had been husband and wife for some eight or ten years and respondent sued for divorce on the ground that appellant was addicted to drink and to gambling and threatened and ill-used her. She alleged that there was no jointly acquired property and claimed divorce as by mutual consent, that is, on terms of her being allowed to take back her own separate property. She said that of her separate property a house and a cart and two bullocks were in appellant's possession and that she proposed to sue him separately for possession of them. She admitted that there were certain presumably joint debts but she did not say whether or not she proposed to undertake liability for half of those debts.

Appellant objected to the divorce and denied the ill-treatment. He denied that there were any debts and said that the house, cart, and bullocks which respondent claimed as her separate property were really jointly acquired property, that there was also other jointly acquired property consisting of another house, two pieces of land and the produce thereof, besides Rs. 300 in money which was in respondent's possession. He said further that he had had to sell the cart for Rs. 45 to defray his expenses in connection with the suit.

The Trial Court dismissed respondent's suit on the ground that it was proved that there was jointly acquired property and that respondent could not sue for divorce without claiming partition of that property. The learned Judge also expressed an opinion that the cruelty proved or alleged was not sufficient under Burmese Buddhist Law to justify divorce.

Respondent appealed and the lower Appellate Court held that the Trial Court was not justified in dismissing the suit on the ground given, and, finding that cruelty sufficient to warrant a divorce as by mutual consent was proved, gave respondent a decree for divorce and remanded the case to the Trial Court for an enquiry about the jointly acquired property. Naturally, the respondent who had got all she claimed, namely, a divorce as by mutual consent, and who had already in her plaint said that she did not allege

that there was any jointly acquired property, did not take any further trouble in the matter, and the Court holding, quite wrongly of course, that the burden of proof was on her, found that it was not proved that there was any jointly acquired property.

Meanwhile, however, the appellant had appealed to this Court against the lower Appellate Court's decree granting respondent a divorce.

His grounds of appeal are as follows :—

(1) that the lower Appellate Court was not competent to pass a decree for divorce until a finding had been recorded on the question whether or not there was jointly-acquired property ;

(2) that respondent's suit, being a suit for bare divorce without partition, was not maintainable, and

(3) that there was no proof of such cruelty as would warrant a decree for divorce.

I have read the records and heard the learned Advocates on both sides.

The case seems to me to illustrate the inconvenience of the view which has been held by this Court, that under Burmese Buddhist Law, no suit for divorce without partition of property lies. That view was last affirmed in the case of *Mi Saw Bwin* v. *Nga San Nyun* (1), in which the Privy Council's ruling in *Maung Pe* v. *Ma Lon Ma Gale* (2) was discussed and an attempt was made to show that it did not affect the previous ruling of this Court in *Nga Chit Nyo* v. *Mi Myo Tu* (3). That attempt was not, in my opinion, successful. Their Lordships of the Privy Council were dealing with a case in which the husband obtained a decree for bare divorce against his wife and then filed a separate suit for partition of the property. In the latter suit it was decided by the Chief Court of Lower Burma that he could not succeed because he could have sued for partition at the time when he sued for divorce and that, because he failed at that time to obtain the leave of the Court under Order II, rule 2, to institute a separate suit for partition, he could not be allowed to institute such a suit. The Privy Council set aside this decision on the ground that "the cause of action for the divorce was the misconduct of the wife, but the cause of action for the partition was the divorce of the wife founded on that misconduct."

Their Lordships went on to say that, "the partition may no doubt be treated as relief consequential upon the divorce and, therefore, dealt with in the same suit, but the evidence is different and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can properly arise. There is, therefore, not necessarily any hardship on the defendant in severing the two matters. Indeed, it may, and generally would, be the more convenient course finally to settle the question of the divorce and the misconduct before entering upon an enquiry as to partition which would be altogether unnecessary if the decree were refused, or would be put on a different basis if the misconduct were disproved." With reference to these remarks the learned Judicial Commissioner who dealt with the case of *Mi Saw Bwin* v. *Nga San Nyun* (1) said that their Lordships "made some general observations in regard to divorce and partition which probably apply to most systems of marriage law, but are not consistent with the peculiar provisions of the Burma Buddhist Marriage Law." It is with these last words that I venture to disagree. I think that there can be no doubt that Sir George Shaw read into the texts from section 441 of the Kinwun Mingyi's Digest, on which he relied, more meaning than they were intended to bear. The rule that after divorce the parties should not re-marry until the property had been divided was obviously one of convenience, not of law. If quarrels which would bring in fresh parties were to be avoided, it was clearly desirable that partition should be effected before the divorced couple entered into fresh connubial relations, but the extract from Manugye says without ambiguity that the absence of partition is no legal bar to re-marriage, and in view of the remarks of the Privy Council as to the authority of Manugye made in the case of *Ma Nhin Bwin* v. *U Shwe Gone* (4), there can

(1) 28 Ind. Cas. 801; U. B. R. (1914) II, 32.
(2) 11 Ind. Cas. 497; 6 L. B. R. 18; 15 C. W. N. 766; 8 A. L. J. 739; 14 C. L. J. 15; 13 Bom. L. R. 464; 21 M. L. J. 749; 38 C. 629; (1911) 2 M. W. N. 397; 4 Bur. L. T. 153; 10 M. L. T. 479; 38 I. A. 140 (P. C.).
(3) 8 Ind. Cas. 477; U. B. R. (1910) I, 30.
(4) 23 Ind. Cas. 433; 8 L. B. R. 1; 7 Bur. L. T. 105; 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C. L. J. 264; 41 C. 887; 1 L. W. 914; (1914) M. W. N. 449; 41 I. A. 121 (P. C.).

I think be no further doubt on the point. Further, the Manugye makes the proper procedure clear when it says that "the division can be made according to the terms of the divorce." So far as the cases which ordinarily come before the Courts are concerned, it may be said that in the Burmese Buddhist Law three kinds of divorce are recognised and all three of them are mentioned in the case of *Mi Saw Bwin* v. *Nya San Nyun* (1). These three kinds of divorce differ from each other as to the grounds necessary to be proved and as to the effect of proof of those grounds on the method of partition.

The first kind is divorce for gross misconduct of the party sought to be divorced. The case of *Maung Yin Maung* v. *Ma So* (5) in this Court is a case of that kind, and in such a case the guilty party forfeits all property including his own separte property brought to the marriage as well as his interest in the property jointly acquired.

The second kind of divorce is what is generally called divorce by mutual consent or "as by mutual consent." The cases of *Maung Hmon* v. *Ma Meik* (6) and *Maung Pye* v. *Ma Me* (7), are cases of this kind. In such cases the parties each take back what they brought to the marriage and ordinarily divide the jontly acquired property equally but there are certain exceptions to the rule of equal division in respect of particular property and under particular circumstances, see the cases of *Kin Kin Gyi* v. *Maung Kan Gy* (8) and *Mi Myin* v. *Nga Twe* (9).

The third kind of divorce is that in which divorce is granted on the petition of one party without any grounds except the desire of the petitioner for divorce, and without any fault or consent on the part of the other party. The leading case of this kind of divorce, which, it may be remarked, has not been recognised in Lower Burma, is the case of *Mi Kin Lat* v. *Ba So* (10). The rule of partition in respect of this kind of divorce would seem to be that the petitioner relinquished all claim to any share in the jointly-acquired property and has to pay all the joint debts.

Between these three forms of divorce there are no intermediate stages or gradations.

There are only the three methods of partition mentioned, namely :—

(1) forfeiture of all property by the guilty party ;

(2) equal division subject to the rules for particular property and a particular relationship between the parties ;

(3) forfeiture of all interest in the jointly acquired property to the patry divorced.

This being so, it is clear that when once it has been decided which of the three forms of divorce is to be granted, there can be no doubt as to which method of partition is to be adopted. There is, therefore, no reason whatever why a suit for any particular form of divorce should not be instituted and decree without any reference to any property which the parties may possess and why the partition of the property should not be left to be made as Manugye says, "according to the terms of the divorce." This was doubtless what their Lordships of the Privy Council had in mind when they said that the enquiry as to partition "would be put on a different basis if the misconduct were disproved."

It seems necessary, however, to note, in view of cases which have recently been before me, that it would not, in my opinion, be open to the Court to decree a divorce, say, of the second kind, on a suit by a party who claimed a divorce of the first kind unless that party consented to accept such a decree and it would be still less open for the Court to give a decree of the first kind *against* a wife who sued for a decree of the first kind where the husband had not sued for divorce at all.

For the reasons set forth above I venture with all respect to suggest that it is not true that the observations of the Privy Council in *Nga Pe's case* are not consistent with the particular provisions of Burmese Buddhist Law and cannot be applied to

(5) U. B. R. (1897-01) II, 34.
(6) U. B. R. (1904-06) Budd. Law Div. 1.
(7) U. B. R. (1902-03) Budd. Law Div. 6.
(8) U. B. R. (1902-03) Budd. Law Div. 1.
(9) U. B. R. (1904-06) Budd. Law Div. 19.
(10) U. B. R. (1904-06) Budd. Law Div. 3.

those provisions. On the contrary, I think, that it would avoid delay, which in such matters is particularly inconvenient, and would also avoid much confusion of issues, if suits for divorce were ordinarily framed and tried as suits for one or other of the three kinds of divorce specified above or for one or more of those kinds of divorce in the alternative, and if questions of the existence or status of the property to be partitioned were left to be decided after the decree for divorce had been given. I see no reason, therefore, to believe that a decree for divorce ought not to be passed until a finding has been recorded on the question whether or not there was jointly-acquired property, provided that that decree be read, as the lower Appellate Court's decree in this case was evidently intended to be read, as a decree for a particular kind of divorce, that kind being in this case divorce of the second kind, which was clearly what the respondent intended to claim.

This finding disposes of the first ground of appeal.

As for the second ground, I see no reason to believe that if the respondent's suit was, as appellant alleges, a suit for bare divorce without partition such a suit would not lie. I have given reasons for this opinion in considering the first ground and all that I need now say is that the decision of the Privy Council in *Nga Pe's case* seems to me to suggest strongly that such a suit would lie.

The third ground deals with matters of fact and evidence on which the two lower Courts are at variance. The evidence is almost entirely that of persons who might be expected to be favourably disposed to appellant. His own sister gave evidence of his coming to her house and abusing respondent and attempting to assault her. Another sister or cousin living in the same house gave similar evidence and said that he sharpened a *da* and threatened to kill them for taking her into their house. She is the wife of a pensioned Extra Assistant Commissioner and her evidence is presumably trustworthy. Still another relation living in the same house gave similar evidence. Maung Yun, an Advocate, said that on one occasion respondent took refuge in his house and appellant came there drunk and abused her. About a month later again appellant came there again and used filthy abuse to respondent. This witness also said that he had often seen appellant drunk.

Appellant called no evidence and did not even go into the box himself to deny the allegations made against him.

On this evidence I think that the lower Appellate Court was right in holding that the respondent was entitled to a divorce as by mutual consent and in giving her a decree for such a divorce. Such a decree, as I have already said, normally involves each party's taking back the property which he or she brought to the marriage and an equal division of the jointly-acquired property, but in this particular case there was no need for the lower Appellate Court to frame issues as to what property there was. All that was necessary was to give a decree for divorce as by mutual consent and to leave the parties either to divide any property there might be amicably or to sue for partition or recovery of any property to which he or she might claim to be entitled as a result of the divorce.

I, therefore, confirm the decree for divorce as by mutual consent, but set aside the lower Court's order remanding the case for trial of further issues.

I note that the lower Appellate Court's order granting a certificate under section 13 of the Court Fees Act was illegal, in view of the fact that the order of remand did not cover the whole of the subject-matter of the suit, and that if the Court-fee has been refunded to the respondent it should now be recovered from her.

The appellant will pay the respondent's costs throughout.

Decree confirmed.

END OF VOLUME LIX.

GENERAL INDEX.

VOLUME LIX—1921.

Account, *settled, when may be re-opened—Undue influence—Compound interest—Acquiescence—Interest after institution of suit, when may be awarded—Discretion of Court.*

Settled accounts between two parties may be re-opened on the ground of substantial error or fraud; the existence of a fiduciary relation between the parties is not necessary

It is open to a creditor to ask his debtor to execute documents in a particular form, and the fact that a creditor writes to his debtor's servant to obtain his master's signature to that form does not raise the inference that undue influence was to be used

Where accounts contain clear and specific entries of compound interest, and they are accepted by the debtor without any objection on his part, it is a reasonable inference that he has agreed to pay compound interest.

The award of interest after institution of a suit is within the discretion of the Court and where, throughout the whole period of the dealings between the parties, compound interest has been charged and the total amount of such interest exceeds one-third of the amount of the claim, a Court would be justified in refusing future interest. BHAGWAN BAKSH SINGH v. DAMODARJI JOSHI, 18 A. L. J. 1; 42 A. 230 **20**

——, *suit for rendition of—Papers necessary for preparing account with plaintiff and not produced, effect of—Suit, whether maintainable.*

After the removal of a Naib of a Zemindar from his office the Zemindar brought a suit against him to render an account for a certain period of his management: it was proved that the papers relating to that period had been taken away by the Sadr Naib of the Zemindar, and the defendant urged that it was impossible to prepare the account without those papers which the plaintiff would not produce:

Held, that the suit was not maintainable. C JATINDRA NATH DUTTA v. SURESH CHANDRA RAY, 24 C. W. N. 922 **181**

Acts—General.

Act 1850—XIII. *See* WORKMAN'S BREACH OF CONTRACT ACT

— 1860—XLV. *See* PENAL CODE.

— 1865—X. *See* SUCCESSION ACT.

— 1869—IV. *See* DIVORCE ACT.

— 1870—VII. *See* COURT FEES ACT.

— 1871—XXIII. *See* PENSIONS ACT.

— 1872—I. *See* EVIDENCE ACT.

— 1872—IX. *See* CONTRACT ACT.

— 1872—X. *See* CRIMINAL PROCEDURE CODE.

— 1877—I. *See* SPECIFIC RELIEF ACT.

— 1878—I. *See* OPIUM ACT.

Acts—General—concld.

Act 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.

— 1881—V. *See* PROBATE AND ADMINISTRATION ACT.

— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.

— 1882—IV. *See* TRANSFER OF PROPERTY ACT.

— 1882—V *See* EASEMENTS ACT.

— 1882—VI. *See* COMPANIES ACT.

— 1882—XIV. *See* CIVIL PROCEDURE CODE.

— 1882—XV. *See* PRESIDENCY SMALL CAUSE COURTS ACT

— 1887—VII. *See* SUITS VALUATION ACT.

— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.

— 1894—I. *See* LAND ACQUISITION ACT.

— 1897—X. *See* GENERAL CLAUSES ACT.

— 1898—V. *See* CRIMINAL PROCEDURE CODE.

— 1899—II. *See* STAMP ACT.

— 1907—III. *See* PROVINCIAL INSOLVENCY ACT.

— 1908—V. *See* CIVIL PROCEDURE CODE.

— 1908—IX *See* LIMITATION ACT.

— 1908—XVI. *See* REGISTRATION ACT.

— 1909—III. *See* PRESIDENCY TOWNS INSOLVENCY ACT.

— 1911—XII *See* FACTORIES ACT.

— 1913—VII. *See* COMPANIES ACT

— 1914—VIII. *See* MOTOR VEHICLES ACT.

— 1918—VII *See* INCOME TAX ACT.

Acts (Local)—Bengal.

— 1847—IX. *See* BENGAL ALLUVION AND DILUVION ACT

— 1856—IV. *See* CALCUTTA POLICE ACT.

— 1875—V. *See* BENGAL SURVEY ACT

— 1876—VIII *See* BENGAL ESTATES PARTITION ACT.

— 1879—IX *See* BENGAL COURT OF WARDS ACT.

— 1884—III. *See* BENGAL MUNICIPAL ACT.

— 1885—VIII. *See* BENGAL TENANCY ACT.

— 1908—VI. *See* CHOTA NAGPUR TENANCY ACT.

Acts—(Local)—Bombay.

— 1876—X. *See* BOMBAY REVENUE JURISDICTION ACT

— 1879—V. *See* BOMBAY LAND REVENUE CODE.

— 1879—XVII. *See* DEKKHAN AGRICULTURISTS RELIEF ACT.

— 1901—III. *See* BOMBAY DISTRICT MUNICIPAL ACT.

Acts—(Local)—Burma.

— 1898—III. *See* BURMA MUNICIPAL ACT.

Acts—(Local)—C. P.

— 1898—XI. *See* C. P. TENANCY ACT.

Acts—(Local)—Madras.

Act 1864—II. *See* MADRAS REVENUE RECOVERY ACT.
—— 1884—IV. *See* MADRAS DISTRICT MUNICIPALITIES ACT.
—— 1884—V. *See* MADRAS LOCAL BOARDS ACT.
—— 1908—I. *See* MADRAS ESTATES LAND ACT.

Acts—(Local)—Punjab.

—— 1887—XVI. *See* PUNJAB TENANCY ACT.
—— 1912—V. *See* PUNJAB COLONIZATION OF GOVERNMENT LANDS ACT.
—— 1913—I. *See* PUNJAB PRE-EMPTION ACT.
—— 1914—I. *See* PUNJAB EXCISE ACT.
—— 1918—V. *See* RESTRICTION OF HABITUAL OFFENDERS (PUNJAB) ACT.

Acts—(Local)—U. P.

—— 1901—II. *See* AGRA TENANCY ACT.

Regulations.

Reg. 1889—III. *See* UPPER BURMA LAND AND REVENUE REGULATION.

Statutes.

1915—(5 & 6, GEO. V, C. 61). *See* GOVERNMENT OF INDIA ACT.

Administration suit—*Intervenor, costs of, liability for.*

Where a third party, without sufficient reason, appears and defends an administration suit separately, he must bear the costs of so doing, even though the plaintiff be unsuccessful in the action. SOURENDRA MOHAN SINHA *v.* MURARI LAL SINHA, 24 C. W. N 888 **581**

Adverse possession—*Service* inam—*Lands disannexed from office—Possession, whether adverse to holder of office.*

Where lands attached to the office of *karnam* as service *inam* become disannexed from the office and for a large number of years are enjoyed by a person who does not claim the office as ordinary private property, the possession of the lands by such a person for more than twelve years is adverse to the holder of the office against whom that person acquires a prescriptive title to the land. **M** IDARAPALLI DHANUSHKOTIRAYUDU *v.* VANKAYALA VENKATARATNAM, 38 M. L. J. 3; 1 L. W. 453 **65**

Agent—*Agent acting for undisclosed principal—Suit against both agent and principal, whether maintainable.*

A person contracting with an agent for an undisclosed principal is at liberty to sue either the agent or the principal or both under the contract.

Exception 1 to section 108 of the Contract Act applies practically to any sale of any moveable property by any person in any kind of possession, so long as that possession is by consent of the owner and the transferee acts in good faith.

Plaintiff purchased in good faith a diamond ring from defendant's agent which the defendant had entrusted to the latter and paid the price to the agent. The agent was subsequently convicted of breach of trust in respect of the ring at the instance of the defendant. Plaintiff sued defendant for delivery of the ring or for its price :

Held, that the case was covered by the First Exception to section 108 of the Contract Act and that the plaintiff had obtained a good title to the ring and her suit must succeed. **U B** DULABDAS *v.* MA WIN, 3 U. B. R. (1920) 217 **965**

Agra Tenancy Act (II of 1901), s. 10—Khudkasht *land, mortgage of*—Ex-*proprietary rights*—*Rent, rate of, payable.*

A person who owns *khudkasht* lands in a village has the right to make a usufructuary mortgage of those lands, and after the mortgage he becomes an ex-proprietary tenant of the *khudkasht* land which he had cultivated for more than twelve years, and under the law he is liable to pay only ¾ths of the rent which is paid ordinarily in respect of non-occupancy holdings **A** BALDEO SINGH *v.* CHHAIL BEHARI LAL, 18 A. L. J. 944 **688**

—— **ss. 164, 201**—*Co-sharer, suit by, for profits*—Khewat, *amendment of, during pendency of suit*—*Amendment, effect of.*

P, a recorded co-sharer, brought a suit against *D.* to recover his share in the profits of a *mahal* for the years 1912, 1913 and 1914 and obtained a decree in part. Both parties appealed to the District Judge and, during the pendency of the appeal, *D.* obtained an order from the Revenue Court directing the removal of *P's* name from the *khewat*, whereupon the District Judge, treating the order of the Revenue Court as if it were a decision of a Civil Court such as is mentioned in the last clause of section 201 of the Agra Tenancy Act, dismissed the claim *in toto*. In second appeal:

Held, that the decision of the District Judge was wrong, as he was not entitled to go behind the record, or to take into consideration the subsequent amendment of the *khewat* which did not operate in regard to the years in suit, but operated only from the date on which the order directing the amendment was passed. **A** LACHMAN PRASAD *v.* SHITABA KUNWAR, 18 A. L. J. 1008; 2 U. P. L. R. (A.) 386 **639**

Appeal, Civil :—

See CIVIL PROCEDURE CODE, s. 2 (2) **232**
——— ——— ———, s. 47 **523**
——— ——— ———, s. 104 **421**
——— ——— ———, s. 115 **811**
——— ——— ———, O. XXII, r. 2 **230**
See COMPROMISE **787**
See COURT-FEE **667**
See LETTERS PATENT (BOM.) CL. 15 **533**

——— *Finding accepted by appellant—Appellate Court, whether can go behind finding*

Where a finding of the Trial Court is accepted by the appellant in his grounds of appeal, the Appellate Court has no power to go behind that finding. The fact that the appellant's Counsel was careless in drafting the grounds of appeal makes no difference. **L** WADHAWA SINGH *v.* SUNDAR SINGH **689**

——— *Plea of minority not taken in Trial Court, whether permissible in appeal.*

A plea as to the incompetency of a plaintiff, who describes himself as a minor suing through his next friend, to be a *mutwalli* of a *wakf* on account of his minority, which is not taken in the Court of first instance nor mentioned in the petition of appeal, cannot be raised for the first time in the course of argument in the appeal. **N** HANSKUARBAI *v.* IMAM AL **717**

Appeal, Criminal—Presentation to wrong Court—Subsequent presentation to proper Court beyond limitation—Extension of limitation. *See* LIMITATION ACT, s 5 556

Appeal, Second:—

See CIVIL PROCEDURE CODE, s. 20 (c) 2
———— ———— ————, s. 102 188, 192, 595
———— ———— ————, O VI, r. 17 63
———— ———— ————, O. XLI, r. 20 793
See LIMITATION ACT, s. 20 709
See MALICIOUS PROSECUTION 973
See RES JUDICATA 316

———— *Finding of fact—Suit, whether collusive and fraudulent—High Court, interference by.*

A High Court is not entitled, in second appeal, to go behind the findings of fact arrived at by the District Judge which do not result from the misconstruction of a document or the misapplication of law or procedure.

Where the question is whether a suit is collusive, the High Court is bound by the finding arrived at by the first Appellate Court on that point. **L** SARJU *v.* BUDHA 885

———— *Point not involving question of law, whether can be raised for first time.*

A point which does not involve a pure question of law and which was not taken in the lower Courts, cannot be taken in second appeal. **C** NILRATAN MITRA *v* ABDUL GOFUR GAZI, 32 C. L. J 75 3

———— *Point of law, whether can be raised for the first time.*

A Court of second appeal is not bound to entertain a question of law raised for the first time in second appeal, this can only be done by the permission of the Court, *i e*, the Court may take the point of itself, or, if persuaded that for some good cause a vital point has been overlooked in the proceedings in the Court below, it may permit the point to be argued. **A** SHEODHAN KURMI *v* BALKARAN KURMI, 18 A. L. J. 1033; 2 U. P. L. R. (A.), 392 116

Appeal to Privy Council *in criminal cases—Pardon, grant of, to appellant, whether sufficient reason for not entertaining appeal—Sedition, law of, application of, to newspaper articles—Question of fact—Privy Council, whether will interfere with conclusions of local Courts—Penal Code (Act XLV of 1860), s. 124 A.*

Where an appeal in a criminal case is pending before the Privy Council and a free pardon is granted to the appellant, this of itself is a sufficient reason for the Board declining to entertain the appeal.

Once it appears that in a trial for sedition the principles of the law of sedition have been rightly understood by the Tribunal in India, the question whether those principles have been properly applied to the facts of the case is so much in the nature of a question of fact and depends so largely upon local conditions that it is difficult for the Board to interfere on this ground with the conclusions arrived at by the Court in India. **P C** KALI NATH ROY *v.* EMPEROR, 19 A L J. 65; 33 C. L. J. 124; 40 M. L J. 101; 13 L. W. 253; (1921) M. W. N. 49; 29 M. L. T. 142; 22 CR. L. J. 129; 2 L. 34; 25 C. W. N. 701 641

Arbitration—*Agreement in contract to refer disputes to arbitration—Arbitrators, power of, to decide what are terms of contract.*

Where by the terms of a contract,—in this case an Advice Note,—it is provided that any dispute whatsoever arising on, or out of, the contract should be referred to arbitration under the Rules of the Bengal Chamber of Commerce, for the time being, for decision, and that such decision should be accepted as final and binding on both parties to the Advice Note, it is within the authority of the arbitrators under a submission made to them to decide what are the terms of the contract, and whether or not a particular term was included in the contract as originally made. **C** *In the matter of* AN ARBITRATION BETWEEN BAIJNATH KALOORAM & ALIBHOY MAHOMED, 24 C W. N. 567 439

———— *Agreement to refer, binding effect of—Contract, provision in, to refer to arbitration—Notice of intention to refer—Full period not given, effect of—Award, enforcement of—Duty of Court.*

An agreement to submit to arbitration involves a submission signed by both parties, but an agreement to submit, provided it is an agreement, may be collected from a series of documents, even though connected by parol evidence, and the signature of any document forming part of the agreement is sufficient to bind the party signing to the submission contained in the agreement.

A contract was entered into between a firm trading in cloth at Cawnpore (vendees) and a firm of importers at Delhi (vendors) for the sale of cloth goods. The contract was in the form adopted by the Delhi Piece Goods Association, and provided for the submission of disputes to two arbitrators, one to be appointed by each party, it being agreed that if one of the parties on being requested by the other party to nominate an arbitrator failed to do so within 20 clear days of the request, the first party would appoint a sole arbitrator. A dispute having arisen the vendors intimated to the vendees their intention to appoint an arbitrator and that gentleman on 5th February gave notice in writing to the vendees to appoint their arbitrator and to attend for a final decision on 25th February failing which a decision would be arrived at by him alone in their absence. The vendees did not appoint an arbitrator, and the arbitrator appointed by the vendors submitted his award on the 25th February:

Held, that as the vendees were entitled to 20 clear days' notice and as the award was made only 19 days from the request to appoint an arbitrator, the failure to give the requisite number of clear days for the appointment was fatal to the appointment and jurisdiction of the vendor's arbitrators as sole arbitrator, and that, consequently, no arbitrator had been lawfully appointed with authority to act alone within the terms of the submission made by the parties, and his award was of no legal effect.

When a Court is asked to enforce an award, it must satisfy itself that the award is enforceable in the same way as a decree would be enforceable, if it were a decree An award which is either a mere declaration of the respective rights and liabilities of the parties in respect of a particular contract, or is an attempt to pass a sort of order or

Arbitration—concld.

decree for specific performance in a matter in which no such decree can be passed in law would not be enforceable if it were a decree of Court. **A** SUKHAMAL-BANSIDHAR v. BABULAL KEDIA & Co., 18 A. L. J. 652; 2 U. P. L. R. (A.) 244; 42 A. 525 **75**

——— *Award—Decree in terms of award—Order staying suit—Final decree, whether necessary.*

An order staying a suit is permanent unless the order itself provides otherwise by imposing a terminus.

Where during the pendency of a suit the subject-matter of the dispute is referred to arbitration and the suit is stayed, the order staying the suit is sufficient finally to dispose of the suit. **A** STRAUSS & Co. LD. v. RAGHUBAR DAYAL, 2 U. P. L. R. (A.) 387; 19 A. L. J. 19 **784**

——— *Award not in terms of reference—Award incorporated in decree, effect of—*Res judicata.

The mere fact that an arbitration award is not strictly in accordance with the terms of the reference to arbitration, does not render the decree, in which the award is incorporated, void for want of jurisdiction, and the decree operates as *res judicata* to bar a subsequent suit in respect of the same cause of action. **C** SIBNATH SAHA *v.* MOHESH CHANDRA **89**

———, order superseding, whether can be attacked in appeal from final decree *See* CIVIL PROCEDURE CODE, s. 105 **676**

———, *reference to—Acquiescence—Award—Jurisdiction, want of, objection as to, whether can be taken.*

The parties by an agreement submitted matters in dispute between them to arbitration, but owing to their conduct the arbitrators were unable to proceed. One of the parties then instituted a suit in the Court of the Munsif in respect of certain matters included in the submission, as the Munsif had no jurisdiction to deal with the entire subject-matter of the submission, but the suit was dismissed on the ground that it was not maintainable in view of the agreement to refer to arbitration which still subsisted. On appeal, the dismissal was set aside and the case remanded to the Munsif to take action under paragraph 18 of the Second Schedule to the Civil Procedure Code: the Munsif accordingly stayed the suit, and formally referred the matter to the arbitrators and umpire requesting them to proceed with the arbitration: the parties acquiesced in this decision, appeared before the arbitrators and the matter was fully litigated before this Tribunal: the arbitrators made their award, and an application to make the award a decree of Court was allowed by the Subordinate Judge notwithstanding the objection of the opposite party to the jurisdiction of the arbitration Tribunal to deal with the matter, and an appeal against this order proving unsuccessful, the matter came before the High Court in revision:

Held, that the applicants for revision having accepted the decision of the Munsif, and submitted themselves to the decision of the Arbitration Court, it was not open to them to seek a reversal of the award on the ground of want of jurisdiction. **A** SUKHNATH RAI *v.* NEHAL CHAND, 18 A. L. J. 614; 2 U. P. L. R. (A.) 240; 42 A. 661 **801**

Autrefois acquit, principle of, applicability of. *See* CRIMINAL PROCEDURE CODE, s. 403 **207**

Benami transaction——*Fraudulent purpose—Plaintiff, when can succeed*—In pari delicto, potior est conditio defendentis

Where the purpose of a *benami* transaction is fraudulent a party seeking the assistance of the Court in avoiding the transaction must show that the purpose did not go beyond the stage of mere intention, otherwise the maxim *in pari delicto potior est conditio defendentis* will become applicable and will prevent the plaintiff from succeeding. **N** ISMAIL *v.* WASUDEO, 16 N. L. R. 129 **285**

Bengal Alluvion and Diluvion Act (IX of 1847), s. 3, *scope of—"Changes," meaning of—Map prepared under section, value of.*

The word "changes" in section 3 of the Bengal Alluvion and Diluvion Act means, changes brought about by the action of the river or the sea, and not changes by the act of one proprietor in annexing to his estate the property belonging to another proprietor.

Therefore, a map prepared under section 3 of the Bengal Alluvion and Diluvion Act unlike a Revenue Survey map or a map prepared under the Bengal Survey Act, can never be said to be a map according to possession of the parties. **Pat** BIBI WAKILAN *v.* DEO NANDAN PROSAD, 5 P. L. J. 681; 2 P. L. T. 81 **298**

Bengal Municipal Act (III of 1884), s. 202, *applicability of—Dispute as to title—Order under section, nature of—High Court, power of, to interfere*

Section 202 of the Bengal Municipal Act gives a summary power for the removal of an obstruction or encroachment on a road, drain, sewer or aqueduct, and its provisions cannot be applied where there is a dispute between any person and the Municipality with regard to the title to any land. Such a dispute must be decided in the ordinary way by a Civil Court.

An order made by a Magistrate under section 202 of the Bengal Municipal Act is a judicial proceeding, and the High Court has power to revise such order. **C** ALOKE MOHAN SAHA *v.* NARAYANGANJ MUNICIPALITY, 22 C. L. J. 25 **137**

——— **ss. 290, 295**—*Local Government, power of, to make rules imposing conditions for water connections—High Court, interference by.*

The Local Government has power, in making rules under section 290 of the Bengal Municipal Act, to impose conditions under which house connections with the service water pipe may be allowed, to define what are the fittings required for such connections, and to impose as one of the conditions the provision of a meter at the owner's or occupier's expense, and the fact that section 295 of that Act makes it lawful in certain cases to have a meter fixed at the expense of a Municipality does not preclude the Government from imposing such a condition.

The High Court will not interfere with rules and conditions authority for which is expressly provided unless they are in conflict with some legal principles. **C** NAGENDRA LAL DAS *v.* MUNICIPAL COMMISSIONERS, CHITTAGONG, 47 C. 436 **340**

——— **s. 333**—*Act done in pursuance of Act, what constitutes—Notice of suit, omission to give, effect of.*

Bengal Municipal Act—concld.

Where the Vice-Chairman of a Municipality acts under the direction of the Commissioners, any act done under his instructions is an act done under the Bengal Municipal Act. Consequently, if the provisions of section 344 of the Act as regards notice are not complied with by a person aggrieved by the act, a suit by him against the Vice-Chairman to recover damages is not maintainable **C** SASANKA SEKHAR BANERJEE *v.* SODHANSU MOHAN GANGULI, 24 C. W. N 891; 48 C. 45 **572**

Bengal Survey Act (V B. C. of 1875), s. 41—*Order settling boundary dispute, effect of—Suit to recover possession of lands dealt with by order—Limitation—Boundary pillars, failure to set up, effect of—Presumption—Burden of proof.*

An order under section 41 of the Bengal Survey Act has the force of a Civil Court decree, and the party in whose favour the order is passed should be considered to be in actual possession at the date of the order, and a person wishing to upset the order must bring a suit within 12 years from the date of the order.

An order settling a boundary dispute under section 41 of the Bengal Survey Act is not void if, after the decision is come to, boundary pillars are not set up. The placing of boundary pillars is a part of the procedure which is performed by the officers of the Survey Department after a boundary dispute is decided. It is to be presumed that the boundaries were duly laid down and the burden of proving the contrary lies on the party alleging it. **Pat** RAFIQ-UN-NISSA *v* KESHWAR NARAIN SINGH **840**

Bengal Tenancy Act (VIII B. C. of 1885), ss. 3 (9), 30, 182—*"Holding," meaning of—Undivided share in tenancy, whether holding.*

An undivided share of land is not a "holding" within the meaning of section 3 (9) of the Bengal Tenancy Act, and the phrase "a parcel or parcels of land" in that clause means an entire parcel, or entire parcels of land. Consequently, section 30 of that Act has no application when the tenancy of a *raiyat* is an undivided share of land, it being immaterial how the tenancy was created, or whether the parcel held jointly with others is a small or large portion of the land of the tenancy, or that the undivided parcel which is part of the tenancy is homestead, and not agricultural land: it is sufficient if there is some land which is not held entirely by the tenant. **C** BINAYAK DAS *v.* SAMIRUDDI, 24 C. W. N. 1022 **209**

——— s. 15—*Omission to comply with provisions of section, effect of—Landlord and tenant—Permanent tenure-holder, heirs of, failing to get registration of names, position of.*

The interests of the heirs of a recorded permanent tenure-holder in the tenure, cannot be destroyed by proceedings to which they were not parties, merely because they omitted to comply with the provisions of section 15 of the Bengal Tenancy Act. **C** PROVASH CHANDRA CHATTERJEE *v* JAHARUDDIN MONDAL, 2 C. L. J. 77 **49**

——— s. 22—*Purchase of* raiyati *holding by co-sharer landlord prior to amendment of section—Landlord, status of.*

Under section 22 of the Bengal Tenancy Act, prior to its amendment by Act I of 1928 (E. B. A. Coun.) the status of a co-sharer landlord purchasing a *raiyati* holding was that of a *raiyat*, and as such he was able to grant an under-*raiyati* lease. **C** INU MANDAL *v* BIMALENDU ROY **337**

——— s. 22 (2) *Occupancy holding purchased by co-proprietor—Purchaser, position of—Partition, effect of.*

Where an occupancy holding is purchased by a co-proprietor it virtually becomes the *bakasht* land of the co-sharers which the purchasing co-sharer is allowed under section 22 (2) of the Bengal Tenancy Act to keep apart for himself on condition of paying rent to his co sharers. On a partition among the co-sharers the land is liable to be allotted as *bakasht* to the co-sharer in whose *patti* it is situate and the purchasing co-sharer is not entitled to continue in possession of it. **Pat** MATHURA SAHU *v.* CHANDRADIP SINGH **87**

——— s. 85, clause (2)—*Landlord and tenant—Sub-lease exceeding nine years, whether admissible in evidence to prove tenancy—Sub-lessee having subsisting tenancy, effect of.*

A sub-lease granted by a *raiyat* after the passing of the Bengal Tenancy Act for a term exceeding nine years and registered in contravention of the terms of section 85, clause (2) of the Act is inadmissible in evidence to prove the tenancy of an under-*raiyat*. Where, however, the sub-lessee has a subsisting tenancy he can defend his possession, or recover possession on being dispossessed on the strength of such subsisting tenancy even though the lease cannot be produced to prove the tenancy. **C** NANDA KUMAR *v* DINABANDHU NANDI **748**

——— s. 87—*Abandonment, proof of.*

In order to succeed under section 87 of the Bengal Tenancy Act, a plaintiff must establish, first, that the *raiyat* voluntarily abandoned his residence without notice to his landlord, secondly, that he did so abandon his land without arranging for payment of his rent as it fell due, and, thirdly, that he ceased to cultivate his holding either by himself or by some other person. **Pat** RAMJANUM SINGH *v.* KHUB LAL SINGH, 2 P. L. T. 219; (1921) PAT 151 **508**

——— s. 99. *application under, for restoration of management of estate to co-owners—Common manager appointed by District Judge, whether party to proceedings*

The common manager of an estate, appointed by the District Judge under the Bengal Tenancy Act, is not and cannot be made a party to a proceeding by the co-owners under section 99 of the Act for restoration of the management of their estate. **C** BHAGABATI DEBYA *v.* NILKANTHA CHATTERJEE, 24 C. W. N. 927 **191**

——— ss. 105, 109—*Application under s. 105, nature of—Dismissal for default, effect of—Jurisdiction of Civil Court to entertain claim made subsequent to application.*

An application for enhancement of rent made under section 105 of the Bengal Tenancy Act, which is withdrawn, or is dismissed for non-prosecution, is an application made within the meaning of section 109 of the Act, and once such an application is made, a Civil Court has no jurisdiction to entertain a claim in respect of a matter which formed the subject of that application. **C** ABEDA KHATUN *v.*

Bengal Tenancy Act—concld.

MAJUBALI CHOWDHURY, 24 C. W. N. 1020; 33 C. L. J. 304 **760**

——— **s. 167**—*Mortgage of holding—Decree on mortgage, effect of—Subsequent sale of holding in execution of rent decree—Purchaser, position of.*

B. held a mortgage of an occupancy holding and on 6th February 1912 obtained a decree upon the mortgage, in execution of which he, on 19th November 1913, purchased the holding. On the 19th March 1912, however, the landlord, in execution of a decree for arrears of rent against the tenant, purchased the holding and obtained formal possession on 17th June 1912. On 8th May 1914 he brought the present suit for possession, and *B.* was subsequently joined as defendant, and after he had been so joined a notice was served upon him, under section 167 of the Bengal Tenancy Act, on the 15th May 1915:

Held, that, inasumch as the sale in execution of the mortgage-decree took place after the sale in execution of the rent-decree it had not the effect of extinguishing the mortgage encumbrance at the date of the sale in execution of the rent-decree and that at that date the mortgagee had a subsisting encumbrance; that the purchaser at the sale in execution of the rent-decree took subject to that encumbrance, and was, therefore, bound to annul the encumbrance within the time limited by section 167 of the Bengal Tenancy Act, and not having done so, the encumbrance still subsisted; but that his position was that of a purchaser of the equity of redemption, and as he was no party to the mortgage-decree or to the sale in execution of which *B.* purchased the mortgaged property, it was open to him to redeem the mortgage. **C** BIDHUMUKHI DASI *v.* BHABA SUNDARI DASI, 24 C. W. N. 961 **868**

——— **Sch. III.** *See* CIVIL PROCEDURE CODE, s. 66 **719**

——— ——— **, Art. 3**—*Landlord holding after termination of right to hold—Suit by tenant to recover holding—Limitation*

Where a landlord takes over the tenancy of his tenant under a usufructuary mortgage, and continues in possession after termination of his right under the mortgage, his possession is adverse, and a suit by the tenant to recover possession is not governed, as to limitation, by Article 3, Schedule III to the Bengal Tenancy Act, as there was no dispossession within the meaning of that Article. **C** KHETRA NATH MONDAL *v.* LAKHAN SARDAR **442**

Berar Land Revenue Code, 1896, ss. 206 (1), 209 (2)—*Pre-emption—Share held by all members of joint Hindu family—Notice to manager, whether sufficient—Co-parceners in joint family, whether have independent rights of pre-emption—Presumption—Several co-parceners having equal rights of pre-emption—Procedure.*

Where a share in a Survey Number is held by all the members of a Hindu joint family, notice to the manager of the family will ordinarily suffice for the purposes of section 206 (1), Berar Land Revenue Code. This course would be an obvious one where all members other than the manager are minors, but where the would-be vendor chooses to depart from the procedure laid down in the Code and to rely upon a consent which would more properly be described as a definite expression of a determination not to exercise the right of pre-emption, he and his vendees should be careful to see that the substituted precaution is such as will bind all concerned

There is no presumption that where a manager does a certain act he does it in the capacity of manager.

There is nothing in the Berar Land Revenue Code to militate against the view that every co-parcener in an undivided Hindu family has an independent right of pre-emption which he can exercise by himself.

All the co-parceners should be considered as having equal rights of pre-emption until the contrary is shown

Where two or more co-parceners are equally entitled to the right of pre-emption the person to exercise. it should be determined by lot. **N** MOTIRAM *v.* BHIKAN RAO **601**

Berar Land Revenue Code—concld.

Bombay District Municipal Act (III of 1901), s. 59 (b) (ii)—*Vehicle kept outside, but used inside, district, whether liable to wheel-tax.*

In order to be liable to wheel-tax under clause (*b*) (*ii*) of section 59 of the Bombay District Municipal Act, a vehicle must be both kept and used within the district A vehicle kept outside, but used within, a district is not liable to wheel-tax under the section **B** SURAT CITY MUNICIPALITY *v.* MANEKLAL ICHHARAM, 22 BOM L R. 1104 **389**

Bombay High Court Rules, rr. 130, 131.—Third party proceedings—Order refusing directions, whether judgment—Appeal, whether lies. *See* LETTERS PATENT (BOM.), CL. 15 **533**

——— **, Ch. VIII, rr. 127 to 133**—*Letters Patent (Bombay, cl. 12—Third party procedure—Cause of action arising partly within jurisdiction—Leave of Court—Procedure*—Res judicata.

When a defendant asks the Court to issue a third party notice in a case in which leave has to be obtained under clause 12 of the Letters Patent, then an application should be made to the Judge for such leave to be endorsed on the notice in the same way as it is endorsed on a plaint

An order on a summons for direction under the rules relating to third party procedure merely amounts to this, that the third party comes into the suit as if he was an added party defendant and then it is open to him at the trial to raise any issues which an added defendant is entitled to raise, one of which is, whether leave ought not to have been given under clause 12 of the Letters Patent as he was residing outside the jurisdiction

Before it can be assumed that leave has been granted under clause 12 of the Letters Patent it must be proved that an application was made to the Judge under clause 12 of the Letters Patent, and if the Judge makes the order it should appear clearly on the face of it that he was giving leave under clause 12 of the Letters Patent. **B** KARIM ELAHI SHETI *v.* SHER AHMED HAJI MIR AHMED, 22 BOM. L. R. 863; 45 B. 24 **28**

Bombay Land Revenue Code (Act V of 1879), s. 74. *See* RAJINAMA 114

——— **s. 83**—*Landlord and tenant—Ejectment—Permanent tenancy—Burden of proof.*

The presumption is that a tenant is an annual tenant and the onus lies on him to prove that he is something more. If he wishes to prove that he is a permanent tenant he must prove, first of all, if he has not got a document of permanent tenancy, the antiquity of his tenure. If he succeeds in establishing this, then the second paragraph of section 83 of the Bombay Land Revenue Code comes into operation. The landlord has to prove that there is evidence of the intended duration of the tenancy either by agreement or by usage. If he cannot do that, then it is presumed that the tenancy is co-extensive with the duration of the tenure of the landlord. **B** MANEKLAL *v.* BAI AMBA, 22 BOM. L. R. 1394; 45 B. 360 751

——— **s. 83**—Permanent tenancy—Presumption—Grant, proof of, whether necessary. *See* LANDLORD AND TENANT 278

——— **s. 121**—*Boundaries fixed by Collector—Adverse possession—Suit to recover portion of survey number, maintainability of—Jurisdiction of Civil Courts.*

The fixing of boundaries of different Survey Numbers by the Collector under section 121 of the Bombay Land Revenue Code has the effect merely of showing what land belongs to the persons in whose names the Survey Numbers are registered. It does not affect the right of any one of those persons to show in a Civil Court that he has acquired a title by adverse possession against a registered occupant. **B** MANAK *v.* NARAYAN, 22 BOM. L. R. 1114 (foot-note) 437

——— **s. 121**—*Boundary fixed by Collector—Adverse possession—Suit to recover portion of Survey Number from registered occupant, maintainability of—Jurisdiction of Civil Courts.*

When the settlement of a boundary is made by the Collector under section 121 of the Bombay Land Revenue Code, it does no more than establish where the boundary line lies and that the owners of the respective Survey Numbers are entitled to their property according to the boundary line as fixed by the Collector. This, however, does not prevent any of them filing a suit in the Civil Court on the ground that he has acquired a portion of his neighbour's Survey Number by adverse possession. **B** BHAGA MOTIJI *v.* DORABJI SORABJI, 22 BOM. L. R. 1111; 45 B. 67 440

Bombay Revenue Jurisdiction Act (X of 1876), s. 11—*Collector, order made by, directing removal of encroachment on public road—Appeal, failure to prefer—Suit to set aside order, whether maintainable.*

A Collector made an order directing the plaintiff to remove an alleged encroachment on a public road. The plaintiff preferred no appeal against this order but more than two months after the order was made he brought a suit in the Civil Court to get the order set aside:

Held, that the suit was barred by the provisions of section 11 of the Bombay Revenue Jurisdiction Act. **B** DAYAL KHUSHAL *v.* SECRETARY OF STATE, 22 BOM. L. R. 1089 122

Buddhist Law, Burmese—*Divorce, suit for, frame of—Partition, whether must be prayed for, along with divorce.*

Suits for divorce under the Burmese Buddhist Law should ordinarily be framed and tried as suits for one or other of the three kinds of divorce permitted by that law, or for one or more of those kinds of divorce in the alternative, and the question of the existence or status of the property to be partitioned between the parties should be left to be decided after the decree for divorce has been given.

When once it has been decided which of the three forms of divorce is to be granted, there can be no doubt as to which method of partition is to be adopted. **U P B** MAUNG NGA *v.* MA PYU, 3 U. B. R. (1920) 251 1005

——— ——— *Gift by grand-parent to grand-child, nature and object of—Possession, delivery of, whether necessary—Donee, whether can sue donor for possession.*

Gifts made by grand-parents to grand-children are an exception to the ordinary rule of Buddhist Law under which an actual delivery of possession is necessary to validate a gift. Such gifts are valid without any transfer of possession.

These gifts are, however, merely contingent, not actual, and the property so given remains absolutely at the disposal of the donors for their lifetime, the rules for such gifts operating not as between donor and donee, but as between the donee and his co-heirs, and affecting only the partition of the estate on the donor's death.

The intention of such gifts is to secure that the grand-children who, being presumably younger, might fare badly in competition with their elder uncles and aunts, shall receive such share of the inheritance as the grand-parents consider fair. **U P B** MA MEI *v.* MAUNG LAUK HNYA, 3 U. B. R. (1920) 228 999

Burma Municipal Act (III of 1898), s. 98—*Duty of Municipality to remove and dispose of night soil, whether imperative—Nuisance committed by Municipality—Injunction to restrain nuisance.*

Per *Twomey, C. J.*—Section 98 of the Burma Municipal Act does not impose an imperative duty upon a Municipality to remove and dispose of night soil.

Per *Young, J.*—Section 98 of the Burma Municipal Act imposes upon a Municipality the duty both of removing and disposing of night soil.

Per *Curiam*—The Legislature did not contemplate a nuisance as the necessary result of a Municipal Committee exercising the powers conferred upon it by section 98 of the Burma Municipal Act. Therefore, if a nuisance is committed by a Municipal Committee in removing or disposing of night soil under that section, it is liable to be restrained by injunction. **L B** RANGOON MUNICIPAL COMMITTEE *v.* BURMA RAILWAYS CO., LTD., 13 BUR. L. T. 62 and 136; 10 L. B. R. 203 823

——— **s. 142 (d)**, *bye-laws made under—Bye-law prescribing license-fee for lodging houses, whether* ultra vires.

A bye-law of a Municipal body requiring keepers of lodging-houses to pay a license-fee reckoned on the maximum number of lodgers authorized, although the actual number of lodgers in the house may be less than the authorized number, is not illegal or *ultra vires*. **L B** P. S. PILLAY *v.* MOULMEIN MUNICIPAL COMMITTEE, 13 BUR. L. T. 107; 22 CR. L. J. 113 545

Bye-Laws, *Municipal, validity of, test of—Interpretation, rule of.*

In determining the validity of bye-laws made by public representative bodies under statutory powers, their consideration is approached from a different standpoint from bye-laws of Railway or other Companies which carry on business for their own profit, although incidentally for the advantage of the public. Courts of Justice are slow to condemn Municipal bye-laws as invalid, on the supposed ground of unreasonableness, and support them if possible by a "benevolent" interpretation, and credit those who have to administer them with an intention to do so in a reasonable manner. But, on the other hand, if a bye-law necessarily involves that which is unreasonable, it is the duty of the Court to declare it to be invalid. **L B** P. S PILLAY *v.* MOULMEIN MUNICIPAL COMMITTEE, 13 BUR L T 107; 22 CR. L. J. 113 **545**

C. I. F. contract—*Property, when passes.*

As regards a *C. I. F.* contract as between the buyer and the person importing the goods, the property in the goods passes when the goods are shipped, but when the first buyer sells to another party the property in the goods does not pass until the bills of lading are endorsed to the purchaser. **B** RUSTAMJI A. DUBASH *v.* HAJI HUSSEIN LARI, 22 BOM. L. R. 1165 **515**

Calcutta High Court, Original Side, Rules—Sale held by Registrar under rules, without attachment. *See* CIVIL PROCEDURE CODE, O XXI **432**

Calcutta Police Act (IV B. C. of 1866), s. 54 A, *requisites for conviction under—Possession of old* chuddar, *whether sufficient in itself to arouse suspicion.*

To justify a conviction under section 54 A of the Calcutta Police Act there must be reason to believe that the article in possession of the accused has been stolen or fraudulently obtained. The possession of an old *chuddar* is not enough in itself to arouse suspicion that the article was stolen or fraudulently obtained. **C** BAI DAS *v.* ALI BUX KHAN, 23 C. W. N. 1053; 22 CR. L. J 122 **554**

C. P. Tenancy Act (XI of 1898), s. 41 (2)—"*Premium,*" *meaning of—Sub-lease—Lessor agreeing to pay rent to creditor—Surrender of holding—Sub-lessee, right of, to possession—Joint family—One member tenant of holding—Other members, whether also tenants.*

The term "premium" in section 41 (2) of the C. P. Tenancy Act means a payment made in lump when a lease is granted or renewed and should not be pressed so as to make it include what is ostensibly a merely periodical payment.

On 3rd July 1914 *B.* with the consent of the *malguzar* executed a simple mortgage-bond of his absolute occupancy holding in favour of *L.*, and undertook to pay the amount due by 19 annual instalments. On the same day, *B.* gave a sub-lease to *L's* son *J.* of the holding for 19 years and agreed to pay the rent to the *malguzar*, and to pay to *L.* the rent payable by the sub-lessee. On 8th July 1914, *B.* surrendered the holding to the *malguzar* for a consideration, and the *malguzar* let the land to *B's.* son for a *nazrana* who, through his mother and guardian, executed a sub-lease in favour of the *malguzar* for a term of two years. On 16th April 1917 *J.*, alleging that he had been illegally ejected in December 1914 brought the present suit for possession, and the question was whether the consideration for the sub-lease to *J.*, *viz*, 19 annual payments, could be regarded as a premium:

Held, that the sub-lease to *J.* could not be treated as given in consideration of a premium and that he was entitled to possession thereunder.

The mere fact that one member of a joint family is a tenant of a holding does not make all the members of the family his co-tenants. **N** JAGANNATH *v.* BEHARI **419**

——— s. 60—*Lease by occupancy tenant for term exceeding one year, validity of—Ejectment of sub-lessee - Notice to quit, necessity for—Tenancy, manner of proving.*

Under section 60 of the C. P. Tenancy Act a lease for a period exceeding one year granted to a sub-tenant by an occupancy or ordinary tenant is absolutely invalid, irrespective of whether the sub-tenancy was consented to by or on behalf of the landlord or not, and a lessee under such a lease cannot plead absence of notice to quit prior to being ejected.

A tenancy may be proved without proving any written lease that may exist. **N** SURATSING *v.* RANI **461**

Champerty, *whether void in India—Transaction, when void—Compromise, fraudulent.*

W. and Co. brought a suit to recover from the defendant losses on certain cotton contracts, based on an account the correctness of which was not disputed In this suit the third party, *i. e*, the party who undertook to indemnify the defendant against losses, appeared as a party, and put in an agreement of compromise between the plaintiff and defendant entered into after admission of the suit, and alleged that the effect of this agreement was that the defendant was to pay plaintiff half the sum for which the suit had been brought and as regards the balance he was to bring a third party notice against the third party that the plaintiff and defendant were to share the balance equally, and that defendant obtained this concession by agreeing to give evidence against the third party, and that, consequently, the agreement was fraudulent, collusive and against public policy, and that no decree should be passed against the defendant:

Held, (1) that as the account had been proved and also that the transactions entered therein did take place between the plaintiff and defendant which resulted in a loss for which defendant was liable, the agreement furnished no sufficient ground for not passing a decree against the defendant;

(2) that inasmuch as champerty is not void in India unless the transaction is not a *bona fide* one for the acquisition of an interest in the subject of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive, the agreement did not fall within the description of an illegitimate transaction, and was, therefore, not invalid. **B** WELD & Co. *v.* SHER AHMED EKBAL AHMED **10**

Chota Nagpur Tenancy Act (VI of 1908), ss. 52, 234—*Landlord and tenant—Rent, suit to recover arrears of—Limitation—Co-sharer landlords—Suit for apportionment of rent—Right to recover rent, whether suspended*

Under section 52, read with section 234, of the Chota Nagpur Tenancy Act, rent falls due on the last day of each quarter of the agricultural year, and a suit for arrears of rent should be brought within three years from the end of the agricultural year in which the arrears become due. Where, however, a co-sharer landlord brings a suit for apportionment of rent making the tenants and the other co-sharers parties to the suit, the right to recover rent is deemed to be held in suspense till a decree is passed in the suit **Pat** MIDNAPUR ZAMINDARY COMPANY LD. *v.* JAGA NATH SARANGI 314

Circumstantial evidence, *value of*—*Quantum of proof necessary for conviction*

The fundamental rule by which circumstantial evidence is estimated, is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than that of his guilt.

Although it cannot be laid down as a proposition of law that *quantum* or value of evidence must depend upon the enormity of the crime, yet it is safer to follow the established rule that "the fouler the crime is the clearer and the plainer the proof ought to be" **Pat** RAGHUNANDAN KOERI *v.* EMPEROR, P. L. T. 684; 2 R. L. R. 58 858

Civil Procedure Code (Act XIV of 1882), ss. 375, 462, 461—*Bengal Court of Wards Act (IX of 1879), ss. 14, 15, 51—Compromise of suit—Minor defendants—Guardian appointed by Court of Wards, whether requires leave of Court for compromise.*

A guardian appointed under the Bengal Court of Wards Act, 1879, on behalf of infants has power to compromise proceedings in the Civil Court to which those infants are defendants, without obtaining the leave of the Court under section 462 of the Civil Procedure Code, 1882. Upon such a guardian consenting to an agreement for compromise, that agreement is necessarily recorded by the Court under section 375 of the Code, without the examination of its terms required in the case of ordinary guardians. **P C** NAKIMO DEWANI *v.* PEMBA DICHEN, 9 A. L. J. 171; 40 M. L. J. 201; (1921) M. W. N. 115; 29 M. L. T. 202; 34 C. L. J. 211 911

Civil Procedure Code (Act V of 1908), s. 2 (2)—*Decree—Order setting aside ex parte decree—Rubkari drawn up—Rubkari, whether decree—Execution—Limitation, terminus a quo.*

An order granting "with costs" an application to set aside an *ex parte* decree was made on 27th February 1915, and on the 8th March 91 a document, described as a *rubkari*, was drawn up which specified the amount of the costs payable to the successful applicant On 4th March 1918 the applicant applied in execution for realisation of his costs, but his application was dismissed as time-barred, the Court holding that the *rubkari* was a decree, and that limitation commenced on 27th February 1915;

Civil Procedure Code—contd.

Held, that the *rubkari* was not a decree within the meaning of section 2 (2) of the Civil Procedure Code but was an order within section 2 (4) of the Code which completed and rendered the order of 2 th February 1915 capable of execution, and limitation commenced to run from 8th March 1915, and, therefore, the application for execution was within time **C** NOOKOOR CHANDRA MULLICK *v.* KAJANI KANTA GHOSE 51

——— **s. 2 (2), O. VI, rr. 14, 15, 17, O. XXI, r. 66** *Execution of decree—Application for order for sale—Verification by karpardaz of decree-holder, whether sufficient—Application not signed by decree-holder—Defect, whether can be remedied—Order on application whether "decree"—Appeal, whether lies.*

The verification of an application under Order XXI, rule 66 of the Civil Procedure Code by the *karpardaz* of the decree holder who is acquainted with the facts verified by him is sufficient and valid under Order VI, rule 15 of the Code

The mere fact that the application is not signed by the decree-holder will not make it absolutely void The defect can be cured at any stage by amendment.

An order made under Order XXI, rule 66 of the Civil Procedure Code is not a decree within the meaning of section 2 (2), and is, therefore, not appealable. **Pat** BRAJA SUNDAR DEB *v.* SIVARANJAN DE., I P. L. T. 64 282

——— **s. 2 (2), O. XXII, r. 4** *Mortgage, suit on—Order rejecting application to make preliminary decree final, whether 'decree"—Preliminary decree, proceedings following, nature of—Death of sole judgment-debtor—Abatement of suit*

An order rejecting an application to make a preliminary decree in a mortgage-suit final, on the ground that the suit had abated owing to the death of the sole judgment-debtor is a "decree" and is open to appeal and second appeal.

Until a final decree is passed, all proceedings following a preliminary decree in a mortgage suit are proceedings in a pending suit and an application made therein is not an application for execution.

Where, therefore, before the making of a final decree in a mortgage-suit the sole judgment-debtor dies, and the decree-holder fails to apply within six months of his death to have his heirs substituted, and made subject to the preliminary decree, the suit, under rule 4 of Order XXII of the Civil Procedure Code, will abate BHUTNATH *v.* TARA CHAND, 33 C. L. J. 115; 25 C. W. N. 595 177

——— **s. 11**—Res judicata—*Adoption by widow—Suit for declaration by reversioners—Gift by widow—Second suit for declaration—Question of relationship, whether* res judicata

N., the widow of *H.*, adopted one *J.* Plaintiffs, claiming as reversioners of *H*, brought a suit for a declaration that the adoption shall not affect their reversionary rights in the estate of *H* and obtained a decree. Subsequently, *N* made a gift in favour of *I* Plaintiffs again brought a declaratory suit contesting the validity of the gift :

Held, that the question of plaintiffs' relationship to *H*, was *res judicata* in the subsequent suit, inasmuch as *I*, was claiming under *N*, who was a party to the

Civil Procedure Code—contd.

previous suit and was bound by the decree passed in that suit. **L** INDRAJ *v* RANJI LAL **808**

——— **S. 11**—Res judicata—*Alienation—Suit to contest alienation, dismissal of—Suit for possession, whether maintainable.*

Plaintiffs brought a suit for a declaration that a gift made by *R.* in favour of *N.* shall not affect their reversionary rights. The suit was dismissed on the ground that on *R.*'s death her grand-daughter *J.* would have a right to succeed to her, and that the plaintiffs' interest was too remote. After *R*'s death, plaintiffs brought a suit against *N.* for possession of her estate :

Held, that *J.*'s right to succeed to *R.* being *res judicata*, and *J.* being alive the plaintiffs' suit was not maintainable. **L** NAWAB *v.* PUNJABA **946**

——— **S. 11**—Res judicata—*Assignment of decree—Leave to assignee to execute decree, whether involves decision that execution is not barred by limitation.*

The appellant as assignee of a decree applied to be brought on the record as such, and to have the decree executed against the respondents. The latter resisted the application on the ground (*inter alia*) that execution was barred by limitation The application was granted, but the question of limitation was not expressly dealt with. Subsequently, on appellant proceeding to execute the decree, the plea of limitation was again raised and the Court gave effect to it :

Held, that the order allowing appellant to execute the decree involved legally the rejection of the plea that execution was barred by limitation and that such plea could not be raised in subsequent proceedings. **P** RAJA OF RAMNAD *v.* VELUSAMI TEVAR, 19 A. L. J. 168; 40 M. L. J. 197; 13 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218; 25 C. W. N. 581 **880**

——— **S. 11, Sch. II, paras. 20, 21**—*Arbitration—Award—Order refusing to file award, whether* res judicata *—Suit to enforce award, whether barred—Limitation for suit—Limitation Act (IX of 1908), Sch. I, Art. 120.*

Although an application under paragraph 20 of Schedule II to the Civil Procedure Code to file an award is numbered and registered as a suit, proceedings under paragraphs 20 and 21 of the Schedule are not proceedings in a suit.

Where an application to file an award is rejected, a suit to enforce the award is not barred by the rule of *res judicata.*

A suit to enforce an award is not provided for by any other Article of the Limitation Act; such a suit is, therefore, governed by Article 120 of Schedule I to the Act. **B** RAJMAL GIRDHARLAL *v.* MARUTI SHIVRAM, 22 BOM. L. R. 1377; 45 B. 29 **755**

——— **S. 20**—*Place of suing—Goods ordered by value-payable parcel post—Cause of action, where arises.*

A. at Kasganj, in the U. P. ordered certain goods of a firm in Delhi ; the goods were sent by value payable parcel post : on taking delivery *A.* found that the parcel did not contain the goods he had ordered ; he accordingly instituted a suit at Kasganj against the firm for damages. The Court returned the plaint on the ground that the cause of action arose at Delhi and it had no jurisdiction to entertain the suit :

Civil Procedure Code—contd.

Held, that the suit had been correctly filed at Kasganj.; that although the contract was entered into at Delhi it was not completed till delivery was made and the goods paid for at Kasganj ; that until actual delivery and payment was made at Kasganj the goods remained the property of the firm at Delhi, and that the Kasganj Court had jurisdiction to entertain the suit. **A** RAM LAL *v.* BHOLA NATH, 18 A. L. J. 749; 2 U. P. L. R. (A.) 254; 42 A. 619 **359**

——— **S. 20**—*Place of suing—Jurisdiction—Cause of action*—Hundi *drawn in Cawnpore for acceptance and payment in Calcutta*—Hundi *accepted and paid in Calcutta—Suit to recover sum paid - Place of suit—Commission to examine specific witness—Witness not named examined, effect of.*

D., a firm at Cawnpore, drew a *hundi* in favour of the Bank of Bengal on *P.*, a firm carrying on business at Cawnpore and Calcutta ; the *hundi* was to be accepted in Calcutta for the accommodation of, and was to be debited to, *D.*, who in case of non-payment undertook to indemnify *P.* against any loss or damage. *P.* accepted the *hundi* in Calcutta and made payment there. On failure by *D.* to pay the amount of the *hundi*, *P* brought the present suit in Calcutta to recover that amount and it was objected that the Calcutta Court had no jurisdiction to entertain the suit :

Held, that as the plaintiff's cause of action would not be complete unless he proved the fact that he had accepted the *hundi* in Calcutta and had proved that he had paid in Calcutta on the due date in accordance with his acceptance, part of the cause of action arose within the local limits of the Ordinary Original Jurisdiction of the High Court at Calcutta and the Court had jurisdiction to entertain the suit.

Where, on the application of the defendant, a commission is issued for taking the evidence of one particular witness only, and, in spite of protests of the plaintiff, the evidence of another person is also taken, the Court would be justified in ignoring the evidence of such person. **C** RAM CHUNDER-GOURI SHANKAR *v.* GUNPUTRAM-BISWANATH, 47 C. 583 **539**

——— **S. 20 (c)**—*Place of suing—Fraud, decree obtained by—Suit to set aside decree, whether can be brought in Court other than that which passed decree—Cause of action—Wrong report with regard to service of summons—Civil Procedure Code (Act V of 1908), ss. 104 (2), 115—Revision—Plaint, order directing return of—Appeal—Appellate Court's order—Appeal, second, whether lies.*

A suit to set aside an *ex parte* decree on the ground of fraud may be brought in a Court other than that by which the decree sought to be set aside was passed.

Plaintiff sued the defendant at Lahore for setting aside an *ex parte* decree passed against him by the Munsif of Ferozepore. It appeared that notice of the suit in which the impugned decree was passed was issued to be served on the plaintiff in Lahore, but was not served and was returned with a report that he was evading service, whereupon the *ex parte* decree was passed. The Munsif of Lahore, holding that the cause of action arose at Ferozepore, returned the plaint for presentation to the proper Court On appeal the District Judge held that the suit was cognizable by the Lahore Court and remanded it for

decision on the merits. The defendant applied for revision to the High Court :

Held, (1) that the order passed by the District Judge, being one passed on appeal against an order returning the plaint, was not appealable and that, therefore, a petition for revision was competent ;

(2) that, inasmuch as a wrong report was made by the serving officer with regard to the plaintiff's alleged attempt at evasion of service, part of the cause of action arose at Lahore and the suit was maintainable at Lahore. **L** RAM LAL-ISHAR DAS *v.* SALIG RAM **2**

——— **s. 47**—*Decree-holder depositary of property attached—Detention of property—Suit for damages for wrongful detention, whether maintainable.*

In execution of a decree against *P.* his property was attached and placed in charge of the decree-holder *D* as *sapurdar* or depositary. *P.* applied to the Court for an order directing *D.* to produce the property. *D.* alleged that under an oral order of release the property was made over to *S.*, the brother of *P.* The present suit was brought by *P.* to recover from *D* damages for wrongful detention, but the suit was dismissed on the ground that the matter being within the purview of section 47 of the Civil Procedure Code the suit was not maintainable :

Held, that the suit not having been brought against the decree-holder as such, or against a party to the suit, but being a suit against a depositary, who set up no right to the property deposited, did not fall within the scope of section 47 of the Civil Procedure Code, and was maintainable. **N** SITARAM *v.* DONGER SINGH **477**

——— **s. 47**—*Execution of decree—Decree-holder auction-purchaser, suit by, against judgment-debtor and stranger to recover possession of property purchased, whether barred.*

Where a decree-holder auction-purchaser in trying to obtain possession of the property purchased by him is resisted not only by the judgment-debtor but also by a stranger who claims to have an interest in the property, his proper remedy is to bring a separate suit for possession both as against the judgment-debtor and as against the stranger. Section 47 of the Civil Procedure Code is not a bar to the maintenance of such a suit. **B** GOBA NATHU BARGLA *v.* SAKHARAM TEJU PATIL, 22 BOM. L. R. 110 ; 44 B. 977 **366**

——— **s. 47**—*Execution of decree—Stay of execution, order granting—Appeal, whether lies.*

An order granting a stay of execution is not a decree nor does it fall within the purview of section 47 of the Civil Procedure Code. No appeal, therefore, lies against such an order. **B** JANARDAN TRIMBAK GADRE *v.* MARTAND TRIMBAK GADRE, 22 BOM L R 1212; 45 B 241 **523**

——— **s. 47**—*Pre-emption suit—Decree awarding possession on payment of purchase-money—Money paid—Possession not obtained—Suit for possession, whether maintainable.*

Where a person obtains a decree in a pre-emption suit for possession on payment of the purchase-money and pays the money, but fails to obtain possession, he is not entitled, by virtue of section 47 of the Civil Procedure Code, to maintain a fresh suit for possession on the basis of the decree. **A** RAMANAND *v.* JAI RAM, 18 A. L. J. 1001; 2 U. P. L. R. (A.) 379; 43 A. 170 **632**

——— **ss. 47, 146, O. XXI, rr. 97, 98, 99**—*Auction-purchaser under money decree, whether representative of judgment-debtor.*

An auction-purchaser under a simple money decree is a representative of the judgment-debtor for the purpose of Order XXI, rule 98, Civil Procedure Code, against whom proceedings can be taken under section 146 of the Code. **M** MANICKA GRAMANI *v.* PARASURAM MUDELEY, 12 L. W. 350; (1920) M. W. N. 787 **894**

——— **s. 48**, *applicability of, to mortgage decrees, passed before passing of Code.*

Section 48 of the Civil Procedure Code of 1908 governs an application for the execution of a mortgage-decree even though obtained before that Code came into force. **B** GOPALDAS GANPATDAS *v.* TRIBHOVAN JETHIRAM, 22 BOM. L. R. 1420; 45 B. 365 **790**

——— **s. 66**, *scope of—Execution sale*—Benami *purchase—Certified purchaser kept out of possession—Real purchaser in possession—Title of certified purchaser, extent of—Bengal Tenancy Act (VIII of 1885), Sch. III.*

Section 66 of the Civil Procedure Code is not restricted to *benami* purchases made by or on behalf of judgment-debtors.

P., the landlord, purchased a holding at an execution sale *benami* in the name of *D.* and the latter was certified as the purchaser. *P.*, however, remained in possession of the holding for more than three years when he was dispossessed by *D.* *P.* thereupon brought the present suit to recover possession :

Held, that as *D.* had been kept out of possession for a period of two years his title had become extinguished by virtue of the Third Schedule to the Bengal Tenancy Act. **C** HARISH CHANDRA GUHA *v.* NRIPENDRA COOMAR CHAKRAVARTI, 24 C. W. N. 1024 **719**

——— **s. 73**—*Execution of decree—Money paid into Court—Rateable distribution, right to, in respect of execution costs, whether permissible.*

Money paid into Court in execution of a decree is assets available for rateable distribution under section 73 of the Civil Procedure Code, but such distribution is limited to the amount of the decrees and cannot be extended to the costs of the application for execution, unless, prior to the receipt of the money, there was an order made expressing in terms that such costs are to be added to the amount of the decree. **C** NOOR MAHOMED *v.* BILASIRAM, 47 C. 515 **458**

——— **s. 73, O. XXI, r. 72**—*Rival decree-holders—Rateable distribution—Permission to bid and to set off—Right of other decree-holders, whether affected.*

A. and *B.* held decrees against a common judgment-debtor. *B.* obtained permission to bid at the sale of the judgment-debtor's property, and to set off his claim under his decree against the purchase-money He purchased one item of property but did not deposit the purchase-money, another item was sold to a stranger who deposited the purchase-money. *A.* applied for rateable distribution but

Civil Procedure Code—contd.

his application was disallowed in respect of the purchase by *B*.:

Held, that *A* was entitled to rateable distribution in respect of both purchases, as the permission to set off granted to *B* did not affect *A*'s right to such distribution. **M** ARUNACHELLAM CHETTY *v.* SOMASUNDARAM CHETTY, 12 L. W. [illegible] 86

——— **s. 92, O. I, r. 10, O. XXIII, r. 1** —*Scheme suit—Prayer*, inter alia, *for appointment of trustee—Withdrawal of suit—Court, power of, to transpose parties and adjudicate on merits.*

In a suit instituted under section 92, Civil Procedure Code, where the plaintiff applies to withdraw the suit and it appears to the Court that his object is to prevent the Court from deciding the suit on the merits the Court has power to allow the suit to proceed with some of the defendants as plaintiffs notwithstanding the withdrawal by the plaintiff from the suit

The language of clause 2 of rule 10, Order I, Civil Procedure Code, is wide enough to give a Court power to add either as plaintiff or as defendant *any person*, that is, whether already a party, as defendant or plaintiff, so as to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit **M** MAHOMED SIRAJUDDIN *v.* GHULAM JAILANI, 2 L. W. 45 233

——— **s. 99, O. XLI, r. 31**—*Omission to comply with provisions of rule, effect of.*

The omission by an Appellate Court to comply strictly with the provisions of Order XLI, rule 31 of the Civil Procedure Code amounts to no more than an irregularity curable by section 99 of the Code. **S** LAKHAMBAI *v.* DEVIBAI, 14 S. L. R. 12 673

——— **s. 102**—*Suit to recover grazing fee, nature of—Appeal, second, whether lies*

A person who is allowed to graze his cattle on the land of another upon payment of a fee *per capita* has no interest in the land and is not a tenant. Consequently, the grazing fee is not in the nature of rent.

A suit for recovery of money claimed as grazing fee is of the nature cognizable by a Court of Small Causes and, under section 102 of the Code of Civil Procedure no second appeal lies in such a suit if the amount in dispute is less than Rs 500. **C** JATINDRA MOHAN *v.* ABDUL AZIZ, 32 C. L. J. 83 595

——— **s. 102**—*Suit to recover price of coal, nature of—Appeal, second*

A suit to recover the price of coal supplied under an agreement is in the nature of a Small Cause suit, and where the amount sought to be recovered therein is below Rs 500, a second appeal is barred under section 102 of the Civil Procedure Code: DHAK & Co. *v.* SIB NARAYAN SINGH 188

——— **s. 102, O. XXI, r. 71**—*Application to recover deficiency from defaulting purchaser—Amount sought to be recovered less than Rs. 500—Appeal, second, whether lies.*

Where the amount sought to be recovered from a defaulting purchaser by an application under Order XXI, rule 71 of the Civil Procedure Code is less than Rs 500, an order passed on the application is not subject to second appeal. **B** RAJACHARYA

Civil Procedure Code—contd.

SHESHACHARYA *v.* CHEMANNA GURUSHANTAPPA, 22 BOM. L. R. 1345; 45 B. 23 192

——— **s. 104, O. XL, r. 4, O. XLIII, r. 1 (s)**—*Receiver—Order passing accounts—Order granting leave to sue Receiver—Appeal, whether lies—Suit, maintainability of.*

Where a Court is seized with a particular matter under a particular rule, and an order under that rule is appealable, then the order actually made by the Court in that matter, whether it is a positive order or a negative order is also appealable.

An order passing a Receiver's accounts is an order made under rule 4 of Order XL of the Civil Procedure Code and is appealable under clause (*s*) of rule 1 of Order XLIII of the Code

No appeal lies against an order granting leave to sue a Receiver. Where the court appointing a Receiver has gone into the accounts filed by the Receiver and has passed them, overruling the objections of the party impugning the accounts, a suit will not lie against the Receiver for damages for negligence, etc., based on the same allegations which have already been considered and overruled. **B** SHRINIWAS KRISHNASWAMI MUDLIAR *v.* WAZ, 22 BOM. L. R. 1346; 45 B. 49 421

——— **s. 105**—*"Affecting the decision of the case", meaning of—Arbitration, order superseding, whether can be attacked in appeal from final decree*

The words "affecting the decision of the case" in section 105 of the Civil Procedure Code, mean affecting the decision of the case with reference to the merits of it.

An order superseding an arbitration is not an order which affects the decision of the case with reference to the merits of it, and even if such an order is erroneous the error cannot be made a ground of objection in the appeal from the final decree in the case **L** BUDHU RAM-HOSDA RAM *v.* RAMZAN 676

——— **s. 107, O. XXIII, r. 1**—*Appellate Court, power of, to allow withdrawal of suit*

An Appellate Court has jurisdiction to allow a suit to be withdrawn with liberty to bring a fresh suit on the same cause of action **B** SHEKH HASAN GULAM MOHIDIN *v.* MAHOMED ALI, 22 BOM. L. R. 1358; 45 B. 206 210

——— **s. 110, O. XLV, r. 4**—*Privy Council appeal—Connected suits—Value in one below Rs. 10,000—Certificate, whether should be granted.*

Where in two connected suits the points raised are identical and the valuation of the subject-matter in one exceeds Rs 10,000 and in the other is less than that amount, and the former is certified as a fit one for appeal to the Privy Council the latter should also be similarly certified **A** BHAGWAN SINGH *v.* BHAWANI DASS-HAGWAN DAS, 18 A. L. J. 1119; 47 I. P. L. R. (A.) 411 794

——— **s. 115**—*"Case", meaning of—Jurisdiction, decision as to—Revision, whether maintainable*

The word "case" in section 115 of the Civil Procedure Code does not necessarily in every case mean the whole case but may mean a particular branch of a case for which an independent remedy, or a different procedure, is provided by the Code

Where on the objection of the defendant that the Court has no jurisdiction to entertain the suit the

Civil Procedure Code—contd.

Court decides it has jurisdiction, the order of the Court does not amount to a decision of a case and no revision lies against it. **L** SAWAN MAL *v.* KANHAYA LAL-GOPAL DAS **680**

——— **s. 115**—*Interlocutory order—Order allowing party to produce additional evidence after closing case—Revision, whether competent.*

Interference by way of revision with interlocutory orders is only justified where irremediable damage is likely to result.

In a suit for the recovery of a sum of money five issues were framed and both the parties produced their evidence, at the conclusion whereof the plaintiffs asked for permission to produce additional evidence on the second issue The Court refused the application but allowed the plaintiffs to produce further evidence on the fifth issue. The defendants applied for revision to the High Court:

Held, that there was no possibility of irremediable damage being done to the defendants and that, therefore, the petition for revision was not competent. **L** FIRM MAKHAN AL-TEJ PAL *v.* FIRM JAI NARAIN-BIRJ RAJ, 67 P. W. R. 1921 **450**

——— **s. 115** *Revision.*

The mere fact, that a Court has used threatening language towards an arbitrator is not a ground for interference under section 115 of the Civil Procedure Code in the absence of anything to show that, in consequence of such language, the arbitrator was forced to arbitrate against his will. **A** BASDEO MAL *v* KANHAIYA LAL, 18 A. L. J. 95; 43 A. 10 **667**

——— **s. 115** -Revision—Plaint, order directing return of *See* CIVIL PROCEDURE CODE s 20 (c) **2**

——— **s. 115, O. XXXVIII, r. 10**—*Attachment before judgment - Property sold - Decree passed - Proceeds of sale attached and recovered by another decree-holder against same judgment-debtor—Suit to recover share, dismissal of—Revision.*

Certain perishable property belonging to a defendant having been attached before judgment and sold, the sale-proceeds were paid into Court to the credit of the suit Eventually, a decree was passed in the suit, but before the decree holder could apply for execution a person who had previously obtained a decree against the same judgment-debtor obtained an order of attachment and payment of the sum lying in Court, and the money was paid to him. The subsequent decree holder thereupon brought a suit to recover from the prior decree-holder the amount which he would have got out of the moneys attached if there had been rateable distribution The suit was dismissed. In revision:

Held that the plaintiff not having at once applied for execution of his decree to make his position secure his suit had been rightly dismissed. **B** VISHNU DHONDDEV PALKAR *v* RAMPRATAP DAULATRAM MARWADI, 22 BOM. L. R. 1407: 45 B. 60) **713**

——— **s. 115, Sch. II, Para. 16**—*Award—Decree passed on award without giving time for filing objections—Appeal, whether lies—Revision*

Where a Court passes a decree in terms of an award without giving the parties time to file objections, no appeal lies against the decree, but the High Court has power to set aside the decree in the exercise of its discretion under section 115 of the Civil Procedure Code. **B** RAVJIBHAI KASHIBHAI *v.* DAHYABHAI ZAVERBHAI, 22 BOM. L. R. 1454 **811**

——— **s. 145**, *scope of—Receiver, surety for, liability of.*

Section 145 of the Civil Procedure Code applies where any person has become liable as surety for a Receiver and such surety can be ordered to pay the sum which he has bound himself to pay **L B** MAUNG PO THEIN *v.* MA WAING, 10 L. B. R. 2 & 13 BUR. L. T 91 **844**

——— **s. 149**—*Appeal filed on insufficiently stamped memorandum—Deficiency made after expiry of limitation—Extension of time.*

Where an appeal is filed in time on an insufficiently stamped memorandum, and on the deficiency being pointed out to the appellant by the office he disputes the order and does not make up the deficiency till long after the appeal is barred by time, he is not entitled to the benefit of section 14 of the Civil Procedure Code. **L** WADHAWA SINGH *v.* SUNDAR SINGH, 4 P. W. R. 1921 **657**

——— **O. I, r. 3**, *scope of—Joint trial, when justified Declaratory suit by reversioner in respect of several alienations—Alienees, whether can be made joint defendants.*

The language of Order I, rule 3, Civil Procedure Code, is extremely wide, and even if there be only one question common to all the cases, that is sufficient to justify a joint trial.

Plaintiff sued for a declaration to the effect that certain alienations shall not affect his reversionary rights. He impleaded all the alienees as defendants in the case:

Held, that there being at least one question common to all the transactions, namely, whether the plaintiff, by reason of his relationship to the alienor, was competent to maintain the suit it was not bad for misjoinder of parties. **L** JIWAN SINGH *v* GARBHA SINGH **522**

——— **O. I, rr. 9, 10.** *See* DECLARATION OF TITLE **292**

——— **O. II, r. 2**, *applicability of, to suits for immovable property—Causes of action, joinder of all, in one suit, whether necessary.*

In determining the applicability of Order II, rule 2 of the Civil Procedure Code to a suit respecting immovable property the mere fact that the title to the property in dispute in both suits is the same and that the property is the same does not necessarily show that the cause of action is the same. Thus, in a suit by reversionary heirs for a declaration of their right and for possession after setting aside a deed of gift, and in a subsequent suit for possession as reversionary heirs of the estate, on the ground that they were in possession and were dispossessed by the defendant, the cause of action is distinct, and the mere fact that the cause of action in the latter case arose before the institution of the previous suit, did not make it obligatory on the plaintiff to include the claim in the previous suit.

It is not necessary that all the causes of action should be joined in the same suit, but the suit should include the whole claim arising out of the same cause of action, that is, the cause of action for which the suit is brought. **C** MANMATHA NATH BOSE *v.* JAGAT RAM ROY **517**

Civil Procedure Code—contd.

——— O. II, r. 2—*Dekkhan Agriculturists' Relief (Act XVII of 1879), ss. 12, 13—Mortgages, simultaneous—Suit on one mortgage—Account taken only in respect of one mortgage—Subsequent suit on another mortgage, whether maintainable.*

When a Court takes an account as provided by section 13 of the Dekkhan Agriculturists' Relief Act, it does not start the account with the particular bond or mortgage-deed, or whatever it may be which is pleaded as the basis of the suit. The account is taken of the transactions between the parties to the suit, and if those transactions began at an earlier date than a particular bond, whether a money-bond or a mortgage-bond, and if the transactions led up to that particular bond then the account is taken from the earliest of the preceding transactions and is continued right up to the date of the suit.

Defendant had had several transactions with the plaintiff. A balance was made up and, in order to secure payment of the balance, the defendant executed three mortgages in favour of the plaintiff. The latter brought a suit on one of the mortgages and obtained a decree. The account taken in the suit was limited to the particular mortgage which was sued upon. Subsequently, the plaintiff sued on the second mortgage :

Held, that the suit was barred by Order II, rule 2 of the Civil Procedure Code read with sections 12 and 13 of the Dekkhan Agriculturists' Relief Act. **B** DALUCHAND BALARAM *v.* APPI KHEMA SASTEE, 22 BOM. L. R. 1093; 45 B. 55 **347**

——— O. II, r. 2—*Mortgagor authorising mortgagee to sue either for interest due or for possession in case of default in payment of interest—Suit for interest—Subsequent suit for possession, whether barred.*

A mortgagee is not debarred by Order II, rule 2, Civil Procedure Code, from suing for possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of the mortgagor's failure to pay interest at the stipulated time, simply because on the occurrence of a previous default the mortgagee sued only for interest and not for possession. **L** PARMESHRI DAS *v.* FAKIRIA, 1 L. 457; 56 P. W. R. 1920 **71**

——— O. VI, r. 17—*Appeal, second—Suit, character of, whether can be altered—Suit for possession, whether can be converted into suit for enforcement of mortgage.*

It is not open to a plaintiff in second appeal to apply to alter the character of his suit so as to convert it from a suit for possession into one to enforce a mortgage. **C** MOHENDRA LAL BISWAS *v.* JAGAT CHANDRA ROY **63**

——— O. IX, r. 9, O. XXI, r. 90—*Application to set aside execution sale, dismissal of, for default—Restoration of application, whether permissible.*

The provisions of Order IX, rule 9, Civil Procedure Code, are applicable to an order dismissing for default an application made under Order XXI, rule 90, Civil Procedure Code, to set aside a sale held in execution of a decree. **O** GAURI *v.* HINGA, 23 O. C. 349 **575**

Civil Procedure Code—contd.

——— O. XX, r. 4 (1)—*Provincial Small Cause Courts Act (IX of 1887), s. 25—Judgment of Small Cause Court, contents of—Brief reasons for decision, statement of.*

The judgment of a Judge of a Small Cause Court should contain a brief statement of the reasons for the decision which would satisfy the High Court that the Judge had applied his mind to the materials placed before him. A judgment in a Small Cause suit as follows:—'Point: Is the plaint claim true? I find the plaint claim true', is not a judgment in conformity with the law. **M** KANDASAMI CHETTY *v.* RAMALINGA CHETTY, 12 L. W. 285 **906**

——— O. XXI, r. 2—*Execution of decree—Payment out of Court—Certification by decree-holder—Limitation—Payment disputed—Procedure.*

There is no time fixed within which a decree-holder is bound to certify a payment made to him out of Court, such payment can be certified by the decree-holder at any time.

Where a judgment-debtor denies having made a payment which the decree-holder certifies, the Court should take evidence and come to a conclusion, one way or the other, whether the payment has actually been made or not. **B** PANDURANG BALKRISHNA *v.* JAGYA BHAU, 22 BOM. L. R. 1120; 45 B. 91 **399**

——— O. XXI, r. 33—*Restitution of conjugal rights, decree for—Execution by detention in prison, order disallowing—Court, duty of.*

Ordinarily, a Court passing a decree for restitution of conjugal rights against a wife ought to exercise the discretion conferred upon it by rule 33 of Order XXI of the Civil Procedure Code and direct that the decree shall not be executed by the detention of the wife in prison. It is no ground for refusing to exercise this discretion that the wife has already been in jail under the sentence of a Criminal Court and that it would be no violence to her feelings to be sent to jail if she disobeys the decree for restitution of conjugal rights. **B** BAI PARVATI *v.* MANSUKH JETHA, 22 BOM. L. R. 1097; 44 B. 972 **361**

——— O. XXI, r. 33—*Restitution of conjugal rights, decree for—Form of decree.*

Where a suit for restitution of conjugal rights is decreed not only against the plaintiff's wife but also against other defendants in the suit who are proved to have prevented the wife from going to the husband, the decree should not direct that the husband is entitled to recover possession of the wife, but, after declaring the husband's right, should add a direction that the defendants other than the wife do refrain from preventing the plaintiff's wife from returning to him. **Pat** BISWESWAR RAM *v.* PALTU RAM KAHAR **887**

——— O. XXI, rr. 35, 36—*Decree for possession—Possession not obtained—Subsequent suit for possession, whether maintainable.*

Plaintiff purchased *J*'s share in a well, and obtained a decree for possession of that share as against *J.* and his co-sharers. They took out execution against *J.* alone and filed a *dakhalnama*. Subsequently, they brought a suit for possession against *J.*'s co-sharers. It was found that they had not obtained possession according to law in execution of their previous decree :

Civil Procedure Code—contd.

Held, that it was necessary for the plaintiffs to obtain symbolical possession according to law in execution of the previous decree and having failed to do that they could not maintain the present suit, their title having merged in the previous decree. **L** RAM CHAND *v.* JANA 770

——— O. XXI, r. 53—*Execution of decree—Attachment of decree in favour of judgment-debtor—Sale of attached decree—Procedure.*

Where a decree in favour of a judgment-debtor is attached in execution of a decree against him, the Court ought, under Order XXI, rule 53 of the Civil Procedure Code, to proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. The Court has no power to sell the attached decree.

Where, however, an attached decree was sold and was purchased by the attaching decree-holder who proceeded to execute it and realised a larger amount under it than he had paid for it:

Held, (1) that the procedure adopted by the Court was quite irregular;

(2) that the decree-holder must give credit to the judgment-debtor for the full amount realised by him in execution of the attached decree. **B** VITHALDAS PRABHU *v.* SUBRAYA MANJAPPA, 22 BOM. L. R. 1304; 45 B. 343

——— O. XXI, r. 86—*Execution of decree—Sale—Auction-purchaser, deposit by—Failure to deposit balance of purchase-money—Deposit, when may be refunded.* 541

Where an auction-purchaser, after depositing the required quota of the purchase-money, fails, for some good reason to the satisfaction of the Court, to deposit the balance, the matter is one in which the discretion given to the Court by Order XXI, rule 86 of the Civil Procedure Code, should be exercised in his favour, and the amount deposited refunded to him. **N** GANPAT RAO MOHITEY *v.* KESRICHAND, 17 N. L. R. 15

——— O. XXI, r. 89—*Calcutta High Court, Original Side, Rules—Sale held by Registrar under rules, without attachment—O. XXI, whether applicable.* 705

Although the provisions of Order XXI of the Civil Procedure Code apply ordinarily to sales on mortgage-decrees after attachment under the provisions of the Code, those provisions do not apply to cases where the sale is held by the Registrar of the High Court, without attachment, under, and in conformity with, the rules on the Original Side, of that Court **C** SURENDRA KRISTO RAY *v.* GOOROO PRASAD GHOSE 24 C. W. N. 536

——— O. XXI, r. 90—*Execution sale—Mistake in publishing sale, effect of* 432

Where in publishing a proclamation of sale, by mistake the selling officer and place of sale are announced as different from those fixed by the Court the sale is illegal. **M** JAYARAMA AIYAR *v.* VRIDHIGIRI AIYAR, 39 M. L. J. 188; 12 L. W. 182; (1920) M. W. N. 460; 44 M. 35

——— O. XXI, rr. 90, 93—*Sale in execution of decree—Payment to decree-holder—Security-bond—Sale set aside and refund ordered—Interest, whether should be allowed.* 167

Where part of the purchase-money upon a sale in execution has been paid out to the decree-holder under a security bond, and the sale is subsequently set aside, the Court has power, under Order XXI, rule 93 of the Civil Procedure Code, to order that interest be paid for the period during which the decree-holder has had the use of the money, even though the security-bond does not provide for interest. **P C** MAHARAJ BAHADUR SINGH *v.* FORBES, 19 A. L. J. 101; 33 C. L. J. 176; 25 C. W. N. 866; 40 M. L. J. 141; 13 L. W. 217; (1921) M. W. N. 26; 2 P. L. T. 115; 6 P. L. J. 129

——— O. XXII, rr. 1, 3—*Abatement of suit—Suit, whether can abate after decree—Personal right, suit based on, effect of.* 782

A suit which has terminated in a decree cannot abate by reason of the death of the plaintiff after the passing of the decree.

Even in cases of personal right, such as a claim for damages, the maxim *actio personalis moritur cum persona* does not apply after a decree is passed, inasmuch as a decree is property capable of inheritance as any other property. **Pat** MULCHAND *v.* GOBIND SINGH 939

——— O. XXII, r. 2—*Appeal—Death of respondent—Legal representative already party to appeal—Abatement—Inheritance—Partition among brothers and exclusive possession of respective shares—Descendants of one branch, whether can succeed to estate of member of other branch.*

Where on the death of a respondent it appears that his heirs are already parties to the appeal, it cannot be said to have abated merely because no fresh application is made to bring on the record the legal representatives of the deceased.

Four brothers effected a partition whereby *K.* separated from the other three and got some land whereon he founded a village. The other three continued to be joint and founded another village on the land which had fallen to their share, and both parties and their descendants continued in exclusive possession of their respective villages. One *L* the last male holder in the line of one of the three joint brothers, having died disputes arose as to mutation of his land between the descendants of *K.* and the descendants of the two brothers The Revenue Courts decided that the descendants of *K.* were entitled to one-third share in *L's* land. Thereupon, the other side brought a suit claiming the whole of *L.*'s estate:

Held, that the defendants were not debarred from inheriting their one-third share in the estate of *L.* by reason of the alleged partition or separate and exclusive enjoyment of the village founded by *K.* **L** KARTAR SINGH *v.* LAL SINGH. 11 P. L R. 1921; 9 P. W. R. 1921

——— O. XXII, rr. 2, 4—*Death of one of several defendants—Legal representatives not brought on record—Joint tenants—Defendants jointly and severally liable—Suit, whether abates.* 238

Where the defendants in a suit are jointly and severally liable to the plaintiff, the suit does not abate merely because one of the defendants has died and his legal representatives have not been brought upon the record.

Joint holders of land are jointly and severally liable to the landlord for the rent of the holding. **Pat** JWALA PRASAD *v.* KOPEYA MUNDA 890

Civil Procedure Code—contd.

——— O. XXII, r. 9—*Limitation Act (IX of 1908), s. 5 - Appeal, abatement of, owing to death of appellant—Application for substitution of names, nature of—Court, power of, to set aside order of abatement—Sufficient cause.*

Owing to the legal representatives of a deceased appellant not having been brought on to the record, an appeal automatically abated, but no formal order carrying the abatement into effect was drawn up. More than six months after the death of the appellant an application was made to bring his legal representatives on to the record and to continue the appeal :

Held, (1) that the application was, in substance, an application to set aside the abatement under Order XXII, rule 9, of the Civil Procedure Code, and that the absence of a formal order of abatement was no obstacle thereto :

(2) that the Court had power to entertain the application and decide whether the applicant was prevented by sufficient cause from continuing the appeal, under sub-rule (2) of rule 9, independently of sub rule (3).

The provision in sub-rule (3) of rule 9 of Order XXII of the Civil Procedure Code does not confine the sufficient cause mentioned in sub-rule (2) to the circumstances given in section 5 of the Limitation Act. **A** LACHMI NARAIN v. MUHAMMAD YUSUF, 18 A. L. J. 483: 42 A. 540 **903**

——— O. XXIII, r. 1—*Suit for ejectment withdrawn without leave to bring fresh suit—Subsequent suit for possession on different ground, whether barred*

The fact that a suit for ejectment on the ground that defendant was a trespasser and had no right whatever to the land and in which the defendant raised the defence that he had a tenancy right in the land and could not be ejected, was withdrawn without liberty to bring a fresh suit in respect of the same subject-matter, does not operate as a bar under Order XXIII, rule 1 of the Civil Procedure Code, to a subsequent suit for possession in which the plaintiff states that he is entitled to possession on the ground that the tenancy of the defendant had been determined by service of notice to quit. **C** ABDULLA v. AKHIL CHANDRA BIWAS **84**

——— O. XXIII, r. 3, Sch. II, paras. 20, 21—*Arbitration - Reference made after institution of suit—Award, whether can be recorded as adjustment - Procedure.*

The provisions of paragraphs 20 and 21 of Schedule II of the Civil Procedure Code have no application to cases where the matters referred to arbitration are already the subject-matter of a suit between the parties to the reference.

Where the parties to a suit agree to refer the matters in dispute to arbitration without the intervention of the Court and an award is made on such submission prior to the decision of the suit, the submission and the award can be recorded under Order XXIII, rule 3, of the Civil Procedure Code as an agreement adjusting or compromising the suit and a decree can be passed in terms of the award.

The procedure to be adopted by parties to a suit who enter into an agreement to refer the matter in dispute in the suit or part of it to arbitration without the intervention of the Court may be summarised as follows:—

They may make the agreement an order of Court and then paragraphs 1 to 16 of the Second Schedule apply.

If they do not make the agreement an order of Court;

a they cannot ask for the agreement to be filed under paragraph 17;

b they cannot ask for the award, if made, to be filed under paragraphs 20 and 21;

c if an award is made and both parties accept it, they can apply for a consent decree in terms thereof, and there will be no need to apply for an order recording the terms of the adjustment;

d if the plaintiff disputes the award for any reason, and proceeds with the suit, the defendant can plead the award and have the case set down for hearing on the issue whether the award is binding as an adjustment;

e if the defendant disputes the award, the plaintiff can set the case down for trial on the issue whether the adjustment should be recorded:

f either party can file a suit to enforce the award and apply for a stay of the original suit. **B** MANILAL MOTILAL v GOKALDAS ROWJI, 24 BOM. L. R. 1048; 45 B. 215 **53**

——— O. XXXII, *applicability of, to uncontested probate proceedings*

Although, as a rule, when a Will, of which Probate is sought, affects the interest of a minor, a guardian *ad litem* should be appointed for the minor, yet, until a contest arises, Order XXXII of the Civil Procedure Code has no application to the proceedings

The effect of Order XXXII is, that no person can be appointed a guardian *ad litem* without his express consent, and the question whether the person appointed as such guardian consented to act is always one of importance on the merits, and the refusal by such a person to accept a citation when tendered to him might be regarded as a refusal by him to act. **C** RADHASHYAM DASYA v RANGA SUNDARI DASYA, 24 C. W. N. 511 **664**

——— O. XXXII, r. 3—*Execution of decree—Judgment-debtor, death of—Legal representative minor—Application to bring legal representative on record—Guardian, appointment of—Procedure.*

Where the legal representatives of a deceased judgment-debtor are minors and an application is made to bring their names on to the record under the guardianship of their mother, it is incumbent on the Court, under Order XXXII, rule 4, Civil Procedure Code, before making any order adverse to them, to call upon each minor to show cause against the appointment of his mother as his guardian and to call on the mother to show cause against her appointment, and in the event of her expressing willingness and her being found fit to record an order appointing her guardian and to afford her an opportunity to show cause why the decree should not be executed against the minors. **N** ADKIA v. SHANKAR RAO **757**

——— O. XXXII, rr. 3, 4—*Guardian ad litem, appointment of—Notice to minor, failure to give, effect of - Minor, wishes of, how far to be regarded—Mother and grand-mother, right of.*

Civil Procedure Code—contd.

An order appointing a guardian *ad litem* of a minor defendant without giving notice to the minor as required by clause 4) of rule 3 of Order XXXII, of the Civil Procedure Code is without jurisdiction and is liable to be set aside.

In appointing a guardian *ad litem* for a minor defendant it is desirable, if possible, that the Court should consider the wishes of the minor as to the person who should be appointed. Unless there is any valid reason for refusing to appoint either the mother or the grand-mother of a minor defendant as his guardian *ad litem*, the mere fact that she is a *parda-nashin* lady is not in itself a sufficient ground for rejecting her claims. **Pat** RAJENDRA PRASAD v. PROBODH CHANDRA, 2 P. L. T. 116; 6 P. L. J. 82; (1921) PAT. 158 **936**

——— O. XXXII, r. 4, *applicability of, to non-contentious proceedings in Probate—Duty of Court.*

Order XXXII, rule 4, of the Civil Procedure Code does not apply to a non contentious proceeding in Probate, but where minors are concerned and citations are issued to them, it is necessary for the protection of their interest for the Court to be satisfied not only that a guardian has been appointed but that a guardian has been appointed who has consented to accept the appointment and take upon himself the onus that by virtue of the appointment falls upon him on behalf of the minors. **C** SACHINDRA NARAIN SAH v. HIRONMOYEE DASI, 24 C. W. N. 548 **435**

——— O. XXXII, r. 4—*Minor, certificated guardian of—Suit against minor—Another guardian appointed for suit—Appointment, legality of.*

Where there is a Certificated guardian of a minor, the appointment of another guardian for the purposes of a suit against the minor is illegal, and a decree obtained in such suit by the plaintiff is liable to be set aside on the ground of there being no legal representation of the minor in the suit. **M** BHIMAJI v. RAJABHAI HUSSAIN SAHIB, 12 L. W. 114; 39 M. L. J. 249; 43 M. [illegible] L. T. 295 **842**

——— O. XXXII, r. 4—*Minor—Guardian ad litem having adverse interest—Decree, whether binding on minor.*

A mere defect in following the rule as to representation of minors is not necessarily fatal to the proceedings so as to render invalid a decree against the minors. **M** KUPPUSAWMI IYENGAR v. KAMALAMMAL, 12 L. W. 24; 39 M. L. J. 87; 43 M. 842 **662**

——— O. XXXII, r. 4 (3)—*Minor, suit against—Guardian, appointment of—Consent of guardian, nature of—Minor, when bound by proceedings.*

It is not necessary that the consent of the person to be appointed guardian, under Order XXXII, rule 4 (3) of the Civil Procedure Code, should be express: it may be implied from conduct, as, where notice is served on a person to show cause why he should not be appointed guardian, and he does not appear in answer to the notice appointing him guardian.

In the absence of anything to suggest that the interests of a minor have not been duly protected in a suit, and that he has been prejudiced by the appointment of a guardian, an irregularity in the appointment is not a sufficient ground for setting aside the proceedings at the instance of the minor. **A** CHATTER SINGH v. TEJ SINGH, 18 A. L. J. 959; 2 U. P. L. R. A. 281; 41 A. 104 **671**

——— O. XXXII, r. 7, *object of Reference to arbitration—Benefit of minor—Court, duty of.*

The object of Order XXXII, rule 7, is that when a guardian of a minor party to a suit wishes to take the decision of a case out of the hands of ordinary Courts of Justice and to have it decided by a Court chosen by the parties, the Court ought to take into consideration the circumstances of the case and see whether the reference would be to the benefit of the minor. The Court ought, in such a case, to apply its mind fully to the matter and see whether the reference would really be to the benefit of the minor. Where the Court accords its sanction to the reference without any valid reason the reference is bad and the whole proceeding is vitiated **L** BAKHTAWAR v. KESAR SINGH-GURDIT SINGH, 5 P. W. R. 1921 **31**

——— O. XL—*Receiver, suit against—Sanction of Court, absence of, effect of—Jurisdiction of Court*

The omission to obtain the previous sanction of the Court appointing a Receiver for bringing a suit against the Receiver does not affect the jurisdiction of the Court trying the suit but is an illegality which can be effectively cured by the plaintiff obtaining the requisite sanction during the course of the litigation. **M** KAROOTH PARAKOTE AMMUKUTTY v MANAVIKRAMAN, 12 L. W. 331; 4 M. 793 **533**

——— O. XLI, r. 5—*Stay of proceedings—Registrar, whether has jurisdiction to stay proceedings—Inherent power of Court, when to be exercised*

Proceedings held in pursuance of a preliminary decree are proceedings in the suit and not in execution.

The Registrar of the Patna High Court has power to receive and dispose of applications under Order XLI, rule of the Civil Procedure Code, but the only application and the only order contemplated by that rule are an application and an order for stay of execution The Registrar, therefore, has no power to direct a stay of proceedings in a suit pending the disposal of an appeal

An Appellate Court has jurisdiction to order stay of proceedings pending the disposal of an appeal, but it does so, not by virtue of statutory power under Order XLI, rule 5, but in the exercise of its inherent power for the ends of justice

If the proceedings are bound to be protracted, and the expense involved in the taking of accounts is likely to be great, the Appellate Court will exercise a proper discretion in staying proceedings: otherwise, in the event of the decree being reversed on appeal, such expense would be wholly thrown away If the proceedings, however, are not likely to be of any length, as for instance, proceedings to ascertain the market value of certain stocks and shares there is no object to be gained by stay of proceedings, and the Appellate Court will refuse to stay proceedings. **Pat** NEVA OJHA v. SARBHOO DUTT OJHA, 2 P. L. T. 70 **893**

——— O. XLI, rr. 20, 33—*Appeal, second—Appellate Court, power of, to add respondents, after expiry of limitation.*

Civil Procedure Code—contd.

An Appellate Court has power, in second appeal, to add as respondents to the appeal persons who were parties to the suit in the original Court but were not impleaded as respondents in the lower Appellate Court, although the time within which an appeal might have been preferred as against them has expired. **L B** YOOSOF OOSMAN BROS. & CO. *v.* WIN NE YA, 10 L. B. R. 191 **798**

—— **O. XLI, r. 22,** *applicability of, to Letters Patent Appeal.*

Rule 22 of Order XLI of the Civil Procedure Code is not applicable to an appeal under clause 15 of the Letters Patent, consequently, a memorandum of cross-objections filed therein cannot be entertained. **C** BROJENDRA CHANDRA SARMA *v.* PROSUNNA KUMAR DHAR, 32 C. L. J. 48; 24 C. W. N. 1016 **589**

—— **O. XLI, r. 22 (4)**—*Appeal rejected as insufficiently stamped—Cross-objections, whether can be heard.*

An insufficiently stamped memorandum of appeal is of no validity at all and the rejection of such a memorandum is not a dismissal in default within the meaning of Order XLI, rule 22, (4) of the Civil Procedure Code. Unless and until an appeal is properly filed in Court there can be no cross-objections, and if an insufficiently stamped memorandum of appeal is rejected because it is insufficiently stamped, no cross-objections can be entertained or heard **L** LAJPAT RAI *v* LACHMAN DAS **795**

—— **O. XLIII, r. 1 (4)**—*Appeal from order of remand—Findings of fact, whether can be questioned.*

The policy of the Legislature being not to allow a second appeal on facts, the appellant, on an appeal from an order of remand is not entitled to question the findings of fact recorded by the Appellate Court. **L** HONDA RAM *v* HOTU RAM, 7 L. 25 **715**

—— **O. XLV, r. 8 (b)**—*Judicial Committee's Rules, r. 42—Appeal heard* ex parte—*Application for re-hearing—Procedure—Omission to notify respondents of admission of appeal, effect of.*

The accidental omission to notify the respondents of the admission of an appeal to the Privy Council is not a sufficient ground for re-hearing, provided the respondents in fact knew of the admission. **P C** HARDIT SINGH *v.* GURMUKH SINGH, 22 BOM. L. R. 550; 4 P. W. R. 1921 **7**

—— **O. L, r. 1 (a) (iii)**—*Small Cause Court—Procedure—Issues not struck—Case involving many questions—Duty of Court*

Although under the law a Small Cause Court is not required to frame issues, yet where the matter in dispute is not very simple and various questions arise for decision, the Court should indicate to the parties what the points are on which evidence has to be adduced and give them an opportunity to produce their evidence thereon. **L** PIR MUHAMMAD SADR-UD-DIN *v.* KHAIR-UD-DIN **703**

—— **Sch. II**—*Arbitration—Award—Extension of time for submitting award, whether proper—Agreement to refer to arbitration—Party to agreement, whether can withdraw.*

Inasmuch as a Court has jurisdiction to extend the time for submitting an award, the mere exercise of that jurisdiction does not amount to a terial irregularity.

Civil Procedure Code—concld.

Once a party agrees to submit a dispute to arbitration, and the arbitrator proceeds to evidence, it is not open to him to withdraw from the arbitration.

The adjudication of disputes by arbitration should be the result of the free consent of the arbitrator to undertake the duties of arbitrating between the contending parties who have agreed to repose confidence in his judgment.

The Court has no authority to compel a private arbitrator to arbitrate against his own will.

The mere fact, however, that a Court has used threatening language towards an arbitrator is not a ground for interference under section 115 of the Civil Procedure Code in the absence of anything to show that, in consequence of such language, the arbitrator was forced to arbitrate against his will. **A** BASDEO MAL *v.* KANHAIYA LAL, 18 A. L. J. 921; 43 A. 101 **667**

—— **Sch. II, para. 12 (b), (c)**—*Arbitration—Award- Court, power of, to correct arithmetical error in award.*

The only power a Court has under paragraph 12 (*b*) and (*c*) of the Second Schedule to the Civil Procedure Code is either to amend an obvious error in the award which can be amended without affecting the decision, or to rectify a clerical mistake or an error arising from an accidental slip or omission. It has no power to correct an error of calculation or arithmetic and award a sum different from that awarded by the arbitrator **B** GOPAL DINKAR *v.* GANESH NARAYAN, 22 BOM. L. R. 1416; 45 B 512 **785**

Companies Act (VI of 1882), ss. 144 (a), 150- *Payment order, who can obtain—Third party, whether can take advantage of provision.*

Section 150 of the Companies Act, 1882, confers certain special privileges of which a third party cannot take advantage.

The Liquidator of the Doaba Bank transferred, with the sanction of the Court, certain book debts and calls due by the contributories of the Bank to certain persons on the 24th March 1918. On the 11th August he entered into an agreement with the vendees whereby he undertook to execute powers-of-attorney in their favour in order to enable them to obtain a payment order, and sanction of the Court was obtained in respect of this agreement also. The vendees then applied under section 150 of the Companies Act, 1882, for an order of payment:

Held, that, inasmuch as the application was made in the interest and for the benefit of third parties, it could not be said to have been made 'in the name and on behalf of the Company' as contemplated by clause (*a*) of section 144 of the Act, and was, therefore, incompetent. **L** DOABA BANK LD. *v* KUNDAN LAL, 18 P. W. R. 921 **588**

Companies Act (VII of 1913), s. 162—*Suspension of business—Winding-up—Discretion of Court—Dead lock—Substratum gone, principle of, when applicable.*

The matter of granting or refusing an application for winding up a Company rests entirely in the discretion of the Court, and, in the case of a Company which has suspended business for a whole

Companies Act—1913—concld.

year, the power will be exercised only when there is a fair indication that there is no intention to carry on the business; if the suspension is satisfactorily accounted for and appears to be due to temporary causes, the order may be refused.

The fact that the firm of Managing Agents of a Company has been dissolved, but steps have been taken to appoint new Managing Agents, is no indication of a complete dead lock which can only be removed by compulsorily winding-up the Company.

In the absence of proof that the objects of a Company as set out in the Memorandum of Association, cannot be fulfilled in other ways, or by the employment of other agencies, the principle of 'substratum gone' cannot be applied. **C** MURLIDHAR ROY *v* BENGAL STEAMSHIP CO. LTD., 47 C 554 **542**

——— **s. 162 (6),** *scope of—Winding up by Court, when to be ordered.*

Though a Court is not bound to construe clause (6) of section 162 of the Companies Act as only covering grounds of a like nature with those specified in clauses (1) to (5) of the section, yet it will require grounds of a like magnitude before acting under the clause, and it is only in extreme cases that it will, at the suggestion of the minority, disregard the wishes of the domestic forum, and condemn the company to extinction. **L 8** COWASJI *v.* NATH SINGH OIL COMPANY LTD, 13 BUR L. T 51 **524**

Compromise—*Parties agreeing to abide by decision of Court—Decision, whether can be questioned as incorrect—Appeal, whether lies*

Where parties to a suit effect a compromise in respect of some of the suit property, and as regards the rest agree to be bound by the decision of the Court to be arrived at after considering certain documentary evidence to be placed before it, it is not open to either of the parties to question the correctness of the Court's decision by appeal. **A** SHAHZADI BEGAM *v.* MUHAMMAD IBRAHIM, 19 A. L. J. 14 **787**

Confession *of co-accused, value of.*

The confession of a co-prisoner cannot *per se* sustain a conviction, and in order to achieve that object it must be corroborated *aliunde* by independent evidence in some material circumstance **L** KEHR SINGH *v.* EMPEROR, 22 CR. L. J. 151 **913**

Contract, *breach of—Damages, measure of—Variation, effect of—Delivery not to be made, effect of.*

Plaintiffs contracted to buy certain goods from one *M* which they agreed to sell to the defendants Subsequently, it was agreed between the parties that the defendants should pay *M.* direct against delivery and should get *M* to give credit to the plaintiffs for the amount. Defendants agreed to sell the same goods to *M.*, and, therefore, failed to take delivery. Plaintiffs sued the defendants for damages:

Held, (1 that the intention of the original contract between the plaintiffs and the defendants that there should be delivery by the former to the latter was subsequently modified and there was in fact to be no delivery;

(2) that the plaintiffs were only entitled to the difference between the price which they had agreed to pay to *M.* and the price which defendants had agreed to pay to them. **B** HIRA LAL AMBA LAL *v.* GOPALJI KALLIANJI, 22 BOM. L. R 358 **263**

——— *, breach of—Damages, suit for—Party wrongfully cancelling contract, whether can set up alternative defence.*

If a buyer cancels the contract without any justification, he disables himself from setting up any defence which he might otherwise have done to an action for damages **B** RUSTAMJI A. DUBASH *v.* HAJI HUSSEIN LARI, 22 BOM. L. R. 1165 **515**

———, *construction of—Performance, condition for avoiding—Condition not coming into existence—Breach of contract—Damages, liability for*

The parties entered into a contract in India for the purchase and sale of Alizarine at a certain rate: the contract provided that if there was any fluctuation in the Syndicate rates, the conditions of the contract regarding the price would become void, and the price would be fixed by mutual consent. The Syndicate was composed of a German firm and an English member or members and regulated the supply and fixed the price of Alizarine. The Great War broke out and deliveries continued for some time, and then ceased. The purchasers brought the present action for damages for breach of the contract to continue the deliveries, and the question was, whether the War frustrated the contract either generally or by destroying the Syndicate:

Held, that the matter was purely an Indian one and there was nothing in the contract which in terms made any modification of the obligation of the sellers depend upon the continuance of the Syndicate; that as there was no fluctuation or alteration in the Syndicate rates, by reason of the Syndicate not having been operative, or for some other reason, the condition avoiding the contract if there was such fluctuation never came into operation and the contract continued on the footing of the rates specified, and that as the contract was broken the buyers were entitled to recover damages. **P C** TOOLSIDAS TEJPAL *v* VENKATACHALPATHY IYER. (1921) M W. N. 557; 25 C. W. N. 46; 25 M. L. T. 410; 13 L. W. 1 **27**

Contract Act (IX of 1872), ss. 11, 65—*Minor, contract by—Minor, whether bound to restore benefit*

Section 65 of the Contract Act starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was and never could have been any contract, for instance, where one of the parties to a contract is a minor. **B** MOTILAL MANSUKHRAM *v.* MANEKLAL DAYABHAI, 22 BOM. L. R. 1195 45 B 215 **245**

——— **s. 19**—*Acknowledgment, suit on—Signature of executant obtained by intimidation, effect of.*

A person acknowledging his liability to pay a certain sum cannot be held bound by the acknowledgment, where it is found that his signature was obtained by intimidation and that the amount acknowledged has been paid. **L** BIS RAM *v.* KEWAL RAM **781**

——— **s. 60**—*Appropriation of payment—Amount deposited for special purpose, whether can be appropriated.*

An amount deposited with a creditor for a special purpose cannot be regarded as a re-payment

Contract Act—concld.

which the debtor can subsequently claim to have appropriated towards any other debt. **N** NARAYAN *v.* WAMAN **121**

—— **s. 69**—*Probate—Decree against assets—Payment by executor—Probate revoked - Suit to recover amount paid, maintainability of*

Plaintiffs obtained Probate of a Will, and afterwards admitted a claim against the deceased, and a decree was passed against the assets of the deceased in their hands, and they made payment. The Probate was subsequently revoked, whereupon they brought the present suit to recover the sum paid by them stating that no immovable property of the deceased was in their hands :

Held, that the suit must fail as the plaintiffs were not interested in making payment of the amount due under the decree in order to protect the assets of the deceased, and they, consequently, were not justified in making the payment. **N** CHANDRABHAGA *v* HARSUKHDAS **128**

—— **ss. 108, except. 1, 230, 231**—*Sale of goods by person in possession Purchase in good faith—Title, whether passes Principal and agent—Agent acting for undisclosed principal Suit against both agent and principal, whether maintainable.*

A person contracting with an agent for an undisclosed principal is at liberty to sue either the agent or the principal or both under the contract

Exception to section 108 of the Contract Act applies practically to any sale of any moveable property by any person in any kind of possession, so long as that possession is by consent of the owner and the transferee acts in good faith

Plaintiff purchased in good faith a diamond ring from defendant's agent which the defendant had entrusted to the latter and paid the price to the agent. The agent was subsequently convicted of breach of trust in respect of the ring at the instance of the defendants Plaintiff sued defendant for delivery of the ring or for its price :

Held, that the case was covered by the First Exception to section 108 of the Contract Act and the plaintiff had contained a good title to the ring and her suit must succeed. **U B** DULABDAS *v.* MA WIN **965**

—— **s. 171**—*Banker*—Natukkotai Chetty, *whether banker, and entitled to banker's lien.*

A Natukkottai Chetty in the Madras Presidency is a "banker" within the meaning of section 71 of the Contract Act, and is, therefore, entitled to a banker's lien on goods bailed to him as security for a general balance of account, unless it is shown that there is a contract to the contrary. **M** OFFICIAL ASSIGNEE OF MADRAS *v.* RAMASWAMI CHETTY, 12 L. W. 89; (1920) M. W. N. 424; 38 M. L. J. 166; 43 M. 747 **475**

Contribution—*Registered* pattadar *with limited interest in land, position of—Government revenue, payment of, by* pattadar *for whole land*—Pattadar, *right of, to contribution.*

A claimed certain land which was included in the *patta* of *B.* the registered holder, and liable for the Government revenue. The suit was compromised and a decree passed awarding the land to *A* conditional on his paying the assessment to *B.* Subsequently, the Government revenue was enhanced, and *B.*, who had paid the enhanced assessment, brought the present suit against *A.* for contribution:

Held, that *A*, being the registered holder but interested in only a portion of the land, having paid the whole of the assessment was in the position of a co-mortgagor and had a right to contribution as against other persons interested in the land on which the revenue was a charge **M** MUHAMMED KHALIL *v* ALATHADI MALWA KUNHI RAMA NAIR, 2 L. W. 80; 9 20 M. W. N. 477 **262**

Co-owners—*Mistake—Rent, payment of, by one co-owner to another, effect of—Relationship of parties.*

D purchased from *P* a portion of certain lands held by him, and for many years paid rent therefor to *P* On *D*'s refusal to pay rent, *P.* brought the present suit to recover rent :

Held, that there was no relationship of landlord and tenant between the parties as the transaction of sale by *P* to *D.* had the effect of making them co-owners and that the fact that the parties had for years past understood their mutual relations to be that of landlord and tenant would not result in their being treated in law as if they were superior and subordinate holders respectively, because they could not have a mutual relation in law which was contrary to the true state of facts **C** CHANDRA KANTA CHAKRABARTY *v.* ADINATH SHOM, 32 C. L. J. 81 **565**

Copyright *in unpublished work Sale of unpublished work, when complete—Purchaser, rights of*

P purchased the right to publish and sell 90 songs in Tamil composed by *D* Shortly afterwards, *D.* sold 47 songs to *M*, 40 of which were the same as those sold to *P*; *M* published these 40 songs and sold them to the public *P.* instituted the present suit to restrain *M* from selling all or any of the 90 songs. It appeared that in respect of the sale to *P.*, *D.* undertook to correct and revise the songs, but that he had failed to do so, and it was contended that, owing to this, the bargain was incomplete, and that no rights of *P* had been infringed :

Held, that the sale to *P.* was complete and its completeness was not affected by the mere fact of *D* undertaking to revise some of the songs, or re-write some of them that *P* had acquired an exclusive right to publish or refrain from publishing the songs, and any one publishing them without his consent infringed his legal right, and that, consequently, he was entitled to restrain *M.* from infringing his rights therein. **M** RAMIAH ASARI *v* CHIDAMBARA MUDALIAR, (1920 M. W. N. 46; 12 L. W. 15 : 38 M. L. J. 341 **279**

Co-sharers—*Suit by joint co-sharer for village profits without asking for partition, whether maintainable—Undivided share, sale of, whether effects partition.*

P. at an auction-sale in execution of a decree purchased an undivided share in ancestral village property and obtained symbolical possession. He now sued for village profits :

Held, that as *P.* had not sued for partition, his suit for profits was not maintainable, and that the auction-sale had not effected a division of the village shares. **N** SIDH GOPAL *v.* HIRALAL **428**

Co-sharers—concld.

——— *User of joint property—Interference with user of co-sharer, whether permissible*

A co-sharer cannot materially alter the condition of the joint property without obtaining the sanction of his co-sharers.

Plaintiff used certain land which he owned jointly with defendant for the purpose of the access of the sweeper to the privies in his house which belonged exclusively to him Defendant built a wall across the joint land and put an end to this user of the plaintiff :

Held, that the defendant was not entitled to obstruct the user of the plaintiff in this manner, and that the plaintiff was entitled to an injunction directing the defendant to remove the obstruction. **Pat** DEBENDRA PRASAD SUKUL *v* SURENDRA PRASAD SUKUL **975**

Court-fee—*Decree for possession on payment of money—Appeal—Relief asked possession without payment—Court-fee payable.*

Where a plaintiff is given a decree for possession of land on payment of a sum of money and he appeals from the decree asking that he should be given possession without any payment, the Court-fee leviable on the memorandum of appeal is an *ad valorem* fee on the amount directed to be paid by the lower Court. **L** WADHAWA SINGH *v.* SUNDAR SINGH, 21 P. W. R. 1921 **667**

Court Fees Act (VII of 1870), s. 7 (iv) (d)—*Suits Valuation Act (VII of 1887), s. 8—Injunction, suit for Valuation for purposes of Court-fee and jurisdiction.*

A suit for an injunction comes within section 7 *(iv) (d)* of the Court Fees Act and the Court-fee has to be computed according to the amount at which the relief sought is valued in the plaint, which value the plaintiff is entitled to fix himself. In such a case it is wholly unnecessary for the plaintiff to fix any value for the purposes of jurisdiction as, by section 8 of the Suits Valuation Act, the value for the purposes of Court-fee is also the value for the purposes of jurisdiction. **B** GOVINDA KRISHNA SATHE *v.* HANMAYA LINGAYA FULMALI, 22 BOM. L. R. 450; 45 B. 167 **777**

——— **s. 11, para. 2**—*"Decree", meaning of—Additional Court-fees, non-payment of—Penalty—Court, power of, to fix time for payment*

In applying section 11 of the Court Fees Act to a suit for partition and mesne profits, the term "decree" in that section should be taken to refer to the final, and not the interim decree in the suit

Where in a suit for partition and mesne profits the Court decrees the claim and awards a specific sum on account of such profits, on the plaintiff paying the additional Court-fee, if any, due in respect of the profits, the Court has no power, under section 11, paragraph 2, of the Court Fees Act, to fix any time for payment and the only penalty which the plaintiff incurs in the event of his not paying the Court-fees is that he cannot execute the decree until he does pay the fee. **M** NATHARSA ROWTHAR *v* MUHAMMAD ROWTHAR **385**

Covenant *restricting user of land, whether runs with land Registration, whether notice*

A covenant by which the covenantor restricts the ordinary user of his property does not run with the land, and is not binding on a purchaser without notice.

Registration does not necessarily give notice to anybody of anything But if a registered document is so indexed that an inquirer anxious to ascertain whether there are documents relating to a property which he proposes, for instance, to buy, can find from the index documents relating to that property, then it will be held that he has notice of those documents because if he made the inquiry, which as a prudent man he ought to make, then they would come to his notice **B** GORDHANDAS VITHALDAS *v* MOHANLAL MANAKLAL DOSHI, 22 BOM. L. R. 1178; 45 B. 170 **506**

Criminal Procedure Code (Act X of 1872), s. 518, *order under, nature of—Order made in 1917—Disobedience of order in 1920, whether punishable—Penal Code (Act XLV of 1860), s. 188.*

Accused was convicted under section 188 of the Penal Code for disobeying an order purporting to have been passed by the District Magistrate in 1873 under section 518 of the Criminal Procedure Code of 1872 :

Held, that the conviction could not be sustained, inasmuch as an order made under section 518 of the Criminal Procedure Code of 1872 could not enure for all time but had a temporary operation only. **A** RAM DAS *v.* EMPEROR, 8 A. L. J. 87 **34**

Criminal Procedure Code (Act V of 1898), s. 12 (1), (2)—*Jurisdiction—Sub-Divisional Magistrate, whether can take cognizance of offence outside his sub-division.*

A Sub-Divisional Magistrate has no jurisdiction to take cognizance of matters outside the local area within which the District Magistrate has appointed him to act. **A** CHAUBEY KUNJ BEHARI LAL *v* LAUUA, 19 A. L. J. 771; 22 CR. L. J. 122 **554**

——— **s. 55**—*Accused, discharge of, from custody—Magistrate, jurisdiction of, to order further detention.*

Where by the order of a Magistrate a person is discharged from custody on the ground of insufficient evidence to connect him with the offence in connection with which he was detained, the Magistrate has no authority to direct his further detention in connection with a different matter, unless and until he has been re-arrested by the Police under section 55, Criminal Procedure Code. **A** RAHU *v.* EMPEROR, 18 A. L. J. 1114; 22 CR. L. J. 115 **547**

——— **s. 107**—*Magistrate, power of, to proceed against person within jurisdiction, whose residence is outside jurisdiction.*

The fact that a person is within the territorial limits of the jurisdiction of a Magistrate when an apprehension of a breach of the peace arises, is sufficient to give the Magistrate jurisdiction to bind such person over under section 107 of the Criminal Procedure Code, and such jurisdiction is not ousted merely because the person to be bound over has his place of residence outside the jurisdiction. **A** ZIAULLAH KHAN *v.* EMPEROR, 22 CR. L. J. 100 **413**

——— **s. 107**—*Order requiring security to keep peace, whether conviction*

An order binding down a person in a proceeding

Criminal Procedure Code—contd.

under section 107 of the Criminal Procedure Code is not an order convicting a person under any law. **Pat** RAWLINS *v.* ANANT LAL SAHU, 2 P. L. T. 176; (1921) PAT. 40 **905**

——— **ss. 107, 145**—*Possession, dispute as to, absence of—Proceedings appropriate—Security to keep the peace—Proceedings against several persons—Overt acts, proof of.*

Where one party is clearly in possession of property and another party wants to take forcible possession of it, there is no dispute as to possession of the property within the meaning of section 145 of the Criminal Procedure Code, and the appropriate course is to initiate proceedings under section 107 of the Code.

An order under section 107, Criminal Procedure Code, can only be passed when there is a finding that the persons sought to be bound down are guilty of wrongful acts committed or sought to be committed by them. This can only be proved by overt acts against each individual.

When wrongful overt acts are committed or threatened to be committed jointly by a number of persons, the act is really committed severally and jointly by each of them, and all of them would be liable to the penalty of section 107 of the Code. **Pat** LACHMI SINGH *v.* EMPEROR, 1 P. L. T. 681; 22 CR. L. J. 86 **374**

——— **ss. 107, 145, 147**—*Dispute in respect of lac growing on trees—Proceeding under s* 145, *whether within jurisdiction—Rights of parties—Civil suit pending—Breach of peace apprehended—Proper course*

The Police submitted a report that, in attempting to collect lac on plum trees standing on lands comprised in the holdings of the tenants of a Zemindari concern, the officers of the latter were opposed by the lessees of the tenants, and that there was every possibility of a serious breach of the peace at any moment between the parties: an order was thereupon made by the District Magistrate directing a proceeding under section 145 of the Criminal Procedure Code to be drawn up and the *lac* trees attached: this order was attacked in a revision petition to the High Court and the question was, whether the subject-matter of the dispute came within section 145:

Held, that "lac" did not fall within the meaning of the expression "land" in section 145 of the Criminal Procedure Code, and that the proceedings held under that section were without jurisdiction; that the matter did not come within section 147, and even if it did, no order for attachment could be made.

Where a civil suit is pending for the determination of the rights of the parties in certain property, it is improper to start proceedings under section 145 of the Criminal Procedure Code: if immediate steps are necessary to avert a serious breach of the peace proceedings under section 107 to bind down the parties are more appropriate. **C** AL MUHAMMAD *v.* FAKIRUDDIN MUNSHI, 24 C. W. N. 1049; 32 C. L. J. 255; 22 CR. L. J. 131 **643**

——— **s. 110,** *proceedings under—Defence evidence, when should not be discredited.*

In a proceeding under section 110 of the Criminal Procedure Code, the fact that a large number of the defence witnesses are caste-fellows of the accused, many of them coming from villages several miles from the village of the accused, and that they have come forward voluntarily without being summoned is not sufficient to discredit their evidence, notwithstanding that they admit frankly that they have come forward because they regard the accused as head of their brotherhood and look upon it as a slur on the brotherhood that the accused should be treated as a habitual thief or robber **A** RAHU *v.* EMPEROR, 18 A. L. J. 1114; 22 CR. L. J. 115 **547**

——— **s. 110**—*Security for good behaviour—Surety offered, refusal of, without valid reason, legality of.*

Where a person is called upon to furnish security under section 110 of the Criminal Procedure Code, the mere fact that the surety offered is a relation of that person, is on intimate terms with him and is named by him as a witness, is not a valid reason in law for refusing to accept the surety. **A** MUHAMMAD WASI, *v.* EMPEROR, 22 CR. L. J. 22 **134**

——— **s. 120 (1)**—*Accused bound over in security after sentence for another offence—Failure to furnish security—Imprisonment in default, when to commence.*

Accused was convicted under section 147 of the Penal Code, but was released on bail pending the disposal of an appeal against his conviction. While on bail he was proceeded against under section 110 of the Criminal Procedure Code and was ordered to furnish security, or in default to undergo imprisonment. His appeal was dismissed, and the Magistrate directed that, as he was undergoing sentence in default of furnishing security, the sentence under section 147 would take effect after the expiry of the sentence under section 110 of the Criminal Procedure Code:

Held, that the order was illegal as it contravened the provisions of section 120 (1) of the Criminal Procedure Code, and that the period of detention on failure to furnish security could not commence before the sentence under section 147 of the Penal Code had been served out. **A** EMPEROR *v.* JHABDEY, 22 CR. L. J. 95 **303**

——— **Ch. XII, s. 439**—*Proceedings under Ch. XII—Revision—High Court, interference by.*

The High Court will not intefere with proceedings which are, in fact and in law, proceedings under Chapter XII of the Criminal Procedure Code. **A** HAR PIARI *v.* NATHE LAL, 18 A. L. J. 1140; 2 U. P. L. R. (A.) 428: 22 CR. L. J. 97 **401**

——— **s. 145**—*Dispute concerning right to bore for minerals—Court jurisdiction of, to go into questions of possession and title—Breach of peace apprehended—Procedure.*

Where in a proceeding under section 145 of the Criminal Procedure Code, the dispute between the parties is not one concerning land and does not involve any question of actual possession, but, as in this case, concerns the rights of the respective parties to carry on boring operations for coal over a specific area, the Court has no jurisdiction to go into intricate questions of title and possession which arise between the parties. If, in such a case, there is a likelihood of a breach of the peace, proceedings which are simple in nature and which summarily and expeditiously dispose of the matter

should be adopted, and proceedings under section 107 of the Criminal Procedure Code are more appropriate in such a case than proceedings under section 45. **C** INDIAN IRON & STEEL CO., LTD., *v.* BANSO GOPAL, 32 C. L. J. 54: 22 Cr. L. J. 99 **403**

——— s. 145, *scope of—Dispute embracing several items of property—Lumping items together, legality of—Possession, decision as to, in absence of parties, legality of—Preliminary order—Failure to record reasons, effect of.*

Section 145 of the Criminal Procedure Code gives a Magistrate a special jurisdiction to decide a dispute as to actual possession of immovable property, on his being satisfied that the dispute is likely to cause a breach of the peace, but a decision ought not to be arrived at arbitrarily, and should be a judicial decision arrived at after giving each of the disputants an opportunity of being heard. A decision arrived at in the absence of the parties, or either of them is illegal.

Where a dispute embraces several items of property, they may be lumped together in a single inquiry provided the disputants are the same for each item. Where, however, the disputants on one or both sides are different for different items of property, the disputants concerned in each item should be given an opportunity of being heard before a decision is arrived at on the question of actual possession, because in such a case the Magistrate would have no jurisdiction to decide the question of actual possession of a number of items after only hearing the parties who claimed possession of one or two of them.

The failure by a Magistrate to record his reasons for being satisfied that there is a danger of the breach of the peace, though a serious irregularity, does not affect his jurisdiction. **M** VELU MALAVARAYAN *v.* KUPPUSAWMI PILLAI, 12 L. W. 315; 22 CR. L. J. 90 **378**

——— s. 145—*Temporary order, pending decision of question of possession, legality of.*

A Magistrate has no power to pass a temporary order pending his decision of the question of possession under section 145 of the Criminal Procedure Code. **L** RAM DITTA *v.* DYAL MAL, 22 CR. L. J. 48; 14 P. L. R. 1921; 2 P. W. R. 1921 CR. **160**

——— ss. 145, 146.

Section 145 of the Criminal Procedure Code contemplates the existence of a dispute regarding property likely to lead to a breach of the peace and proceedings thereunder are only initiated for this purpose. When all likelihood of a breach of the peace has disappeared, all necessity ceases for maintaining any orders passed on account of the dispute. **L** KHUSHI RAM *v.* EMPEROR, 1 L. 451; 22 CR. L. J. 4 **36**

——— s. 146—*Attachment of property—Magistrate, power of, to release property from attachment.*

Where property is attached under section 146 of the Criminal Procedure Code, the Magistrate has inherent power to release the property from attachment as soon as he is satisfied that all likelihood of a breach of the peace has disappeared, for instance, where one of the parties to the dispute dies leaving the other party as his heir. In such a case the judgment of a competent Court is not a *sine qua non* before the property can be released. **L** KHUSHI RAM *v.* EMPEROR, 1 L. 451; 22 CR. L. J. 4 **36**

——— s. 164—*Confession, record of, when not in accordance with law.*

A confession recorded in answer to the question—"After due warning do you want to say anything?" without any indication of what the due warning was, cannot be accepted as a confession recorded in accordance with law. **Pat** MADHU MAJHI *v.* EMPEROR, 2 P. L. T. 129: 22 CR. L. J. 119 **551**

——— ss. 164, 339 (2)—Confession, what is—Confession recorded by Magistrate, procured by Police Officer, admissibility of. *See* EVIDENCE ACT s. 24 **324**

——— s. 190—*Cognizance of offence under cl. (c) of section, when can be taken.*

A necessary condition for taking cognizance of a case under clause (c) of section 190 of the Criminal Procedure Code is for the proceedings to be instituted upon information received from any person other than a Police Officer or upon the Magistrate's own knowledge or suspicion. **Pat** ABDUL ALI *v.* EMPEROR, 1 P. L. T. 446; 22 CR. L. J. 9 **41**

——— ss. 190 (1) (c), 191, 537—*Proceedings initiated on Magistrate's own motion—Failure to comply with provisions of s. 191, effect of—Trial, whether legal.*

Where a Magistrate initiated proceedings on his own motion but did not comply with the provisions of section 191, Criminal Procedure Code, and did not inform the accused that he had the option of having his case tried by another Magistrate:

Held, that this omission was not a mere irregularity curable by the provisions of section 537, but was an absolute illegality which vitiated the whole trial. **L** BODHA *v.* EMPEROR, 22 CR. L. J. 98 16 P. L. R. 1921; 4 P. W. R. 1921 **384**

——— s. 195—*Refusal to sanction prosecution, whether bar to prosecution for defamation.*

The dismissal of an application for sanction under section 195 of the Criminal Procedure Code to prosecute for defamation in respect of a statement made in a judicial proceeding is no bar to the institution of a prosecution for defamation. **C** SATISH CHANDRA *v.* RAM DAYAL, 32 C. L. J. 94; 24 C. W. N. 982; 22 CR. L. J. 31 **143**

——— ss. 195, 439, 476—*Sanction to prosecute, when to be granted—Delay in making application or malice—Revision—High Court, interference by.*

The main principle which should guide a Court in taking action under section 195 or section 476 of the Criminal Procedure Code is, that no prosecution should be allowed to be instituted unless there is a reasonable probability of conviction. The mere fact that there has been delay in applying for sanction, or that the applicant is actuated by malice or vindictiveness, is no ground for refusing to grant sanction, where there is a probability of securing a conviction.

Inasmuch as an order under section 195 is appealable, the High Court will not interfere in revision, but it will do so in respect of an order under section 476, if that order is shown to be perverse. **N** KRISHNARAO *v.* SITARAM, 22 CR. L. J. 151 **855**

Criminal Procedure Code—contd.

——— **s. 195 (b)**—Fabricating false evidence —Execution proceedings, whether judicial proceedings—Judicial proceeding not pending--Sanction, whether necessary. *See* PENAL CODE, s 192 **193**

——— **s. 200** *Complainant, failure to examine—Irregularity*

The failure to examine a complainant under section 200 of the Criminal Procedure Code is a mere irregularity which can be subsequently cured and does not vitiate the proceedings **Pat** ABDUL ALI *v.* EMPEROR, 1 P. L. T. 446; 22 CR. L. J 9 **41**

——— **s. 222 (2)**- Charge, contents of— Prosecution, duty of. *See* PENAL CODE, s 408 **372**

——— **s. 237**—*Charge of murder—Abetment, conviction for, whether legal.*

K and *N* were charged with the murder of one *W*. It was found that while *N* committed the actual murder he did so at the bidding of *K*. whose actual presence at the scene of the murder was not established The Sessions Judge convicted *N*. under section 302, Indian Penal Code, and *K* of abetment of murder :

Held, that on the facts found *K* could have been charged not only with the commission of the principal offence of murder, but also with the abetment thereof and, therefore, by virtue of section 237, Criminal Procedure Code, he could be convicted of the offence of abetment though he was not charged separately with it. **L** KEHR SINGH *v.* EMPEROR, 22 CR L. J. 161 **913**

——— **s. 238**—*Trial for offence with aid of assessors—Conviction for minor offence triable by jury, legality of.*

Section 238 of the Criminal Procedure Code empowers a Court trying an accused person for an offence with the aid of assessors to convict him for a minor offence triable by jury. **B** CHANGOUDA PIRGOUDA *v* EMPEROR, 22 BOM L. R. 1241; 22 CR L. J. 41; 45 B 619 **195**

——— **s. 250**—*Compensation, order for, without examining all complainant's witnesses, legality of.*

Before making an order against a complainant under section 250 of the Criminal Procedure Code awarding compensation to the accused notice should be given to the complainant and he should be permitted to adduce evidence. It is illegal to make such an order before concluding the examination of all the witnesses of the complainant. **M** JONNALAGADDA APPALANARASAYYA BHUKTA *In re*, 12 L. W. 388; 39 M. L J 454; (1920 M. W. N. 785; 22 CR L. J. 161; 44 M. 51 **913**

——— **s. 250**—*Complaint dismissed as false and malicious—Complainant, liability of, to pay compensation—Complainant, who is.*

M. enlisted in a Labour Corps, and a few days later deserted, whereupon *S*. was deputed to search for him. *S* reported to the Commandant that in his endeavours to arrest *M*. he had been assaulted by two other persons who had released *M*. The Commandant invoked the assistance of the Police who, in the first information report, described *S*. as the complainant : he pointed out two men as those who had assaulted him and released *M* : they were arrested and sent up for trial, but the Magistrate discharged them finding the complaint to be false and malicious, and ordered *S*. to pay compensation.

Criminal Procedure Code—contd.

In revision it was urged that *S* did not file the complaint and that as there was no finding that the complaint was frivolous or vexatious the order for compensation was not justified :

Held, (1) that *S* was the complainant as it was he who pointed out the men whom he falsely alleged had effected the release of *M* ;

(2) that the finding that the complaint was false and malicious was tantamount to finding it to be vexatious, and that the order for compensation was justified. **S** FAIZ MAHOMED *v.* EMPEROR, 14 S. L. R. 168; 22 CR. L. J 120 **552**

——— **Ch. XXI**, *provisions of, contravention of, effect of—Offence triable as warrant case, trial of, as summons case after commencement of trial, legality of.*

Where an offence complained of is triable exclusively as a warrant case, and the trial has actually begun, and the statements of the complainant and some of his witnesses recorded, it is illegal to split the offence into two component parts, and to proceed to try it as a summons case.

A Magistrate when trying a warrant case is not justified in recording the statement of the accused immediately after the examination of the complainant and before he is cross-examined and the evidence for the prosecution recorded: such a procedure is not only prejudicial to the accused in his defence, it contravenes the provisions of Chapter XXI of the Criminal Procedure Code, and entirely vitiates the trial. **A** GANGA SARAN *v* EMPEROR, 19 A. L. J. 6; 22 CR L. J. 143 **850**

——— **s. 256**—*Accused, right of, to summon prosecution witnesses for cross-examination—Magistrate, whether can direct payment of costs.*

Section 256 of the Criminal Procedure Code gives the accused an absolute right to re-call prosecution witnesses for cross-examination at the expense of the prosecution, and it is not open to the Magistrate to order the accused to pay costs for re-calling those witnesses. **L** TAQI SHAH *v.* EMPEROR, 22 CR. L. J 112 **416**

——— **s. 260**—*Summary trial—Large number of accused and witnesses—Procedure.*

Where a large number of witnesses and accused are involved in a case, the case should not be tried summarily. **L** GHASITA MAL *v.* EMPEROR, 22 CR. L. J. 145 **849**

——— **s. 239**—*Trial by Jury—Evidence insufficient—Duty of Judge—Misdirection.*

In a trial by jury the Judge in discussing the evidence against the accused in his summing up to the jury pointed out that one fact, even if believed had very little weight that another fact, if believed did not show that accused took part in the offence, and that a third fact amounted to nothing in itself :

Held, that, although the Judge clearly invited the jury to acquit, yet he ought to have gone further and told the jury there was no evidence against the accused, and his omission to do so amounted to a misdirection sufficient to entitle the accused to an acquittal. **C** ASIMUDDIN SARDAR *v.* EMPEROR, 22 C. L. J. 84; 22 CR L. J 60 **204**

——— **ss. 297, 298**—*Trial by Jury—Jury asked to take broad view of the evidence—Warning against minor discrepancies—Misdirection.*

Where a Sessions Judge in his charge to the jury observed :—

"If you are satisfied that there was no object in proving a false case, not from the point of view of seeking for small discrepancies, but upon a broad view of the evidence given before you : "

Held, that there was no misdirection to the jury and the Sessions Judge was right in conveying the caution against minor discrepancies in immaterial and collateral events in the case. **Pat** BAIJNATH MAHTON *v.* EMPEROR, 1 P. L. T. 703; 22 CR. L. J. 125 **557**

——— **s. 309**—*Sessions trial—Evidence taken and assessors discharged—Sessions Judge taking evidence thereafter, legality of.*

In a Sessions trial with the aid of assessors, a Sessions Judge has no power to take evidence after the assessors have been discharged, and if he does so, the trial is vitiated **A** JAISUKH *v.* EMPEROR, 19 A. L. J. 1; 22 CR L J. 127; 43 A. 125 **559**

——— **s. 339**—*Approver failing to comply with conditions of pardon—Sessions Judge, whether can pass order of commitment.*

If a Sessions Judge, before whom an approver has given evidence, finds that the approver has not told the truth, he has power himself to pass an order committing the approver to stand his trial. **L** DAULAT *v.* EMPEROR, 22 CR. L J. 123 **560**

——— **s. 342,** *applicability of, to trials by Presidency Magistrate—Examination of accused, necessity of.*

A Presidency Magistrate trying an accused person for an offence punishable under section 352 of the Penal Code is bound, before convicting, to examine the accused person in the manner prescribed by section 342 of the Criminal Procedure Code, and an omission to do so, is an illegality which vitiates the proceedings. **B** FERNANDEZ *v.* EMPEROR, 22 BOM. L. R. 1040; 22 CR L. J. 17; 45 B. 672 **129**

——— **s. 342.** *See* PENAL CODE, s. 76 **37**

——— **s. 345**—*Composition of offence with one of several accused persons, whether operates as acquittal in respect of all.*

Where an offence is compounded with one of several accused persons, the composition does not necessarily have the effect of an acquittal in the case of all the accused. **B** EMPEROR *v.* ALIBHAI ABDUL VORA, 22 BOM. L. R. 1221; 22 CR. L. J. 55; 45 B. 346 **199**

——— **s. 350**—*Case withdrawn from file of Magistrate—Magistrate, whether ceases to exercise jurisdiction*—De novo *trial—Accused, failure of, to demand new trial, effect of.*

A Magistrate ceases to exercise jurisdiction within the meaning of section 350 of the Criminal Procedure Code when a case is withdrawn from his file, and where, in such a case, the accused, on the case being sent to another Magistrate, fail to ask for a new trial the latter Magistrate is competent to record the remaining evidence and pronounce judgment. **Pat** RUPA SINGH *v.* EMPEROR, 1 P. L. T. 673; 22 CR. L. J. 82 **370**

——— **s. 350**—*Failure to comply with provisions of section, whether vitiate proceedings.*

The case of the accused was taken up by a Magistrate who, after recording the prosecution evidence and framing a charge, was transferred.

On the case coming before his successor the accused applied for a trial *de novo*, and the Magistrate fixed a date for the trial, but took it up on an earlier date without notifying the change of date to Counsel for the accused, and on this date he merely read over to each witness the statement recorded by his predecessor, asking such further questions as he thought necessary. On a subsequent date Counsel applied on behalf of accused to re-call certain of the prosecution witnesses for cross-examination, but this was refused :

Held, that the whole of the proceedings were irregular and unfair to accused, who had a right under section 350 of the Criminal Procedure Code, to demand all the prosecution witnesses to be re-summoned and re-heard, and that the proceedings must, therefore, be set aside. **L** MANGAL SINGH *v.* EMPEROR, 16 P. W. R. 1919 CR.; 22 CR. L. J. 119 **551**

——— **s. 403**—Autrefois acquit, *principle of, applicability of—Penal Code (Act XLV of 1860), s. 338—Motor Vehicles Act (VIII of 1914), s. 16—Acquittal under s. 338, Indian Penal Code, whether bars trial under s. 16 of Motor Vehicles Act.*

The acquittal of a person charged under section 338 of the Penal Code with having caused grievous hurt by rashly driving a motor car, on the ground that it is not proved that he was driving the car, is, under section 403, Criminal Procedure Code, a bar to the trial of that person under section 16 of the Motor Vehicles Act for driving the car without a license so long as his acquittal on the same facts for a diffirent offence remains in force, as, applying the principle of *autrefois acquit*, he cannot be tried a second time on the same facts cognate to, or involved in the offence with which he was previously charged. Section 403 of the Criminal Procedure Code does not depend for its application upon additional evidence being available or not, that fact is altogether irrelevant. **Pat** MAKSUDDAN HISTRY *v.* EMPEROR, 22 CR. L. J. 63; 2 P. L. T. 31; (1921) PAT. 108 **207**

——— **s. 403**—*Plea of previous acquittal—Magistrate, duty of.*

A decision that a prosecution is barred under the provisions of section 403 of the Code of Criminal Procedure ought not to be arrived at without an investigation of the facts put forward on behalf of the complainant. **C** RADHA KISSEN *v.* FATEH CHAND, 23 C. W. N. 543; 22 CR. L. J. 67 **323**

——— **s. 417**—*Appeal from acquittal—Trial Court, finding of, value of—Appellate Court, interference by, when justified.*

If in an appeal from an acquittal the evidence is all oral and its credibility is a mere matter of opinion without involving other considerations, the opinion of the Court which heard the witnesses must be treated as almost conclusive.

The indications of mistake must be obvious, or the evidence too strong to be rejected, before the Appellate Court will interfere. **L** EMPEROR *v.* SAMAND, 22 CR. L. J. 172 **924**

——— **s. 437**—*District Magistrate, power of, to direct re-trial by himself—Further inquiry, when to be directed.*

A District Magistrate has no power, when acting under section 437 of the Criminal Procedure Code, to direct a re-trial by himself.

Criminal Procedure Code—contd.

Where no fresh evidence is forthcoming, and the circumstances and the evidence are such that two different Courts might take a different view of the evidence, an order of discharge should not be interfered with by directing a further inquiry. **A** BINDESHRI DUBE *v.* EMPEROR, 18 A. L. J. 1135; 2 U. P. L. R. (A.) 374; 22 CR L. J. 49 **193**

——— ss. 439, 476—*Penal Code (Act XLV of 1860), s. 182—Complaint not enquired into—Order calling upon complainant to show cause why he should not be prosecuted, legality of—Revision—High Court, power of interference of.*

Accused presented a complaint to the District Magistrate who, without giving him an opportunity of having his complaint inquired into, and without any inquiry into the complaint, called upon the accused to show cause why he should not be prosecuted under section 182 of the Penal Code:

Held, (1) that the order of the District Magistrate was illegal and improper, as a complainant can be made to suffer the consequences of his action only when his complaint, after full and open inquiry, is found to be false;

(2) that the High Court had power to revise the order, although no final order directing the prosecution of the accused had been passed. **A** SHEO BALAK *v* EMPEROR, 22 CR. L. J. 81 **369**

——— s. 476—*Order directing prosecution—Evidence recorded in absence of accused—No opportunity to cross-examine—Order, whether justified.*

An order under section 476, Criminal Procedure Code, directing the prosecution of a person upon evidence recorded in his absence, and without affording him an opportunity to cross-examine the witnesses cannot be justified. **A** LAL LOKPAL SINGH *v.* EMPEROR, 19 A. L. J. 56; 22 CR. L. J. 143 **655**

——— s. 488—*Maintenance proceedings—Husband willing to keep wife in his house, whether ground for escaping liability.*

Where in proceedings under section 488 of the Criminal Procedure Code it appears that the husband had turned his wife out of his house, he cannot escape liability for giving maintenance to her merely by saying in Court that he will keep her in his house, a promise which he might break as soon as he gets home. **L** AISHAN *v.* SHER MUHAMMAD, 22 CR. L. J. 149 **853**

——— s. 488—*Order for maintenance—Subsequent declaratory decree of Civil Court, effect of.*

The jurisdiction conferred by section 488 of the Criminal Procedure Code is auxiliary to that possessed by the Civil Courts, and before enforcing an order for maintenance made under that section a Magistrate is bound to take into consideration any subsequent order of a Civil Court which would disentitle a wife to maintenance.

A Magistrate ought to refuse to enforce an order for maintenance of a child made under section 488 of the Criminal Procedure Code if, after the passing of the order, a Civil Court decides that the respondent is not the father of the child. **L B** BO GYI *v.* MA NYEIN, 13 BUR. L. T 104 22 CR. L. J. 127 **559**

——— ss. 517, 522, *applicability of—Force, use of, proof of.*

Criminal Procedure Code—concld.

Section 517 of the Criminal Procedure Code is limited in its application to moveable property

In order to make section 522 applicable to immoveable property it is not necessary that force should be an ingredient of the offence of which the accused is convicted, provided the use of force appears from the evidence. **M** ADEPU REDDI *v.* RAMAYYA, 12 L. W 227; 22 CR L. J. 110 **414**

——— s. 526 (8)—*Transfer of case—Adjournment, Court when bound to grant—Ground for transfer—Magistrate showing haste in recording accused's statements.*

Under section 526 (8) of the Criminal Procedure Code a Court is only bound to give such an adjournment as will afford reasonable time for an application for transfer being made and an order obtained thereon before the accused is called on for his defence. But where, before he is called on for his defence, he has ample time to make such an application and does not do so, the legality of the proceedings of the Magistrate cannot be questioned.

The fact that a Magistrate exhibits haste in recording the statement of an accused person before all the evidence for the prosecution is concluded, is sufficient to create an apprehension in the mind of the accused that he will not have a fair trial and to entitle him to a transfer of the case to some other Magistrate. **A** ABDUL RAB *v.* AZIMAT ALI, 18 A L J. 1145; 22 CR. L J 88 **376**

——— ss. 537, 540—*Prosecution evidence recorded after defence evidence closed Irregularity.*

The special powers conferred upon a court by section 540 of the Criminal Procedure Code may be exercised under proper circumstances, but the recording of evidence on behalf of the prosecution after the defence evidence is closed cannot be justified It is an irregularity which ought to be avoided. **B** ALEX PIMENTO *v.* EMPEROR, 22 BOM. L. R. 1224; 22 CR. L. J. 58 **202**

——— s. 537 (a)—*Warrant for arrest of woman in abduction case—Magistrate omitting to record reasons for issue of warrant—Irregularity.*

The omission by a Magistrate to record, in the first instance, his reasons for issuing a warrant of arrest against the alleged abducted woman in a case under section 498 of the Penal Code, amounts to a mere irregularity within section 537 *a* of the Criminal Procedure Code. **A** MAHAR SINGH *v.* EMPEROR, 18 A. L J. 149; 22 CR L J. 111 **415**

——— s. 562, *applicability of—"Cheating," whether includes aggravated forms.*

Section 562 of the Criminal Procedure Code applies only to a case of simple cheating falling under section 417, Indian Penal Code, and not to aggravated forms of cheating under sections 418 to 420, Indian Penal Code. **L** EMPEROR *v.* RAB NAWAZ, 1 L 611; 22 CR L J. 150 **854**

Criminal proceedings, *whether abate on death of complainant.*

Criminal proceedings once legally instituted, whether upon a complaint or otherwise, do not terminate or abate merely by the death of the complainant or the person injured **L** HAZARA SINGH *v.* EMPEROR, 2 L. 27; 22 CR L. J. 166 **918**

Custom, *existence of, admitted in adoption deed—Burden of proof.*

The admission of an adoption in a deed amounts

Custom—contd.

to an admission both of the fact and the validity of the adoption, and the burden of proving the contrary lies upon the person making the admission. **M** SOORATHA SINGA *v.* KANAKA SINGA, 12 L. W. 245; (1920) M W. N 528, 43 M. 867 **585**

——— of *Khatris* of Amritsar—Inheritance—Adopted son, share of. *See* HINDU LAW—MITAKSHARA **256**

———**Adoption**—Andhra or Telugu Brahmins—*Daughter's son or sister's son, adoption of, whether valid.*

The custom of adopting a daughter's son or a sister's son obtains among Brahmins of the *Andhra* or Telugu portion of the Madras Presidency. **M** VADREVU RANGANAYAKAMMA GARU *v.* RYALI SOMASUNDARA RAO, 43 M. 876 **609**

——— ——— *Burden of proof*—Jats *of Gurgaon District—Adoption, whether formal—Presumption—Adopted son, status of—Male lineal descendant—Succession to occupancy rights—Punjab Tenancy Act (XVI of 1887), s. 59.*

Where the question of adoption is in dispute, the onus is on the claimant to establish his status as adopted son.

Customary adoption of an heir is almost unknown in the districts which formed part of the old Delhi Territory.

Where, therefore, adoption is proved to have taken place among *Jats* of the Gurgaon District the presumption is that the adoption was a formal one.

One *T*, a *Jat* of the Gurgaon District, having died, plaintiffs-landlords sued for possession of certain occupancy land held by *T*. The defendant resisted the suit on the ground that he was the adopted son of *T*. The adoption of the defendant by *T*. was proved:

Held, that the adoption being a formal one the defendant must be regarded as a male lineal descendant of *T*. within the meaning of section 59 of the Tenancy Act and the landlords had no right to the possession of the land as against him. **L** GIASU *v.* HAR DIAL, 6 P. W. R 1921 **82**

———**Alienation**—*Gift—Widow, whether can gift land in lieu of services*

Although in certain cases a male proprietor can make a gift of ancestral land in consideration of services rendered by the donee, a widow cannot, in the absence of a custom to the contrary, make a gift of land at all. She can ordinarily alienate only for necessity. **L** NIZAM DIN *v.* SHADI **520**

——— ——— *Necessity, proof of—Small item not accounted for—Transaction, old—Silence, long, effect of.*

In a suit by a reversioner to contest a sale, if the amount found to be not for necessity is only a fractional part of the total consideration (in this case Rs. 150 out of Rs. 800) the sale should not be disturbed.

Where the sale took place over forty years prior to suit the long silence of the plaintiff may be taken into account and strict proof of necessity should not be expected or required. **L** GHAMANDI *v.* BUTA, 3 U P. L. R. L 1 **592**

——— ——— *Suit to contest alienation—Fictitious item entered in sale-deed, effect of—Court, duty of.*

Custom—concld.

Fictitious items are very often introduced into conveyances, but it does not follow that they are always introduced for fraudulent purposes. They often are introduced for the purpose of frightening would be pre-emptors, but they might also be introduced by the purchaser in order to enhance the importance of his bargain and, consequently, his status in the eyes of his neighbours. Even if the object of introducing such fictitious items is to scare away pre-emptors, reversioners can derive no advantage from that circumstance.

In such a case the real issue is, what is the contract between the vendor and the vendee? And if it is found that by consent of the vendor and the vendee a fictitious amount was included in the ostensible sale-price the only matter which remains for consideration is whether the real contract is one which should be binding on the collaterals. **L** PUNJAB SINGH *v.* ARJAN, 2 L. 22 **776**

——— **Pre-emption**—*Sale of right to receive certain allowances, whether subject to pre-emption.*

The custom of pre-emption does not apply to a sale of the right of a *zemindar* to receive certain allowances from the *muafidars* of a village. **A** ABDUL WAHID *v.* HALIMA KHATUN, 18 A. L. J. 210; 42 A 262 **188**

———**Succession**—*Daughter versus collaterals of seventh degree*—Birk Jats *of Tahsil Phillaur, Jullundur District.*

Among *Birk Jats* of the Phillaur Tahsil a daughter excludes collaterals of the seventh degree from succession to ancestral property. **L** BHOLA SINGH *v.* BABU, 1 L. 464 **503**

——— ——— Vighmal Khojas *of Shahdara—Females, exclusion of.*

In the case of a family which belonged originally to a non-agricultural Hindu tribe, there is no initial presumption that the family is governed by custom. Among *Vighmal Khojas* of Shahdara, females are excluded from succession by custom. **L** UMDA BEGUM *v.* ZAIB-UL-NISA **694**

Declaration of title, *suit for—Plaintiff in possession—Defendant having no title—Suit, whether maintainable—Non-joinder of parties, effect of—Civil Procedure Code (Act V of 1908), O. I, rr. 9, 10.*

A person who is in possession of land is entitled to maintain a suit for declaration of title and confirmation of possession as against a person who has neither title nor possession, and such a suit is not liable to dismissal merely because a third person who is alleged to be interested in the land has not been impleaded as a party. **Pat** GAJINDRA SINGH *v.* AKAL KOER **292**

———, *suit for, that decree is* ultra vires *and void, whether maintainable.*

A suit for a declaration that a decree is *ultra vires* and void and futile under the law cannot be maintained **O** KISHAN DAYAL *v.* DEPUTY COMMISSIONER, PARTABGARH, 23 O. C. 342 **566**

Decree, *construction of—Mortgage, suit on—Compromise—Decree permitting redemption within a certain time, effect of—Fresh mortgage, whether created—Decree based on nullity, whether can be challenged.*

A decree once granted cannot be challenged on the

Decree—concld.

ground that it is based on a nullity: a decree based on a void contract is good until it is set aside in appeal, and a decree based on a void mortgage contract cannot be otherwise regarded.

In a suit for foreclosure of a mortgage the parties arrived at a compromise and a decree was passed awarding possession to the mortgagee with the provision that the defendant could redeem one-half or the whole of the mortgage within one year, and so avoid wholly or in part the execution of the decree. The mortgagor failed to redeem, and the mortgagee obtained possession of the property as owner in execution of his decree. Subsequently, the mortgagor sued to redeem the mortgage:

Held, (1) that the effect of the previous decree was that the Court decreed possession to the mortgagee as owner, but suspended execution of the decree for one year during which the mortgagor could avoid execution in whole or in part;

(2) that no fresh mortgage was created by the decree;

(3) that the mortgagee having become owner of the mortgaged property, the suit for redemption was not maintainable. **L** KARORI MAL *v.* BAMJI LAL 2 L. 53 **812**

———, *whether binding on persons not parties thereto.*

A decree obtained in a suit to which the parties litigating a subsequent suit were not parties, is not conclusive and binding as against them. **C** NILRATAN MITRA *v.* ABDUL GOFUR GAZI, 32 C. L. J. 75 **3**

Defamation—*Entry of name in surveillance register—Damages, suit for, maintainability of.*

The entry of a person's name in class "C" of the surveillance register, without justification, does not give him the right to recover damages from the person making the entry. **Pat** RAWLINS *v* ANANT LAL SAHU, 2 P. L. T. 176; (1921) PAT. 40 **905**

Definitions:—

Affecting the decision of the case. *See* CIVIL PROCEDURE CODE, S 105 **676**

Case. *See* CIVIL PROCEDURE CODE, S 115 **680**

Case. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 25 **685**

Changes. *See* BENGAL ALLUVION AND DILUVION ACT, S 3 **298**

Cheating. *See* CRIMINAL PROCEDURE CODE, S. 162 **654**

Compelled to answer. *See* EVIDENCE ACT, S. 24 **324**

Decided. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 25 **685**

Decree. *See* COURT FEES ACT, S. 11 (2) **385**

Holding. *See* BENGAL TENANCY ACT, S. 3 (9) **209**

Judgment. *See* LETTERS PATENT (BOM.) CL. 15 **573**

Just Cause. *See* PROBATE AND ADMINISTRATION ACT, S 50 **664**

Person. *See* EVIDENCE ACT, S. 115 **393**

Premium. *See* C. P. TENANCY ACT, S. 41 (2) **419**

Dekhan Agriculturists' Relief Act (XVII of 1879), s. 10 A, proviso, 2, *applicability of*—Bona fide *purchaser for value without notice of less than twelve years' standing, whether protected.*

Dekhan Agriculturists' Relief Act—concld.

The object of the Legislature in enacting section 10A of the Dekkhan Agriculturists' Relief Act was to protect the mortgagor and not the transferee, if the mortgagor was sufficiently diligent in seeking to redeem the property.

The proviso does not protect a *bona fide* transferee for value without notice of the real nature of a transaction if he holds under a registered deed executed less than twelve years before the institution of the suit. **B** PRANJIVANDAS *v.* NARSIDAS MIA CHAND BAHADUR, 22 BOM. L R. 1122; 45 B. 87 **418**

——— **s. 13**—*Advance, fresh, taken before payment of prior advance—Series of transactions—Accounts, mode of taking.*

Where a debtor takes a fresh advance before a prior advance is paid off, an account should, under section 13 of the Dekkhan Agriculturists' Relief Act, be taken as if both the transactions formed one entire transaction. **B** GURUNATH KESHAV KALKUNDRI *v* SADASHIV BALKRISHNA DESPANDE, 22 BOM L R 1150: 45 B 216 **217**

——— **s. 13**—*Mortgage account, mode of taking—Evidence, absence of—Procedure.*

It is not equitable, and it was not intended by the framers of the Dekkhan Agriculturists' Relief Act, that in a case where a mortgage is admitted a plaintiff should lose everything because he cannot go back far enough to a period before the Act was in force to distinguish what is principal and what is interest.

Where, in taking an account under section 13 of the Dekkhan Agriculturists' Relief Act, in the absence of data showing exactly how much principal has been received, the Court forms a reasonable estimate from the amount of consideration stated in the bond as to the probable amount of actual principal, there can be no legal objection to that estimate being accepted and acted on. **B** KONDAN DAMU *v.* INDARCHAND BACHARAJ, 22 BOM. L. R 1299: 45 B. 823 **576**

Digwari tenure—Digwar, *whether can grant permanent lease or acquire interest in waste land.*

A *digwar* cannot either transfer the lands comprised in the *digwari* grant to another so as to create an interest in them by permanent lease, nor can he himself acquire any interest in the uncultivated land, such as jungle or waste land which is comprised within the *Mauza*. **Pat** BAIDYANATH MAHTO *v.* SHYAM MAHTO **899**

Divorce Act (IV of 1869), s. 3 (1)—

—*Divorce, proceedings for—Parties residing within jurisdiction separately—Court, whether has jurisdiction to hear petition.*

If both parties to a petition for divorce are resident within the jurisdiction of the Court at the time of the presentation of the petition, the Court has jurisdiction, under section 3 (1) of the Divorce Act, to hear the petition, notwithstanding that the parties are residing separately from each other. **B** BORGONHA *v.* BOROGONHA, 22 BOM. L R. 861; 44 B. 924 **931**

——— **s. 17**—*Practice—Decree for dissolution of marriage, confirmation of—Notice to respondent, whether necessary.*

In proceedings for confirmation of a decree *nisi* for dissolution of marriage it is not necessary that

the respondent should be served with a notice thereof. **L** ETHEL MABEL EMILY HARRIS *v.* HARRIS, 10 P. L. R. 1921; 19 P. W. R. 1921 **89**

Document, *lost—Loss, proof of—Omission to prove loss, effect of—Irregularity—Civil Procedure Code (Act V of 1908), s. 99.*

Where the explanation for the non-production of a document is that it is lost, the regular course to adopt is to prove the loss before tendering secondary evidence, but the omission to do this is not any worse than an irregularity such as section 99 of the Civil Procedure Code precludes an Appellate Court from treating as a ground for reversing the decree or remanding the case **N** SURATSING *v.* RANI **461**

Easement—*Garden—Right of management and ownership reserved—Succession, how regulated.*

Where an easement is created in favour of a community over a garden which they are empowered to use as a public park, but the right of management and ownership are retained by the owner, the garden descends in the ordinary way subject to the charge upon it. **S** LAKHAMBAI *v.* DEVIBAI, 14 S. L. R. 132 **673**

Easements Act (V of 1882), s. 28—*Right of way, extent of—Intention of parties—Right of way for carts, whether includes right of way for sweepers.*

Under section 28 of the Indian Easements Act the extent of any easement, (other than an easement of necessity, and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired. In the absence of evidence as to such intention and purpose, a right of way of any one kind does not include a right of way of any other kind.

A right of way for persons, cattle, carts, etc, does not include a right of way for sweepers removing night-soil. **B** CHINTAMANI HARGOVAN *v.* RATANJI BHIMBHAI, 22 BOM L. R. 1181 **426**

Evidence Act (I of 1872), ss. 24, 132—*Criminal Procedure Code (Act V of 1898), ss. 164, 339 (2)—Confession, what is—Confession recorded by Magistrate, procured by Police Officer, admissibility of—"Compelled to answer," meaning of—Approver, confessional statement of, admissibility of, in subsequent trial.*

Any statement made by a person which would suggest an inference as to his guilt may be a confession within the meaning of section 24 of the Indian Evidence Act.

If it is found that a confession recorded by a Magistrate under section 164 of the Criminal Procedure Code was procured by a Police Officer by the offer of an inducement, the confession becomes inadmissible under section 24 of the Evidence Act.

Unless a person objects to any question the answer to which is likely to criminate him he cannot be said to have been compelled to give such answer within the meaning of the proviso to section 132 of the Evidence Act.

Per *Shah, J.*—Section 24 of the Evidence Act would apply even if the person who is said to have made the confession was not an accused person at the time that he made the confession. It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession.

Though the statements made by an approver may be given in evidence against him under sub-section (2) of section 339 of the Criminal Procedure Code, it cannot be said that the operation of section 24 of the Indian Evidence Act, is altogether excluded. Ordinarily, the inducement that would appear on the surface would be the inducement of the pardon legally tendered and accepted under the provisions of the Criminal Procedure Code But if it is shown in any case that there was some other influence simultaneously proceeding from any other authority which would invite the application of section 24 of the Indian Evidence Act, then the confessional part of the statements would become inadmissible by virtue of the provisions of that section.

Per *Heaton, Actg. C. J.*—(*Hayward, J.*, Semble).—A statement falling within clause (2) of section 339 of the Criminal Procedure Code is removed from the operation of section 24 of the Evidence Act. **B** EMPEROR *v.* CUNNA, 22 BOM L. R. 1247; 22 CR L J. 68 **324**

——— **s. 35**—Hissawari, *admissibility of, in evidence.*

A *hissawari* prepared in consequence of a demand made by the Collector of a district under section 30 of the Bengal and Registration Act, is inadmissible in evidence under section 35 of the Evidence Act. It is not a public or other official book, register or record, but is merely the record of information supplied by some of the sharers in an estate and can only be admitted in evidence, if it is proved to have been made by the person or persons by whom it is signed. **Pat** TANHA SINGH *v.* BANDHU SINGH, (1919) PAT. 323 **8**

——— **s. 92**—*Written instrument—Oral agreement varying terms as to payment—Evidence of payment or of oral agreement, whether admissible.*

Where an oral agreement is made, which in respect of the manner of payment rescinds or modifies a contract, grant or disposition of property required by law to be in writing or actually written and registered and any payment is made in accordance with the oral agreement, whether in complete or partial satisfaction of the contract, section 92 of the Evidence Act does not exclude evidence of that payment or of the oral agreement that explains it. It does, however, exclude evidence of the agreement in respect of future payments not in accordance with the terms of the instrument. **N** SAMBHOO *v.* TIKARAM **240**

——— **s. 114,** *presumption under, extent of.*

Accused was convicted under section 412 of the Penal Code, and, the Judge holding that he must, under section 114 of the Evidence Act, be presumed to have known the atrocious nature of the dacoity by which the goods were obtained awarded him the maximum penalty :

Held, that, as the presumption alone would not justify fixing the accused with more than knowledge that the goods recovered from him had been obtained by dacoity, the sentence was excessive. **C**

Evidence Act—concld.

ASIMUDDIN SARDAR *v.* EMPEROR, 32 C. L. J. 89; 22 CR. L. J. 60 **204**

——— **s. 115,** *applicability of, to minors—"Person", meaning of—Minor—Misrepresentation as to age—Minor, whether estopped from pleading infancy.*

The word "person," as used in section 115 of the Evidence Act, should not be narrowed down so as to exclude an infant.

Where there have been no misrepresentations by a minor as to his age, or where the misrepresentations have not, as a matter of fact, misled the opposite party, there can be no estoppel and infancy can be successfully pleaded. On the other hand, where the opposite party has been misled by false representations, section 115 is applicable and the plea of minority cannot be heard. **L** WASINDA RAM *v.* SITA RAM, 1 L. 389; 51 P. W. R. 1920 **393**

——— **s. 116**—*Lessee denying title of lessor to lease—Estoppel.*

Where a person executes a lease in favour of another, he is estopped from denying that other's title to grant the lease, it being immaterial whether he was the tenant of some other person before the execution of the lease **N** CHANDOO *v.* PARBHOO **707**

Execution Court, whether can go behind order of Insolvency Court. *See* MORTGAGE DECREE **95**

Execution of decree—*Decree capable of execution but not executed within three years, effect of—Amendment of decree, whether revives decree*

A decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment. RABIUDDIN *v* RAM KANAI SEN **186**

——— *Decree for demolition of wall—New wall erected after demolition—Remedy, proper.*

Where a decree directs the demolition of a wall as being an obstruction to a right of way to which the decree-holder is entitled and the wall is demolished in execution of the decree, but the judgment-debtor erects another wall obstructing the right of way, the proper remedy of the decree-holder is to file a suit for an injunction restraining the judgment-debtor from obstructing his right of way. He is not entitled to get the second wall demolished in execution of the first decree **L** MALUKA *v.* SUNDAR SINGH, 20 P. W. R. 1921 **594**

——— *Decree, mistake in recitals in—Executing Court, whether can look behind decree.*

Where in the recital part of a decree, the nature of the claim as set forward in the plaint is inadequately recited the executing Court is not in any way bound thereby, and it is within the competence of such Court to examine the record and to ascertain for itself what the actual existing circumstances are. **Pat** RAMESHWAR SINGH *v.* SUBU LAL JHA, 5 P. L. J. 402; 2 P L. T. 7 **25**

——— *Executing Court, whether can go behind decree—Jurisdiction of Court.*

The only question with which an executing Court has jurisdiction to deal is the question whether the application for execution should proceed, it has no jurisdiction to deal with the question whether the decree should stand or whether it should be set aside on any of the grounds on which a decree can be set aside. **B** RAMCHANDRA GOVIND *v.* JAYANTA BAVJI, 22 BOM L. R 140?; 45 B 503 **715**

——— *Surety for judgment-debtor—Security, forfeiture of—Sum paid by surety, appropriation of.*

In execution of a decree a judgment-debtor was arrested and imprisoned, but was released on furnishing security in the sum of Rs. 500, the surety undertaking to produce him in Court in the event of his not applying to be adjudicated insolvent within a month. He did not so apply and the surety failed to produce him and paid the Rs 500; the question was how this sum was to be appropriated:

Held, that the sum was to be applied in satisfaction of the decree. **C** SURENDRA NATH GHOSE *v.* KESAB LAL GHOSE, 25 C. W. N. 36 **778**

Execution of document—*Proof, method of.*

The ordinary mode of proving the execution of a document where the executant denies that he wrote it, is by calling some one who saw him write, or who knows his handwriting or by a comparison of his signature with his signature on other documents written by him. **C** DHAR & Co. *v.* SIB NARAYAN SINGH **188**

Expert evidence, *value of.*

The evidence of a skilled witness, however, eminent, as to what he thinks may, or may not have taken place under a particular combination of circumstances, however, confidently he may speak, is ordinarily a matter of mere opinion. Human judgment is fallible. Human knowledge is limited and imperfect.

An expert witness, however, impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides, it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests. **L** HARI SINGH *v.* LACHHMI DEVI, 12 P. L. R. 1921; 10 P. W. R. 1921 **220**

Factories Act (XII of 1911), ss. 28, 29, 31, 41 (a)—*General Clauses Act (X of 1897), s. 21—Approval of system of working factory, whether can be cancelled—Appeal against order of cancellation—Prosecution during pendency of appeal, desirability of.*

Where an Inspector of Factories approves a system of working a particular factory, he has power, under section 21 of the General Clauses Act, to cancel the approval.

Where, however, an appeal is pending from the order of cancellation, it is not desirable to institute a criminal prosecution in respect of the factory having been worked in contravention of the order of cancellation, during the pendency of the appeal. **L** MADAN MOHAN LAL *v.* EMPEROR, 22 CR. L. J. 163 **857**

Fisheries, lease of—Lease, forfeiture of—Waiver of forfeiture. *See* TRANSFER OF PROPERTY ACT, s. 112 **273**

Fraud—*Pleader, failure of, in duty, whether fraud on part of principal.*

The failure by a Pleader to allow essential points to be overlooked does not amount to fraud on the part of his principal. **C** KIRAN CHANDRA *v.* BONO BEHARI DATTA 752

Government of India Act, 1915 (5 and 6 Geo. V, c. 61), s. 107 *Difference of opinion among Judges—Procedure.*

Where a High Court exercises jurisdiction under section 107 of the Government of India Act, 1915, and the Judges hearing a case differ in opinion, the opinion of the Senior Judge prevails. INDIAN IRON & STEEL CO., LTD *v.* BANSO GOPAL, 32 C. L. J. 54; 22 CR. L. J 99 403

Hindu Law—Adoption—*Dancing girl, adoption by, nature of—Estoppel, whether can be relied on to validate adoption.*

An adoption by a dancing girl for purposes of prostitution is nothing more than the going through of certain forms and does not affect the status of any one. When such an adoption is challenged, the doctrine of estoppel cannot be resorted to in order to validate the adoption, which, being opposed to public policy, is void. **M** KANDAIYA PILLAI *v.* CHOKKAMMAL, 12 L W 7; 28 M. L T 105 214

——— ——— Shudra—*Widow, unchaste, whether can adopt.*

An adoption made by an unchaste *shudra* widow is not invalid by reason of the widow's unchastity.

In the Bombay Presidency a widow has implied authority to adopt from the date of her husband's death unless it can be shown that the husband had either expressly or impliedly revoked such authority. Therefore, any conduct of the widow after the husband's death cannot affect the authority which she acquired at the time of his death. **B** BASVANT MUSHAPPA *v.* MALLAPPA KALLAPPA, 22 BOM. L. R. 1400; 45 B. 459 800

——— ——— *Wife of lunatic, whether can adopt during his lifetime.*

Under the Hindu Law an adoption by a wife to her husband, the husband being alive and a lunatic, is invalid. **B** RAMKRISHNA TIMMANNA *v.* LAXMINARAYAN, 22 BOM. L. R. 1181 458

——— **Custom**—*Adoption*—Kshatriyas *of South Kanara—Brother's daughter's son, adoption of, validity of.*

According to the custom prevailing among *Kshatriyas* in South Kanara, in the Madras Presidency, the adoption of a brother's daughter's son is valid. **M** SOORATHA SINGA *v.* KANAKA SINGA, 12 L. W. 245; (1920) M. W. N. 528; 41 M. 867 585

——— **Debt**—*Son, liability of, for father's debt—Immoral purpose—Proof, necessary.*

To enable the son of a Hindu to escape liability for payment of his father's debt on the ground that it was incurred for an immoral purpose, he must establish a direct connection between the debt and the immoral purpose The mere fact that the father kept a concubine is not sufficient. It is sufficient, however, if the Court can draw an inference from the evidence as to the connection between the debt and the immoral purpose **M** SUNDARA GOUNDAN *v.* ARUMUGA GOUNDAN, 12 L. W. 159 390

——— **Guardian**—*Testamentary appointment of guardian, validity of—Suit to remove guardian, maintainability of.*

Hindu Law—contd.

Under the Hindu Law the testamentary appointment by a father of a guardian of his son is valid, and, in the absence of an act of misfeasance or bad management, the mother, acting as the next friend of the minor, is not entitled to an order removing such guardian from his office. **A** DEBA NAND *v.* ANANDMANI, 18 A. L. J. 1127; 2 U. P. L. R. (A. 431 909

——— **Joint family**—*Adoption by widow of co-parcener, validity of—Consent of co-parceners, whether necessary—Effect of adoption.*

The widow of a co-parcener cannot adopt unless she has either the express authority of her husband or the consent of her husband's co-parceners.

An adoption cannot be partly valid and partly invalid, so that the person adopted, although excluded from becoming a member of the joint family, may still be entitled to inherit the self-acquired property of his adoptive father. **B** PANDU KRISHNA JADHAV *v.* DHONDI KRISHNA PATIL, 22 BOM. L. R. 1403 783

——— *Debt—Partition after incurring debt—Co-parceners, liability of.*

Where after a debt is incurred for the benefit of the members of a joint family, the family property is partitioned, such partition has not the effect of relieving the co-parceners from liability for the debt to the extent of the family property in their hands. **M** MUTHU REDDI *v.* CHINNASAWMY REDDI, 12 L. W. 403; (1920) M. W. N. 613; 39 M. L. J. 486; 28 M. L. T. 308 685

——— ——— *Debts of father—Liability of son—Mortgage to pay off previous mortgage, binding effect of.*

Where a Hindu father incurs debts for the benefit of the family, and the debts are not tainted with immorality, such debts are binding on his son by reason of the pious obligation attaching to him to pay the debts of his father.

A mortgage of family property for the payment of a previous mortgage-debt, which saves the family property for the enjoyment of the family, is binding on the family. **A** LACHMI NARAYAN *v.* DEOKI 797

——— ——— *Family property sold for arrears of revenue and purchased by one member, whether joint or separate.*

Where joint family property is put up for sale by the Revenue Authorities on account of arrears of revenue and is purchased by one of the members of the family, then, unless it can be shown that it was purchased out of the joint family purse or was thrown back into the joint family property, it becomes the private property of the purchaser. **B** CHOKHU RAOJI *v.* TATYA NAMA, 22 BOM L. R. 1297 569

——— ——— *Partition—Sons, share of whether included in share of father.*

As a general rule, at a partition among the members of a joint Hindu family each member is presumed to represent not only himself but also his sons, and the sons take their share through their father as being included in the share allotted to him, and the rule is not limited in its application to cases where the sons are minors. **O** RAM BAHADUR SINGH *v.* NIRBHAI SINGH, 2 O. C. 339 564

——— ——— *Partition, suit for—Death of co-parcener after preliminary decree, effect of—Juris.*

Hindu Law—contd.

diction of Court passing final decree to consider effect of death on shares of other co-parceners.

Although, ordinarily, the rights of the parties to a suit ought to be determined as at the date of the institution of the suit, a suit for partition under the Hindu Law is treated as an exception, and, in order to save costs and to prevent multiplicity of proceedings, the Courts are entitled, and even bound, to take into consideration matters subsequent to the commencement of the suit.

In point of law, a partition action does not come to an end with the preliminary decree, but continues till the final decree is made, and the shares to be decreed to the parties must be those to which they are entitled on the date of the final decree. Therefore, where a co-parcener dies after the passing of the preliminary decree, the Court passing the final decree is competent to consider the effect of the death on the shares of the remaining co-parceners. **Pat** KRISHNA LAL JHA *v.* MANDESWAR JHA, 2 P. L. T. 215; 3 U. P. L. R. (PAT.) 17 **872**

——— Joint family—*Presumption as to jointness—Separation of some members—Burden of proof.*

Although the ordinary presumption of Hindu Law is that a family is joint, yet that presumption is displaced by the presumption arising from the admitted separation of certain members of the family, and a person alleging jointness must prove it by other means. The mere fact that two brothers were living and messing separately would not necessarily indicate separation in estate, especially where it is shown that their cultivation was joint, and that they divided only so much of the produce as was necessary for household purposes, and kept the rest for purposes of *len den.* **N** SUA *v.* DUKALU **489**

——— ——— *Property transferred to pay off father's debts—Sons, right of, to recover property, extent of.*

Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted, and the operation of this rule is not limited to cases where the joint family property has passed out of the hands of the family and gone into the hands of persons who were neither previous creditors when the sale is a private alienation, nor judgment-creditors when the sale is by public auction. **O** BASDEO LAL *v* MAHABIR, 23 O C. 344; 8 O. L. J. 18; 3 U. P. L. R. (J. C.) 1 **570**

——— ——— Sale by mother as guardian —Suit by sons to recover property more than three years after eldest has attained majority, whether barred. *See* LIMITATION ACT, s. 7 **759**

——— ——— *Separation—Re-union—Question of law.*

The question of the re-union of a Hindu family and the facts relevant to prove such a re-union are matters of law. **L** NARAIN DAS *v.* MAHNGA RAM **706**

Hindu Law—contd.

——— Joint family—*Separation without actual partition—Suit for joint possession, whether maintainable.*

Where there has been a separation of a Hindu joint family, but not a division by metes and bounds, a suit for joint possession by one member of the family, who has been excluded from possession, is maintainable if he was in joint possession before his exclusion, and he is entitled to be restored to the possession which he held before he was interfered with **A** SHEODAN KURMI *v.* BALKARAN KURMI, 18 A. L. J. 103; 2 U. P. L. R. (A.) 592 **116**

——— ——— *Will—Devise by co-parcener in favour of widow, validity of—Consent of co-parceners—Minor, consent on behalf of.*

A testamentary disposition of joint family property by a Hindu co-parcener in favour of his wife is invalid under the Hindu Law, because on the date of his death, when the Will takes effect, there is nothing for the Will to operate on, his share in the property passing to the other co-parceners by survivorship.

Where a Hindu family consists of a father and his infant son, and the father makes an alienation of the family property, he cannot be said to have consented to the alienation in his capacity of guardian to his minor son **M** PANDIPATI SUBBARAMI REDDI *v.* PANDIPATI RAMAMMA, 12 L. W. 249; (1920) M. W. N. 529; 43 M. 824 **681**

——— Marriage—Sudras *of* Velama *caste—Marriage with wife's sister's daughter, validity of.*

Among *Sudras* of the *Velama* caste in the Madras Presidency, the Hindu Law does not operate to render invalid a marriage with a deceased wife's sister's daughter. **M** RAMAKRISHNA RAO *v.* SUBBANNA RAO, 12 L. W. 155; 39 M. L. J. 18; (1920) M. W. N. 474; 43 M. 830 **268**

——— Mitakshara—*Adoption of a daughter's son, whether valid—Custom of* Khatris *of Amritsar—Inheritance—Adopted son, share of—Joint Hindu family—Property in the hands of member, nature of—Will devising joint property, whether valid.*

Under the Hindu Law, the adoption of a daughter's son is invalid, but it is valid according to a custom prevailing among the *Khatris* of the town of Amritsar.

According to the Mitakshara School of Hindu Law, an adopted son takes one-fourth of the entire estate in the presence of a natural son.

All the property in the hands of the members of a joint Hindu family is to be treated as joint property, but it is open to any member to show that any particular property is his separate property.

In a suit for possession by partition of certain property left by one *P.*, it appeared that he adopted the plaintiff in July 1905. About five years afterwards, he got a son, the defendant, who relied on a Will executed by the deceased whereby he devised his entire estate to his natural son:

Held, (1) that as soon as the plaintiff was adopted by *P.* he became a co-parcener with the latter, and that the latter could not dispose of any property which belonged to the joint family;

(2) that the Will could operate only upon the separate property of the deceased and was invalid

Hindu Law—contd.

qua the joint property. **L** PARMANAND *v.* SHEO CHARAN DAS, 2 L. 69; 21 P L. R. 1921; 15 P. W. R. 1921 **256**

——— **Mitakshara**—*Inheritance — Female heirs—Brother's daughter, whether* bandhu—*Suit for declaration that alleged adoption never took place —Evidence of knowledge—Burden of proof—Limitation Act (IX of* 1908*), Sch. I, Art.* 118.

Under the Hindu Law the only females entitled to inherit are the widow, the daughter, the mother, the father's mother and the father's father's mother.

A brother's daughter is not a *bandhu* with rights of inheritance.

Where in a suit for a declaration that a certain alleged adoption never took place the plaintiff has given *prima facie* evidence of his want of knowledge of the fact of adoption, it is for the defendant to show in the clearest possible way that the fact of the alleged adoption must have come to the plaintiff's knowledge at a particular date when limitation began to run under Article 128 of Schedule I to the Limitation Act. **L** SUJAN DEVI *v.* JAGIRI MAL, 1 L. 608; 8 P. W. R. 1921 **124**

——— ——— *Succession—Male* bandhus, *whether preferred to female* bandhus.

Under the Hindu Law female *bandhus* are excluded by the nine classes of *bandhus* mentioned in the Mitakshara. **B** BALKRISHNA BHIMAJI *v.* RAMKRISHNA GANGADHAR, 22 BOM. L. R 1442; 45 B. 353 **771**

——— **Mutt**—*Debts incurred by head of* mutt—Mutt *properties, whether liable.*

Debts incurred by the head of a *mutt* for necessary purposes of the *mutt* are recoverable out of the properties of the *mutt*, even though such properties are not charged with the debts. **M** LAKSHMINDRATHIRTHA SWAMIAR *v.* RAGHAVENDRA RAO, 12 L. W. 139; 39 M. L. J. 174; (1920) M. W. N. 568; 43 M. 795; 28 M. L. T. 269 **287**

——— **Religious endowment**—*Management vested in family of founder—Right of one member of family to joint possession and management—Possession of one member of family, nature of.*

The fact that the persons entitled to the office of trustee of a charitable endowment are unable to work harmoniously together is not a ground for dismissing a suit by one of the heirs of the founder for a declaration of his right to share in the management and for joint possession of the trust properties with the heir in possession and management, and, in the absence of a scheme of management settled by the heirs themselves or by resort to the Court, the plaintiff is entitled to the rights of joint possession and management.

Where the management of a religious institution vests in the family of the founder, the management of one member of the family must be regarded as being on behalf of all the members, including females, and not adversely to them, and such member has no right to make a testamentary disposition of that right. **M** MEENAKSHI ACHI *v.* SOMASUNDARAM PILLAI, 12 L. W. 232; (1920) M. W. N. 507; 39 M. L. J. 403; 44 M. 205 **464**

——— **Shudras** — *Succession — Illegitimate daughter, whether can succeed to mother.*

Amongst *Shudras* an illegitimate daughter succeeds as heir to her mother in default of any nearer heirs. **B** DUNDAPPA BASAPPA *v.* BHIMAWA BASWANTIAPPA, 22 BOM. L. R. 1206; 45 B. 557 **561**

Hindu Law—contd.

——— **Stridhanam**—*Woman dying without issue*—Stridhanam, *devolution of*—Sapinda, *meaning of.*

Under the Mitakshara School of Hindu Law, the *stridhanam* property of a female married according to an orthodox form who has left no issue, devolves on the husband, and, failing him, on his *sapindas*: thus, the husband's daughters' son's son would have preference over the wife's sister or sister's son.

The term '*sapinda*' means, a relation allied to the propositus by affirmity of blood. **M** MATHOSRI RAMA BOI *v.* SIVAJI RAJAH SAHIB, 12 L. W. 171; (1920) M. W. N. 501 **265**

——— **Succession**—*Acceleration, how effected —Limited owner and full owner, distinction between.*

The succession of the next reversioner can be accelerated only by a limited owner, like a Hindu widow, by making a surrender or by relinquishment. A full owner can only transfer either by sale or gift and such transfer can only be by a registered instrument. **N** UDEBHAN *v.* RANGRAO **451**

——— ——— Bandhu—*Last male owner paternal grandfather's mother's brother's grandson of claimant.*

A person cannot be regarded as the *bandhu* of his paternal grandfather's mother's brother's grandson and cannot, therefore, succeed to the latter's estate. **M** CHINNA PICHU IYENGAR *v.* PADAMANABHA IYENGAR, 12 L. W. 397; (1920) M. W. N. 609; 39 M. L. J. 417; 28 M. L. T. 303; 44 M. 121 **690**

——— ——— *Female heirs—Uncle's daughter, whether* gotraja sapinda.

As a general rule the Hindu Law is opposed to succession of females and such female heirs as have been recognised as entitled to inherit come in as exceptions to the general rule.

A paternal uncle's daughter is not a *gotraja sapinda*. **B** KRISHNABAI GOVIND *v.* KESHAV GAJANAN, 22 BOM. L. R. 1162 **511**

——— ——— *First cousins, whether succeed* per stirpes *or* per capita.

Where at the date of the opening of the succession to the estate of a deceased Hindu his nearest heirs are his first cousins they take *per stirpes* without reference to the shares which their respective fathers would have taken had they been alive. **B** NARSAPPA NINGAPPA *v.* BHARMAPPA RAYAPPA, 22 BOM. L. R. 1196; 45 B. 296 **251**

——— ——— *Paternal uncle's grandson, whether preferential heir as against sister's son.*

Under Hindu Law a paternal uncle's grandson is a *gotraja sapinda*, and is, therefore, a nearer heir than a sister's son, who is only a *bandhu*. **B** ANNAYA MADVALAYA *v.* SIDAYA MURGAYYA, 22 BOM. L. R. 1092 **125**

——— **Vritti**, *whether immoveable property—Interference with right—Injunction, suit for—Acquiescence in decision of caste, effect of—Specific Relief Act (I of* 1877*), s.* 54.

Yajman vritti is immoveable property and an owner of such property is entitled to seek the protection of the Court by way of injunction against any undue interference with his right as such owner by the caste. Where, however, the owner of a *vritti* has for several years acquiesced in a decision of the caste he is not entitled to seek the protection of the Court against the action

of the caste. **B** GIRJASHANKAR DAJI *v.* MURLIDHAR NARAYAN, 22 BOM. L R. 1202; 45 B. 231 **271**

——— Widow—*Adoption—Consent of kinsmen to adoption—Court, right of, to interfere—Husband's daughter's son, whether should be consulted.*

Inasmuch as the law imposes a responsibility upon kinsmen in granting their consent to an adoption the Court cannot interfere with their exercise of it, the right of the Court to scrutinize the kinsmen's reasons extends only to those cases in which consent is refused.

The son of the daughter of a deceased Hindu is not one of the *gnatis* whom it is necessary for the deceased's widow to consult regarding an adoption, and the absence of such consultation would not render invalid an adoption made by the widow. **M** VADRELU RANGANAYAKAMMA GARU *v.* RYALI SOMASUNDARA RAO, 43 M. 876 **609**

———, *alienation by, nature of—Possession of transferee, whether wrongful.*

A transfer by a Hindu widow is voidable, and until the reversioner signifies his intention to avoid it, the transferee cannot be deemed to be in wrongful possession of the property alienated **N** RALJI *v.* SHRIRAM **368**

———— ——— *Alienation by widow, nature of—Transferee, whether entitled to redeem mortgage.*

An alienation by a Hindu widow is only voidable, not void, it is perfectly valid, until it is set aside, and the only persons entitled to dispute the validity of the alienation are the reversioners.

Therefore, a mortgagee has no *locus standi* to resist the claim for redemption of a person who, on the face of it, has a perfectly good title to the equity of redemption granted by a Hindu widow. **B** SITARAM RAVAAJI *v.* KHANDU MAIRALA, 22 BOM. L. R. 1155; 45 B. 105 **480**

———— ——— *Alienation—Necessity—Widow carrying on husband's business, right of, to alienate.*

A Hindu widow in possession of a widow's estate cannot alienate immoveable property which she inherited from her husband, beyond her life except for necessity. But where she inherits a trade or business belonging to her husband she is entitled to carry it on, and can sell in the course of the business, the necessity being the prudent conduct of the business irrespective of whether the sale results in a profit or a loss. **A** PAHALWAN SINGH *v.* JIWAN DAS, 18 A. L. J. 41; 42 A. 103 **162**

———— ——— *Maintenance, decree for, charging family property—Decree, whether has precedence over other debts.*

A decree for maintenance obtained by a Hindu widow which is charged against the family properties has precedence over other debts owing by the estate. **M** SOMASUNDARAM CHETTY *v.* UNNAMALAI AMMAL, 12 L. W. 163; (1920) M. W. N. 458; 39 M. L. J. 179; 43 M. 800; 28 M. L. T. 317 **398**

———— ———, *re-marriage of, effect of, on rights to former husband's estate—Consent decree, against re-married widow, whether binding on former husband's property.*

Under Hindu Law, a widow forfeits her status as a widow by her re-marriage and she also forfeits all rights to her former husband's property which thereupon vests in his next reversioner.

A re-married Hindu widow is incompetent to

enter into a consent decree so as to bind her former husband's estate as she represents that estate only so long as it is vested in her and ceases to represent it when she has divested herself of it. **M** VENKATACHALAM CHETTY *v.* RAMA MUDALI, 12 L. W. 322 **91**

——— Widow—*Residence, right of, whether can be enforced against purchaser from husband.*

A widow's right of residence cannot be recognised against an alienee claiming under a transfer effected by the husband during his lifetime **B** GANGABAI *v.* JANKIBAI, 22 BOM. L R. 1302; 45 B. 337 **583**

———— ——— *Surrender of estate—Widow receiving maintenance in lieu of estate, effect of*

A Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from the succession, as effectually as if she had then died, and this effacement may be effected by any process having the effect of a surrender or relinquishment or abandonment of her rights, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property. The receipt of maintenance by a widow in lieu of her estate amounts to a complete relinquishment of that estate. **P C** BHAGWAT KOER *v.* DHANUKHDHARI PRASHAD SINGH, 12 L. W. 105 **445**

——— Will *in favour of widow, construction of—Estate taken.*

Wherever expressions indicating the creation of a full proprietary right in favour of a widow are found in a Will she is to be treated as taking an absolute estate. **L** MOHAN LAL *v.* MAYA MAL, 18 P. W. R. 192; 11 P. W. R. 1921 **231**

Hissawarl, admissibility of, in evidence. *See* EVIDENCE ACT, s. 35 **8**

Hyderabad Assigned Districts Land Revenue Code, 1896, ss. 72 (2), 78 (4), *scope of—Section* 78 (4), *whether confined to cases under section* 72 (2).

Section 78 (4) of the Hyderabad Assigned Districts Land Revenue Code, is general in its application to tenants and is not confined to cases where the rent of tenants falling under section 72 (2) alone is sought to be enhanced. Once the rent of a tenant of whatever class he may be, is sought to be enhanced, provided it can be legally enhanced, clause (4) of section 78 comes into operation. **N** DATTATRAYA *v.* RAJAYA **711**

Impartible Estate—*Munagala Zemindari, Kistna District, whether impartible—Succession—Primogeniture, rule of—Limitation Act (IX of 1908), Sch. I, Arts.* 127, 141—*Adverse possession—Zemindari Estate, widow and daughter in possession of—Possession, nature of—Art.* 127, *applicability of.*

The Munagala *Zemindari* in the Kistna District is impartible, and succession thereto is regulated by the rule of primogeniture.

The succession of the widow of a Zemindar to his estate and of her daughter after her amounts to a denial of the claim of the junior branches of the family that the estate is either joint family property or owned by the family as tenants-in-common, and the possession of the daughter from the date of her succession is adverse to, and exclusive of, the claims of the other branches of the family within the meaning of Article 144 of Schedule

Impartible Estate—concld.

I to the Limitation Act. Consequently, a suit for the partition of the estate, if brought beyond the period prescribed by that Article, would be barred by limitation.

Article 127 of Schedule I to the Limitation Act, which covers suits by a person excluded from joint family property to enforce a right to a share therein, has no application to such a suit. **M** KEESARA VENKATAPAYYA *v.* NAYANI VENKATARANGA RAO, 38 M. L. J. 142; 43 M. 288 **978**

Inamdars in Berar—*Alienation by* Inamdar, *rule as to—Limitation Act (IX of* 1908*), Sch. I, Art.* 144, *applicability of—Suit to recover* inam *lands—Adverse possession, plea of—Burden of proof.*

The law in Berar in respect of alienations by *Inamdars* is that, if an *Inamdar* alienates an *inam* held under rule 5 of the Berar *Inam* Rules, he having only a life-interest, such an alienation cannot affect his successor, or the next holder of an *inam* certificate, and in the case of such an alienation the plea of adverse possession cannot be successfully raised against the successor of the alienor.

Where in a suit by an *inam* certificate-holder to recover possession of lands alienated by his predecessor, the defendant admits the title of the plaintiff's predecessors, but seeks to show that that title was extinguished by adverse possession, Article 144 of Schedule I to the Limitation Act is applicable, and it is for the defendant to show when his alleged possession under the Article became adverse. **N** MAHOMED SIRAJ-UD-DIN *v* FAYAZ-UD-DIN **473**

Income Tax Act (VII of 1918), ss. 3, 9—*Interest accruing due but not realized, whether assessable to income-tax.*

Money which becomes due to a money-lending firm in the course of its business by way of interest, in the year of account, or the year on the income of which income-tax is to be assessed for the current year, and is not recovered or realized by the firm in that year either in cash or by adjustment in the accounts, does not form part of the assessable income for the year of account, and is consequently not liable to assessment under the Income Tax Act. **M** SECRETARY TO THE BOARD OF REVENUE, INCOME-TAX, MADRAS *v* ARUNACHALAM CHETTIAR, 39 M. L. J. 649; (1920) M. W. N. 789; 29 M. L. T. 16; 13 L. W. 336; 44 M. 65 **482**

Indemnity, *contract of—Decree against defendant—Third party notice—Claim by defendant against third party—Claim to be confined to amount decreed.*

Where in a suit under a contract or right of indemnity the real sum due by the defendant to the plaintiff for which the latter has obtained a decree is less than the real loss incurred by the defendant, the defendant cannot ask for a decree on a third party notice for this latter sum, nor can he be allowed to split up his claim partly for the amount decreed, and partly for the difference between that amount and the total loss, as a term of being allowed to proceed with the third party notice, that is to say, no other proceedings can be taken for the difference between the two amounts, and the case must proceed on the claim for indemnity as regards the first mentioned sum, *i. e.*, the sum for which a decree has been passed. **B** WELD & Co. *v.* SHER AHMAD EKBAL AHMED **16**

Injunction—Pragwal *using flag to indicate his presence to pilgrims—Use of similar flag by another* Pragwal *to deceive pilgrims—Suit to restrain latter, maintainability of.*

S, a *Pragwal*, carried on the business of ministering to the wants of pilgrims at the sacred confluence of the waters at Allahabad: he used a flag with a particular emblem as a means of identification for illiterate pilgrims that they would find him at the spot where the flag was fixed: on his death *B.* carried on the business as the agent and representative of the widow of the deceased: on her death plaintiff, the nearest reversioner, succeeded to the estate of *S.*, but he was obstructed in carrying on the business aforesaid by *B.* who also set up a similar flag in the neighbourhood of the plaintiff. Plaintiff brought the present suit to restrain *B.* from interfering with his business:

Held, that the right to which the plaintiff had succeeded was a heritable and transferable right, that he had a cause of action against *B* and was entitled to restrain him from interfering with his business by the use of a similar flag as the plaintiff's. **A** BENI MADHO *v.* HIRA LAL, 18 A. L. J. 679; 2 U. P. L. R. (A.) 227; 43 A. 20 **873**

——— *restraining defendant in pending suit from prosecuting action in foreign Court, when to be granted.*

In order to obtain an injunction restraining a defendant in a suit pending in British India from prosecuting a suit on the same cause of action in a foreign Court an application for the injunction must be made at a very early stage of the proceedings. An application made after a considerable amount of time and trouble has been expended in the foreign Court will not be granted. **C** TIKAMCHAND SANTOKCHAND *v.* SANTOKCHAND SINGHI, 24 C. W. N. 735 **218**

Instalment decree—*Instalments, default in payment of—Acceptance by decree-holder, whether amounts to waiver—Waiver—Question of fact—Appeal, second—Question whether can be raised—Limitation.*

On 31st August 1910 *R.* obtained an instalment decree against *A* the amount being payable by yearly instalments on the 15th February of every year. *A.* made default and paid the first instalment on 2nd June 1912 and further sums were paid on 29th April and 17th November 1914. On 18th May 1915 *R* applied to execute his decree for the balance due, but was met with the objection that the right to execute having accrued to him on 15th February 1912, and more than three years having elapsed since then, the application was barred by limitation. On appeal it was held that the application was within time on the ground that the acceptance by *R.* of the instalment on 2nd June 1912 amounted to a waiver of his right to enforce execution for the whole amount due under the decree. In second appeal it was urged that the question of waiver not having been raised in the Original Court the Appellate Court erred in going into it, and that that Court was wrong in finding that *R.* had waived his right:

Held, (1) that the question whether or not there was a waiver was a question of fact and the finding on that question could not be challenged in second appeal;

Instalment decree—concld.

(2) that, in any case, *R.* from the moment of his acceptance was barred from enforcing the right which was his by reason of *A.*'s default, and *A.* became barred from pleading that limitation ran from 15th February 1912. **S** BAHADUR *v.* GELOMAL, 14 S. L. R. 128 **607**

Interest—*Agreement to pay interest, absence of, effect of—Delay in bringing suit, effect of.*

A creditor is entitled to a reasonable rate of interest where it is obviously not the intention of the parties that the money should be retained by the debtor free of charge.

Delay in bringing a suit is no good ground for refusing interest. **L** LADHA RAM-WADHAWA RAM *v.* MUHAMMAD **708**

——— *Fraud and undue influence, absence of—High rate of interest, whether recoverable.*

In the absence of fraud or undue influence, the holder of an instrument is entitled to recover interest at the rate stipulated in the instrument, even though the rate may be 25 per cent. per mensem. **C** MANUJENDRA DUTT *v.* BESWANATH ROY **277**

Interpretation of Statutes—*Act depriving subject of right of recourse to ordinary Courts—Words occurring in same context in different places—Upper Burma Land and Revenue Regulation (III of 1889), ss. 24 (2), 53 (2) (ii)—"Claims" in s. 53 (2) (ii), meaning of—Disputes between private individuals, whether within section.*

The language of Acts which deprive the subject of the right of recourse to the ordinary Civil Courts must not be extended beyond its least onerous meaning unless clear words are used to justify such extension.

When the same word is used in the same context in two sections of the same enactment, it is reasonable to suppose that it is used in the same sense in both.

The word "claims" in section 53 (2) (*ii*) of the Upper Burma Land and Revenue Regulation means, claims as against the State and does not include disputes between private individuals. The claims referred to in this section are neither more nor less than the claims mentioned in section 24 (2) of the Regulation.

Section 53 (2) (*ii*) of the Upper Burma Land and Revenue Regulation, therefore, does not bar the jurisdiction of the ordinary Civil Courts over disputes between private persons regarding the ownership or possession of State land or any lien upon or other interest in such land or the rents, profits, or produce thereof. **U B** BURMA OIL CO., LTD. *v.* BAIJNATH SINGH, 3 U. B. R. (1920) 212 **960**

Judgment, *contents of—Evidence, oral, omission to make special reference to, whether vitiates judgment*—Butwara *map and* chitta, *admissibility of—Evidence Act (I of 1872), s. 35—Bengal Estates Partition Act (VIII of 1876), s. 54.*

The omission in a judgment to make any special reference to the oral evidence adduced by the parties to a case is not in itself sufficient to show that, as a matter of fact, the Court did not consider the evidence of the witnesses who were examined in the case.

The *batwara* maps and *chittas* prepared under section 54 of the Bengal Estates Partition Act, VIII of 1876, are admissible in evidence independently of section 35 of the Evidence Act where some evidence introducing the maps and *chittas* is given: and if thereafter they are admitted without objection from either of the parties to a case, it is not open to the parties, in second appeal, to say that they have not been sufficiently proved. **C** MATIWOR RASUK *v.* DHANU MOLLA **963**

Jurisdiction *of Chief Court of Lower Burma over infants, limits of.*

The Chief Court of Lower Burma has no special jurisdiction over infants; its powers in this respect are confined to those given under the Guardians and Wards Act and are only those of a District Court. **L B** HAZRA BIBI *v.* SULEIMAN HAJI MOHAMMAD, 13 BUR L. T. 86 **562**

——— *of Civil and Revenue Courts—Partition—Parao, whether can be partitioned by Civil Court.*

A *parao*, or encamping ground, which bears a separate number in the revenue papers and is included in a *khewat khasra* is part and parcel of the *mahal* within the area of which it is included, notwithstanding the fact that revenue has not been fixed upon it. As such, the *parao*, *i. e.*, the site and not the houses that may be standing on it, is divisible only by a partition suit in the Revenue Court, a Civil Court having no jurisdiction to partition or to divide it. **A** MAHMUD JAHAN BEGAM *v.* GOVIND RAM, 18 A. L. J. 783; 43 A. 45 **4**

——— *of High Court to restrain suit in Foreign Court.*

The High Court has jurisdiction to restrain a party within its jurisdiction from prosecuting a suit in a Foreign Court, and the principle on which this jurisdiction is exercised is that the Court acts *in personam* and will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction. **B** LAKHMIRAM KEVALRAM BHATT *v.* PUNAMCHAND PITAMBER, 22 BOM. L. R. 1178; 45 B. 650 **444**

Land Acquisition Act (I of 1894), ss. 11, 12—*Award, when final*

An award made by a Collector in land acquisition proceedings becomes final and binding only when it is filed under section 12 of the Land Acquisition Act, the mere signing of the award by the Collector does not make it conclusive. Before filing an award it is open to the Collector to destroy one which he has already signed and to substitute another in its place. **B** KOOVERBAI SORABJI *v.* ASSISTANT COLLECTOR SURAT, 22 BOM. L. R. 1186 **429**

Landlord and tenant—*Abandonment of tenancy—Landlord taking possession under agreement with tenant, whether abandonment.*

A landlord who, under an agreement with his tenant, takes possession of the tenancy with a view to cultivate it, cannot set up the plea that the land has been abandoned by the tenant **C** KHETRA NATH MONEAL *v* LAKHAN SARDAR **442**

——— Destruction of building—Negligence—Tenant, liability of—Notice, whether necessary—Tenant determining tenancy, effect of. *See* TRANSFER OF PROPERTY ACT, s. 108 **252**

Landlord and tenant—contd.

——— *Ejectment—Notice to quit, necessity of—Tenant setting up permanent tenancy, whether entitled to notice—Bombay Land Revenue Code (Act V of 1879), s. 83—Permanent tenancy—Presumption—Grant, proof of, whether necessary—Burden of proof—Admission by tenant of annual tenancy, effect of.*

A plea of permanent tenancy set up by a tenant does not amount to a disclaimer of the landlord's title so as to disentitle the tenant from demanding a notice to quit.

A tenant relying upon the presumption contained in section 83 of the Bombay Land Revenue Code need not set up and prove a grant.

Where a tenant relies upon the presumption contained in section 83 of the Bombay Land Revenue Code it is for the landlord to prove an agreement or usage as to the intended duration of the tenancy.

The presumption as to permanency arising from the antiquity of the tenancy cannot be displaced by proof of a document in which the tenant admits himself to be an annual tenant, if it is shown that the tenant still continues, in spite of the document, to hold the land on the old rent. **B** RAMA RANCHHOD *v.* ABDUL RAHIM, 22 BOM L. R. 1214; 45 B. 303 **278**

——— Permanent tenure-holder, heirs of, failing to get registration of names, position of. *See* BENGAL TENANCY ACT, S. 15 **49**

——— *Permissive occupancy—Status of occupant—Ejectment, liability of occupier to.*

A person who enters upon land subject to an agreement to be afterwards arrived at as to the rent, etc, and continues on the land without any concluded agreement having been arrived at, does not hold the land as a "*raiyat*" within the definition of that term in the Bengal Tenancy Act, because, his possession being merely permissive, he does not acquire a right to hold the land for cultivation and is subject to eviction at the will of the landlord after reasonable notice to remove his effects **C** BIPIN CHANDRA SARKAR *v.* BASANTA KUMAR CHAKRAVARTI, 23 C. W. N. 773 **454**

——— *Rent—Enhancement—Change from grain to money, whether enhancement.*

A change from grain to money rent and *vice versa* may, when the circumstances of the case and the evidence adduced admit of it, be treated by the Court as an enhancement. **M** BUTCHIRAJU *v.* SEETARAMAYYA, 12 L. W. 84 **258**

——— *Rent, suit for—Surrender and dispossession, allegations of, disproved—Landlord, failure of, to identify holdings, whether sufficient to deprive him of rent.*

Where in a suit for rent the defendants' allegations of surrender and dispossession are not proved, and he is in possession of the holdings, the mere fact that the plaintiff is unable to establish the identity of the holdings is no reason for depriving him of the rent therefor. **C** BASANTA KUMARI CHAUDHURANI *v.* KRISHNA NALINI DASSYA **312**

——— *Tenancy created by registered instrument—Surrender, oral, validity of—Yearly payment of rent, whether conclusive evidence of annual tenancy—Transfer of Property Act (IV of 1882), s. 107.*

Landlord and tenant—concld.

An oral surrender of a tenancy created by a registered lease is not invalid if it is accepted and acted upon by the landlord.

The fact of an annual rent being reserved, though it may raise a presumption, is not conclusive to show that the tenancy is a yearly one.

After the passing of the Transfer of Property Act, there cannot be a tenancy reserving a yearly rent without a registered instrument in accordance with the provisions of section 107 of the Act. **C** SARI *v.* SAILABALA DASI **788**

——— *Tenant acquiring permanent rights by adverse possession—Burden of proof—Notice to landlord.*

Where a tenant wishes to acquire permanent rights of tenancy by adverse possession, he must give the landlord specific notice of his claim. **B** BABUSING RAMCHANDRA RAJESHIRKE *v.* PANDU TATYA KATE, 22 BOM. L. R. 1413; 45 B. 503 **718**

Legal Practitioners Act (XVIII of 1879), ss. 27, 28—*Agreement under s. 28—Suit based on agreement—Agreement invalid or no agreement—Pleader, right of, to sue—Party and party fee, question of, relevancy of.*

Where there is an agreement under section 28 of the Legal Practitioners Act duly filed in Court, the Pleader can only sue upon it, and is entitled to the amount agreed on.

If the agreement is invalid under that section or there is no agreement, he can sue under section 70 of the Contract Act, and is entitled to whatever is a fair and just remuneration for the services he has actually rendered, and, in the former case, the terms of the agreement may be considered in determining the proper remuneration, and, except as a piece of evidence as to what the remuneration, should be, the "party and party" fee under section 27 of the Legal Practitioners Act does not come into question. **N** RUKHMABAI *v.* BALWANT HARI, 17 N. L. R. 8 **172**

——— **s. 36**—*Tout—Procedure in declaring person a tout—District Magistrate, whether can delegate his powers to Subordinate Magistrate.*

Before directing the inclusion of a person's name in the list of touts, it is necessary that proceedings should be taken in accordance with section 36 of the Legal Practitioners Act, and the person be given an opportunity of showing cause against the inclusion.

The duties to be undertaken under section 36 of the Legal Practitioners Act cannot be delegated by any of the officers mentioned therein to their subordinates. **Pat** MOHAN DAS PUJHARI *v.* EMPEROR, (1919) PAT. 273; 22 CR. L. J. 66 **322**

Letters Patent (Bom.), cl. 12—Third party procedure—Cause of action arising partly within jurisdiction—Leave of Court. *See* BOMBAY HIGH COURT RULES, CH. VIII, R. 127 **28**

——— **cl. 12**—*Third party proceedings—Cause of action partly outside jurisdiction—Party outside jurisdiction—Leave to proceed, necessity for.*

Inasmuch as third party proceedings come within the description "suits of every other description" in clause 12 of the Letters Patent of the High Court of Bombay, the leave of that Court must be obtained to proceed therein when part of the cause of action

arises outside the jurisdiction of that Court and the third party resides outside the jurisdiction. Such leave cannot be inferred from the fact that leave was obtained to issue the third party notice, as that does not necessarily imply that the question was judicially considered **B** WELD AND CO. *v.* SHER AHMED EKBAL AHMED, 21 BOM. L. R. 803 at p 810

——— cl. 15—*"Judgment," meaning of—Bombay High Court Rules, rr.* 130, 131—*Third party proceedings—Order refusing directions, whether judgment—Appeal, whether lies.* **12**

The word "judgment" in clause 15 of the Letters Patent means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined.

An order refusing directions in third party proceedings under rules 130 and 131 of the Bombay High Court Rules is not a "judgment" within the meaning of clause 15 of the Letters Patent of that High Court and is not appealable under that clause. **B** CHARANDAS CHATURBHUJ *v.* CHHAGANLAL, 22 BOM. L. R. 1169; 45 B. 423 **533**

Limitation—*Settlement of claim - Settlement annulled—Cause of action on original claim, whether accrues—Limitation, commencement of.*

Where a claim is satisfied without resort to Court, and that settlement is subsequently annulled by decree of Court, the party claiming has a fresh cause of action on his original claim, limitation to enforce which commences from the date of the annulment. **M** MUTHUVEERAPPA CHETTY *v.* ADIKAPAP CHETTY, 12 L. W. 240; (1920) M. W. N. 505 19 M. L. J. 312; 43 M. 845 **472**

Limitation Act (IX of 1908), s. 5—*Appeal, criminal—Presentation to wrong Court—Subsequent presentation to proper Court beyond limitation—Extension of limitation.*

Where a criminal appeal was erroneously filed in the High Court and on being returned for presentation to the proper Court was, on the same day filed in the Sessions Court, but by that time limitation for presentation of the appeal had expired :

Held, that the delay should be excused under section 5 of the Limitation Act inasmuch as in the case of a criminal appeal it could not be said that there was a "successful litigant" who had secured a "valuable right" **L** SURTA SINGH *v.* EMPEROR, 1 L. 508; 22 CR. L. J. 124 **555**

——— s. 5—*Sufficient cause—Mistake of Counsel's clerk—Letters Patent Appeal—Court, power of, to go behind order of Judge.*

Owing to a *bona fide* mistake by Counsel's clerk in calculating the time within which to file a second appeal, the appeal was filed four days out of time and was rejected as time-barred In Letters Patent Appeal against the order of rejection :

Held, that the mistake amounted to sufficient cause within the meaning of section 5 of the Limitation Act, and that the Court had power to go behind the order

of rejection and extend the period of limitation. **A** SHEO MOHAN PANDE *v.* KALI PRASAD SHUKUL **937**

——— ss. 5, 12—*Appeal, limitation for filing—Time spent in obtaining translation of judgment, whether can be excluded—Delay caused by applying for translation, whether sufficient cause for extension of limitation.*

The time spent in obtaining a copy of the translation of the judgment appealed against cannot be excluded in computing the period of limitation for an appeal under section 12 of the Limitation Act.

The delay caused in filing an appeal by applying for a translation of the judgment appealed against due to ignorance or to carelessness cannot be excused under section 5 of the Limitation Act, as an appellant guilty of such delay cannot be said to have acted *bona fde, i e*, with due care and attention. **L** KANHAYA *v.* NUR MUHAMMAD **985**

——— ss. 6, 9—*Extension of limitation in favour of one person, whether can be tacked on to extension in favour of another—Alienation—After-born son, right of, to sue—Limitation.*

The only case in which, under section 6 of the Limitation Act, an extension of limitation in favour of one person may be tacked on to an extension in favour of a second person is where the first person dies while still under a disability and the second person is his legal representative who is also under a disability at the time of his death.

Where the right to challenge an alienation accrues before the birth of a plaintiff he cannot claim an extension of limitation under section 6 of the Limitation Act. **L** LACHMAN DAS *v.* SUNDAR DAS, 1 L. 558 **678**

——— s. 7, Sch. I, Art. 44—*Hindu Law—Joint family - Sale by mother as guardian—Suit by sons to recover property more than three years after eldest has attained majority, whether barred*

Where property belonging to minor Hindu brothers who constitute a joint family is alienated by their mother as their natural guardian a suit by the brothers to recover the property after setting aside the alienation brought more than three years after the eldest of them has attained majority is barred by time. **B** BAPU TATYA *v* BALA RAOJEE DESAI, 22 BOM. L. R. 1383; 45 B 416 **759**

——— ss. 7, 9, Sch. I, Art. 44—*Hindu joint family—Cause of action accruing to minor brother—Limitation for suit, commencement of.*

Where a cause of action accrues to two brothers of a Hindu joint family when they are minors, time for bringing a suit runs from the date on which the elder of the two attains majority **M** KUPPUSAWMI IYENGAR *v.* KAMALAMMALL, 12 L. W. 243; 39 M. L. J. 375; 53 M. 842 **662**

——— s. 14—*Plaint presented in wrong Court on last day of limitation making allowance for vacation—Plaint, return of, for presentation to proper Court—Exclusion of time.*

Where limitation for a suit expires during the vacation of a Court and the plaint is presented in that Court on the day on which the Court re-opens, but it is subsequently discovered that the Court has no jurisdiction to entertain the suit and the plaint is directed to be returned for presentation to the proper Court, the suit is within time if the plaint is presented to the proper Court on the same day on

which it is actually returned by the wrong Court. In such a case the plaintiff is not only entitled, under section 14 of the Limitation Act, to exclude the period between the first presentation of the plaint and the date on which it is actually returned to him, but is also entitled to take advantage of the fact that the first Court was closed for the vacation when the Limitation for the suit expired. **B** BASVANAPPA SHIVRUDRAPPA *v.* KRISHNADAS GOVARDHANDAS, 22 BOM. L. R. 1387; 45 B. 443 **743**

——— **s. 19**—*Acknowledgment—Letter enclosing account and showing how account settled, whether acknowledgment of right.*

D. wrote a letter to *P.* enclosing a memorandum of account which showed that on the date of the letter a certain specific sum was due by him to *P.*, and that on that date this account had been squared by debiting *P.'s* account with a sum due to *D* from a third party, and remitting the balance due to *P.*:

Held, that the mere fact that *D.* had appropriated a part of the amount due to *P.* in satisfaction of a claim due to *D.* by a third party, did not alter the fact that on the date of the letter a certain specific sum was due by *D.* to *P.*, and that the letter amounted to an acknowledgment of right within the meaning of section 19 of the Limitation Act, so as to afford a fresh starting point of limitation in favour of *P.* for a suit to recover the amount appropriated by *D.* **A** CURLENDER *v.* ABDUL HAMID, 18 A. L. J. 1131; 2 U. P. L. R. (A.) 437 **941**

——— **s. 19**—*Acknowledgment—Letter expressing willingness to pay amount due on comparison of account.*

A statement contained in a letter that if upon a comparison of accounts any amount is found due by the writer of the letter he is prepared to pay it, is an admission that he had dealings with the person addressed and implies a promise to pay, and is consequently a sufficient acknowledgment of liability under section 19 of the Limitation Act. **M** ARUMUGA CHETTIAR *v.* RAMANADAN, 12 L. W. 352 **898**

——— **s. 20**—*Payment of interest 'as such', when may be availed of to obtain extension of time—Appeal, second—Question of payment, whether can be raised.*

In order to obtain the benefit of an extension of the period of limitation under section 20 of the Limitation Act by virtue of a payment of interest "as such" there must be something to indicate that the debtor made the payment with the intention that it should be taken in reduction or satisfaction of interest due; the mere appropriation of the payment by the creditor towards interest is not such an indication nor is the fact that interest was due at the date of the payment. The fact that the amount paid and the amount due for interest were exactly the same, may amount to such an indication.

The question of the payment of interest "as such" is a question of fact, and a plea that such a payment has been made cannot be raised for the first time in second appeal. **N** JAGO *v.* MAHADEO, **709**

——— **ss. 26, 23**—*Defence, whether barred—Revenue sale—Purchaser, suit by, to recover possession—Sale, validity of, whether can be questioned—Defendant found not liable to assessment—*

Purchaser for value without notice, doctrine of, whether applicable to revenue sales.

The law of limitation does not put a bar of time to any defence in any case whatever, except where a suit falls under section 26 or section 28 of the Limitation Act.

When a decree is passed against a defendant in a civil suit and his property is put up for sale in execution proceedings and he does not ask for a stay of execution, the purchaser at the execution sale acquires a good title although it may happen that, eventually, the decree against the defendant is set aside on appeal. But there is a great distinction between sales in execution of Civil Court decrees and sales by the Revenue Courts for arrears of assessment. In the latter case, if it is found that, as a matter of fact, the defendant in the revenue proceedings was entitled to hold his lands free of assessment, any sale which took place on the footing that he was bound to pay assessment would be invalid and the purchaser in such a sale would not get a good title except by adverse possession.

The doctrine of a purchaser for value without notice does not apply to sales held by Revenue Courts. **B** MAHADEV NARAYAN *v.* SADASHIV KESHAV LIMAYE, 22 BOM. L. R. 1082; 45 B. 45 **118**

——— **Sch. I, Art. 11A**, *applicability of—Suit for possession brought more than one year after dismissal of application under O. XXI, r. 100, Civil Procedure Code, whether barred.*

P. purchased *N.'s* share of family property. *D*, on the other hand, purchased the entire property of the family of which *N.* was a member and dispossessed *P*, who thereupon applied under Order XXI, r 100, Civil Procedure Code, for possession. The application was disallowed on 25th August 1914, and *P.* brought the present suit for possession on 30th November 1916:

Held, that the suit was barred by limitation, not having been brought within one year, as required by Article 11A, Schedule I to the Limitation Act, from the date of the order disallowing the application under Order XXI, r. 100, Civil Procedure Code. **C** MOTO DASI *v.* BEHARI LAL **772**

——— ——— **Art. 13**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 61—Execution of decree—Attachment—Claim of third party dismissed—Attachment withdrawn, effect of—Suit by third party to recover property—Limitation.*

Where property is attached in execution of a decree and a claim preferred to it by an alleged purchaser from the judgment-debtor is dismissed on the ground that the alleged purchase was fraudulent, but the attachment is subsequently withdrawn, the unsuccessful claimant is not bound to bring a suit to contest the order within the special period of limitation provided by Article 13 of Schedule I to the Limitation Act. A subsequent suit by the purchaser to recover the property from the judgment-debtor will not be barred merely because he failed to bring a suit to contest the order made in claim proceedings. **B** MANILAL GIRDHAR PATEL *v.* NATHALAL MANASUKHRAM VYAS, 22 BOM. L. R. 1448; 45 B. 561 **774**

——— ——— **Art. 16**—*Water cess, illegal, levy of, from ryots—Suit by Zemindar to recover amount so levied, whether maintainable—Limitation.*

Held, by a (majority) that where the Government

Limitation Act—contd.

levy statutory water cess from the *ryots* of a Zemindar and not from the Zemindar from whom it ought to have been levied, if leviable at all, in a case where the Statute does not authorise the levy, and the Zemindar remits the amount to the *ryots* out of the rents payable by them, the Zemindar is entitled to sue to recover from the Government the amount so illegally collected, but such suit must be brought within the period of limitation prescribed by Article 16 of Schedule I to the Limitation Act, and the plaintiff will only be entitled to recover payments made within one year before suit. **M** SECRETARY OF STATE FOR INDIA *v.* ZAMINDARANI OF VEGAYAMMAPETA ESTATE, 12 L. W. 334 **98**

——— **Sch. I, Art. 44**—*Alienation by guardian of ward's property—Suit to set aside alienation—Limitation.*

A transfer by the natural guardian of a minor of his ward's property is voidable and not void, and a suit to set aside such transfer must be brought within the period of limitation prescribed by Article 44, Schedule I of the Limitation Act. **C** BROJENDRA CHANDRA *v.* PROSUNNA SARMA KUMAR DHAR, 32 C. L. J. 48; 24 C. W. N. 1016 **589**

——— ——— **Art. 62,** *applicability of—Suit for recovery of rent received by joint lessor.*

A lease for a period of five years was executed in favour of *G. R.* and his brother in respect of a field which was the separate property of the latter, and of a field which was the separate property of *G. R*, separate rents being reserved for the two fields. *G. R.* received the rents. The brother died and his widow brought the present suit to recover from *G. R.* the rent received by him in respect of her husband's field, on the 2nd February 1908. The suit was instituted on 2nd February 1914, and the question was whether the suit was barred by limitation :

Held, that the suit was governed by Article 62, Schedule I, to the Limitation Act as the rent received by *G. R.* was received to the use of the plaintiff, and, as it was not brought within the time prescribed by that Article, it was barred. **N** GOPAL RAO *v.* AMBABAI, 16 N. L. R. 182 **455**

——— ——— **Arts. 62, 89**—*Joint family—Partition—Property, portion of, left joint—Account, suit for—Limitation.*

Where on partition of joint family property a portion of the family property is left joint in the hands of one member, it continues to belong to all the members as tenants-in-common and the member in whose possession it is left is an agent of the other members. Therefore, a suit by the other members for an account of such property and for recovery of their shares is governed by Article 89 and not by Article 62 of Schedule I to the Limitation Act and limitation would begin to run from the date when an account is demanded and refused or if no demand is made, when the agency is terminated. **B** GABU NAROBA *v.* ZIPRU RAMSING, 22 BOM. L. R. 1289; 45 B. 313 **357**

——— ——— **Art. 85**—*Mutual account, what is—Advance of money by plaintiff—Grain sent by defendant to plaintiff for sale—Suit to recover balance—Limitation.*

Limitation Act—contd.

An account is mutual when there are transactions on each side creating independent obligations on the other.

Where the transactions create obligations on one side only, those on the other being merely complete or partial discharges of such obligations, the account is not mutual.

The absence of a shifting balance, however, is not conclusive against the mutuality of an account.

Plaintiff made advances of money to the defendant. The latter used to send grain to the plaintiff who used to sell it and, after deducting his commission, used to credit the balance to the defendant's account. He brought the present suit to recover the balance due to him on the account :

Held, that the suit was governed by Article 85 of Schedule I to the Limitation Act. **L** RATAN CHAND JWALA DAS *v.* ASA SINGH BOGHA SINGH, 3 U P. L. R. (L.) 3 **669**

——— **Sch. I, Art. 118.** *See* HINDU LAW—MITAKSHARA **124**

——— ——— **Arts. 123, 144**—*Suit to recover share in property left by Muhammadan—Limitation applicable.*

Where the members of a Muhammadan family continue to live as tenants-in-common without dividing the estate of a deceased ancestor, limitation for a suit by one of his heirs to recover his share in the estate of the deceased will not run from the time of the latter's death, but from the date when the defendant begins to hold adversely to the plaintiff. **B** NURDIN NAJBUDIN *v.* UMRAV BU, 22 BOM. L. R. 1429; 45 B. 519 **780**

——— ——— **Art. 132,** *applicability of, to suit for accounts by* shebait *against Tahsildar.*

The period of limitation contained in Article 132, Schedule I, to the Limitation Act applies to a suit brought by the *shebait* of a *thakur* against the Tahsildar of the *debutter* properties of the *thakur*, for accounts, based on a security-bond executed by the latter in favour of the predecessor of the plaintiff. **C** DASARATHI CHATTERJEE *v.* ASIT MOHAN GHOSH, 24 C. W. N. 879 **126**

——— ——— **Art. 142**—*Suit for possession of waste land—Defendant in adverse possession—Limitation applicable—Burden of proof.*

The proposition that in the case of waste land possession follows title and that in suits for such land it is for the defendant to prove adverse possession, does not apply to cases where the land, according to the plaintiff's own statement, has been occupied adversely by the defendant.

Plaintiff sued for possession of ten *marlas* of waste land of which it was alleged the defendant had taken unlawful possession three years before the suit :

Held, that Article 142 of Schedule I to the Limitation Act was applicable to the case, and that the initial onus was on the plaintiff to prove what he asserted, *viz.*, that the defendant had been in adverse possession for only three years. **L** MAHMUD *v.* UDE BHAN **891**

——— ——— **Arts. 142, 144**—*Suit by heirs to recover property—Limitation—Trespassers, whether can be allowed to tack possession.*

A suit by the heir of a deceased person to recover the property of the deceased from a person who also

Limitation Act—concld.

claims as heir is governed by Article 141 of Schedule I to the Limitation Act.

A trespasser cannot be allowed to add to the period of his hostile possession the period of possession of a former trespasser from whom he does not derive title in any way. **B** RAMCHANDRA BALWANT *v.* BALAJI GANESH, 22 BOM. L. R. 1452: 45 B. 570 **805**

——— **Sch. I, Art. 144.** *See* MUHAMMADAN LAW—SUCCESSION **345**

——— ——— **Art. 182**—*Execution of decree—Limitation—Decree not capable of execution—Limitation, commencement of.*

In order to make the provision of the Limitation Act apply to the execution of a decree, the decree sought to be enforced must have been in such a form as to render it capable, in the circumstances, of being enforced.

Where a decree is passed against the estate of a deceased person in the hands of the judgment-debtor, limitation in respect of the execution of the decree begins to run from the date on which some part of the estate comes into the hands of the judgment-debtor. **P C** RAMESHVAR SINGH *v.* HOMESHVAR SINGH, 1 P. L. T. 73; 19 A. L. J. 2; 40 M. L. J. 1; (1921) M. W. N. 21; 33 C. L. J. 10; 25 C. W. N. 337; 13 L. W. 546; 6 P. L. J. 132; 23 BOM. L. R. 721 **636**

——— ——— **Art. 182 (2)**—*Execution of decree—Appeal, dismissal of, for default—Limitation, commencement of.*

Where there has been an appeal from a decree and that appeal has been properly presented and is within time, any order of the Appellate Court dismissing the appeal or putting an end to the appeal in any way is either a decree or order within the meaning of clause (2) of Article 182 of Schedule I to the Limitation Act, and limitation for the execution of the decree begins to run from the date of the decree or order of the Appellate Court, even where the order of the Appellate Court is not capable of execution and the decree to be executed is the decree of the Original Court. **Pat** RAGHO PRASAD SINGH *v.* JADUNANDAN PRASAD SINGH, 6 P. L. J. 27; 2 P. L. T. 28; (1921) PAT. 34 **896**

——— ——— **Art. 182 (5)**—*Execution of decree—Decree passed by Court in Native State transferred to Court in British India—Execution proceedings taken in Court in Native State, whether taken in proper Court—Application barred by time—Objection not taken—Subsequent application, whether barred.*

Where a decree passed by a Court in a Native State is transferred for execution to a Court in British India all proceedings taken in the Court which passed the decree must be regarded as having been taken in a "proper Court" within the meaning of clause 5 of Article 182 of Schedule I to the Limitation Act and operate to save limitation.

Where an application for execution is barred by time but no objection is taken to it on that score, and proceedings are taken thereunder, it provides a new starting point for limitation. PRABHULINGAPPA KHANGOUDA *v.* GURUNATH BALAJI, 22 BOM. L. R. 1389; 45 B. 453 **747**

Madras District Municipalities Act (IV of 1884), ss. 113, 117, 216 to 221—*Municipalities, right of, to levy fees for transport of night-soil, from owner's premises.*

Under the provisions of the Madras District Municipalities Act, IV of 1884, as amended by the Act of 1897, it is not the duty of the rate-payers to carry their night-soil from their premises to the Municipal depôt wherever situated. It is the duty of the Municipal Council to remove the rubbish and offensive matter from outside the occupier's building or land to the depôt which they are bound under the Act to provide, and they are bound to have covered vehicles or vessels for the removal of offensive matter, and it is illegal for them to charge any fees for such transport. **M** SOUTH INDIAN RAILWAY CO. LTD. *v.* MUNICIPAL COUNCIL, TRICHINOPOLY, 12 L. W. 411; (1920) M. W. N. 618 43 M. 905 **697**

Madras Estates Land Act (I of 1908), ss. 3 (13), 205—*Revision—Order by District Collector—Jurisdction of Board of Revenue to revise.*

The Board of Revenue has no power to revise the order of a District Collector acting in revision under section 205, Madras Estates Land Act, as the section gives concurrent jurisdiction to the District Collector and the Board of Revenue over orders made by a Revenue Officer.

The expression 'Revenue Officer' in section 205 of the Act does not include a District Collector. **M B R** MADRAS ESTATES LAND ACT, s. 205, *In re*, 12 L. W. 145 REV. **345**

——— **ss. 124, 131**—*Sale for arrears of rent, application to set aside—Notice to auction-purchaser, whether necessary—Auction-purchaser, right of, to be heard.*

The purchaser at an auction sale held for arrears of rent has a right to notice of an application by the defaulting *ryot* to set aside the sale and is entitled to be heard before an order to his prejudice is passed. **M** VAITHIALINGA CHETTY *v.* KULLAPPA NAICKEN, 12 L. W. 354 **889**

Madras Local Boards Act (V of 1884)—*Rules under Act—Election to Taluk Board—Election, validity of, whether can be questioned in Civil Court—Jurisdiction of Civil Courts, rules ousting, validity of—Suit to declare election invalid, maintainability of—Declaratory relief—Discretion of Court.*

Per *Sadasiva Aiyar, J.*—Under the Madras Local Boards Act, the Governor-in-Council has no power to make rules ousting the jurisdiction of Civil Courts in the matter of inquiring into the validity or otherwise of elections, and relegating those matters to a special tribunal established for the purpose.

A person who resides, and owns property within the area of a Taluk Board, with a fair chance of being appointed or elected as a member of the Board, has a substantial interest in the matter of the proper constitution of the Board, sufficient to give him the right to sue for a declaration that the election of a member of the Board is invalid. But the granting of such relief is within the discretion of the Court, and a person who has accepted the election proceedings and has competed at the election, is not entitled to question the election on the grounds of bribery, corruption and

Madras Local Boards Act—concld.

want of secrecy in the ballotting, merely because he has failed to be elected.

Per *Spencer, J. (Contra)*—The Governor-in-Council has the power of making rules to provide for the whole scheme of elections and for the conduct of inquiries into complaints and objections to elections held or about to be held as well as into objections to the list of voters, and such rules have the effect of taking away the jurisdiction of the Civil Courts in respect of these matters. **M** LAKSHMINARASIMHA *v.* RAMALINGAM PILLAI, 12 L. W. 202; (1920) M. W. N. 519; 39 M. L J. 319; 28 M. L. T. 205 **245**

Madras Revenue Recovery Act (II of 1864), ss. 1, 2, 39—*Arrears of revenue, sale for—Holder registered* pattadar *and alienee from Hindu widow—Interest, nature of, which passes to purchaser.*

Where a registered *pattadar*, who is an alienee from a Hindu widow, makes default in payment of the revenue and the land is sold under the Madras Revenue Recovery Act, the interest which passes to the purchaser is the full proprietary interest and not merely the interest which the registered *pattadar* had. **M** GOVINDA MALAVARAYAN *v.* VELU MAZHAVARAYAN, 12 L. W. 530; (1920) M. W. N. 701 **307**

Mahabrahmans, *offerings to—Contract to divide offerings, whether can be enforced.*

No contract for the division of money or other articles received by Mahabrahmans in the way of charity is enforceable except as between the immediate parties thereto. **O** MAHESH PRASAD *v.* BHARATH, 23 O. C. 252 **677**

Malicious prosecution—*Damages, suit for, maintainability of, against informer—Burden of proof, wrong allocation of, by Trial Court—Correct appreciation of evidence in appeal—Appeal, second—Finding of fact, whether binding.*

A suit for damages is maintainable against a person who supplied the information on which a prosecution was launched, though he may not have himself figured as the complainant in the Criminal Court.

Where a Trial Court misdirects itself as to the burden of proof, but the Appellate Court appreciates the evidence from a correct standpoint, the finding of fact arrived at by the Appellate Court must be accepted in second appeal. **M** SHUNMUGHA UDAYAR *v.* KANDASAMI ASARY, 12 L. W. 170 **973**

——— *Person expressing honest opinion and not conducting prosecution, whether prosecutor—Damages, suit for, maintainability of.*

No action lies for damages for malicious prosecution against a person who in no wise conducted the prosecution, but merely expressed his opinion to the Police that certain articles were stolen and appeared as a witness in obedience to the Police summons. **M** RAJAGOPALA NAYAGAR *v.* SPENCER & CO. LD., 12 L. W. 87; 28 M. L. T. 298 **218**

——— *Suit to recover damages—Reasonable and probable cause, what is—Malice—Presumption.*

In order to protect him from the liability of having to pay damages for malicious prosecution a prosecutor's belief in the guilt of the accused must be based on grounds which, or some of which, are reasonable and arrived at after due inquiry.

Malicious prosecution—concld.

Where the desire to prosecute the accused arises, not from an honest belief in his guilt but from the disappointment experienced by the prosecutor in being prevented from reaping the fruits of a purchase, it cannot be said that he had reasonable and probable cause for the prosecution.

Malice might be presumed from the want of reasonable and probable cause. **B** JAMNADAS SHIVRAM *v.* CHUNILAL HAMBIRMAL, 22 BOM. L. R. 120; 45 B. 227 **520**

Marriage *by* Kantibadal *form, whether valid among* Vaishnabs

Among *Vaishnabs* a marriage by what is known as the *Kantibadal* ceremony is valid. **C** BENODE REHARY AUDHIKARY *v.* SHASHI BHUSAN BHUR, 24 C. W. N. 958 **882**

———, *validity of, test as to—Law applicable—Buddhist Law, Burmese—Consent of parties, whether necessary—Consent obtained by pressure, whether free.*

The law of the place where it is contracted determines the validity of a marriage.

Under the Burmese Buddhist Law there must be free consent of the parties to a valid marriage.

Consent reluctantly given under pressure is not such free consent as is required by that law. **L B** MA TWE *v.* LWE HAIN, 13 BUR. L. T. 105; 22 CR. L. J. 123 **555**

Marriage settlement—*Child's portion, vesting of—Presumption.*

In marriage settlements the presumption is that a child's portion vests at marriage in the case of a daughter and at majority in the case of a son, unless there is anything in the deed to the contrary.

If, therefore, the language of the instrument be uncertain but is capable of the construction that sons at 21 and daughters at 21 or marriage shall take a vested interest the Court will so decide it by force of the presumption. **L B** ESTHER E S. COHEN *v.* E. I COHEN, 10 L. B. R. 196; 13 BUR. L. T. 78 **806**

Minor—Misrepresentation as to age—Minor, whether estopped from pleading infancy. *See* EVIDENCE ACT, s. 115 **393**

Mortgage—*Foreclosure—Redemption by zur* peshgi *lessee—Mortgagor, right of, whether revived.*

The right of a mortgagor who has been foreclosed is not revived by a *zur peshgi* lessee redeeming the mortgagee. Therefore, where after a mortgage has been foreclosed, a *zur peshgi* lessee from the mortgagor who was not made a party to the foreclosure suit, redeems the mortgage for his own benefit, a representative of the mortgagor is not entitled to redeem the lessee in turn. **N** GHULAM NABI *v.* KANHAISINGH, 16 N. L. R. 180 **511**

——— *Mortgagee in possession—Equity of redemption—Adverse possession of right to redeem, whether permissible—Revenue records, entry in, effect of.*

A person cannot be said to be in adverse possession of the right to redeem immoveable property where the right to possession and actual possession is all the time in the hands of the mortgagee. The fact that he succeedsi n getting his name recorded in the revenue register does not confer a title on him. **L** SHAH NAWAZ *v.* SHEIKH AHMAD, 1 L. 543 **478**

Mortgage—concld.

——— *Redemption—Clog on equity of redemption—Improvements—Condition meant to improve mortgagor out of property, validity of.*

Plaintiff's mother acting as his guardian mortgaged a house belonging to the plaintiff to defendant. Under the mortgage agreement the plaintiff made himself liable for the cost of reasonable improvements, also for interest on the sum expended on improvements and for repairs :

Held, (1) that the condition relating to the cost of improvements did not justify the demolition and re-building of the house at a cost equivalent to several times the mortgage-debt ;

(2) that the condition relating to the payment of interest by the plaintiff was most inequitable and unconscionable, inasmuch as it amounted to an agreement by the plaintiff to pay interest to defendant on money spent by defendant on making himself comfortable. **L** SURAPU *v.* DIWAN CHAND **764**

——— *Redemption—Transfer of equity of redemption in favour of mortgagee by one of several co-mortgagors, effect of.*

The mere fact that one of several co-mortgagors is the registered occupant of the mortgaged land does not entitle him to transfer the portions of the equity of redemption belonging to his co-mortgagors. Any such transfer in favour of the mortgagee does not operate to extinguish the right of the co-mortgagors to redeem their shares in the mortgaged land. **B** LALCHAND SAKHARAM *v.* KHANDU KEDU, 22 BOM. L. R. 1431 **762**

——— *Suit for possession by prior mortgagee—Puisne mortgagee, rights of.*

A. makes a simple mortgage in favour of *B* and subsequently a similar mortgage in favour of *C*. *B.* sues *A* on the mortgage without impleading *C*. He obtains a decree, brings the property to sale and purchases it himself. By that purchase he acquires the right to possession of the mortgage property which up to that time had been enjoyed by the mortgagor *C*. not having been made a party to the suit brought by *B* had no opportunity of redeeming *B*, and in a subsequent suit brought by *B*. to enforce possession of the property, *C*. must be given an opportunity of redeeming *B*, but if he fails to redeem, *B*. will have a decree for possession of the property and not for sale of the property. **Pat** TILKDHARI SINGH *v.* GOUR NARAIN, 5 P. L. J. 715; 2 P. L. T. 95; (1921) PAT, 122 **293**

———, *usufructuary—Redemption, right of, loss of, on failure to pay on certain date—Condition, validity of.*

The law views with jealousy the right of redemption vested in the mortgagor and repudiates all attempts to do away with that right.

The condition in a usufructuary mortgage that the mortgagor would lose his right to redeem in default of payment of the mortgage-money on a certain date, is invalid and inoperative. **Pat** GULAB CHAND RAM *v.* PANCHAM RAM **338**

Mortgage-decree—*Insolvency of mortgagor—Decree-holder consenting party to composition scheme sanctioned by Insolvency Court—Execution Court, whether can go behind order of Insolvency Court.*

Where the holder of a mortgage-decree against an insolvent is a consenting party to a composition sanctioned by the Insolvency Court, then, unless the proceedings of the Insolvency Court are set aside, the execution Court, dealing with an application for execution of the mortgage-decree, cannot go behind the order passed in those proceedings. **C** JUGMOHAN PRADHANI *v.* INDRA CHANDRA **95**

Mortgage-suit—*Interest*—Dhamdupat, *rule of, applicability of.*

In a mortgage suit where interest is calculated at the contractual rate up to the date of the *dies datus*, the decree is subject to the rule of *damdupat* up to that date. **N** NARAYAN *v.* WAMAN **121**

Motor Vehicles Act (VIII of 1914), s. 16—Acquittal under s. 338, Indian Penal Code, whether bars trial under s. 16 of Motor Vehicles Act. *See* CRIMINAL PROCEDURE CODE, s. 403 **207**

Muhammadan Law—*Administration suit by one of several heirs, whether maintainable.*

Although under the Muhammadan Law it is not necessary to take out Letters of Administration to the estate of a deceased person, yet any one who is interested in the estate is at liberty to bring a suit for administration thereof. Such a suit is maintainable even if the plaintiff knows definitely what the estate consists of, and the plaintiff is not, in such a case, bound to sue for partition. **B** ESUFALLI ALIBHAI *v.* ABDEALLI GULAM HUSSEIN, 22 BOM. L. R. 1117; 45 B 75 **396**

——— **Dower**—*Gift in lieu of dower, nature of—Presumption—Widow in possession—Adverse possession.*

There is no presumption that a gift made by a Muhammadan husband to his wife in lieu of dower is an absolute gift, or that in such a case the wife is only to remain in possession of the property so long as her claim is not satisfied out of the profits of the property.

Where, however, the widow is in possession to satisfy herself out of the proceeds of the property for arrears of dower, her position is that of a usufructuary mortgagee, and she cannot by any act of her own so alter the nature of her possession as to make the Statute of Limitation run against those who are entitled to the equity of redemption. **Pat** HIRA SINGH *v.* SHEIKH MOSAHEB, 2 P. L. T. 207; (1921) PAT. 147 **265**

——— **Gift,** *essential, ingredients of—Possession, delivery of, whether necessary.*

Under the Muhammadan Law, a registered deed of gift is invalid if it is not perfected by possession, as that law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee. Where he is neither himself in possession nor in possession through another, his possession is neither actual nor constructive, and he cannot convey an enforceable title. **C** SAMSUL NEHAR BIBI *v.* MOHIUD-DIN AHMAD, 25 C. W. N. 310 **355**

——— **Marriage** *-Agreement by husband not to contract second marriage, validity of—Divorce, grounds for—Contract Act (IX of 1872), ss. 23, 27.*

An ante-nuptial agreement by a Muhammadan husband not to contract a second marriage is legal and is not invalid as being immoral, or opposed to public policy or in restraint of marriage,

Muhammadan Law—contd.

A Court has power to grant a divorce to a Muhammadan wife not only on the ground of habitual ill-treatment by the husband or non-fulfilment by him of ante-nuptial engagements, but for other reasons also *e g.*, desertion or neglect. **L B** KHALILAL RAHMAN *v* MARIAN BIBI, 10 L. B. R. 194; 13 BUR. L. T. 89 **804**

——— **Marriage**—*Dower, husband's liability to pay—Wife pregnant at time of marriage, effect of.*

Although marriage, under the Muhammadan Law, is spoken of as a contract, the performance of the contract accompanied by the appropriate ceremony involves a change of status. The contract is merged in the new status acquired by the parties, and, as long as that status continues, so long do the rights and liabilities of the parties under the contract continue.

Defendant married plaintiff and agreed to pay the latter a certain amount of prompt dower. Five months after the marriage the plaintiff gave birth to a fully developed child. Shortly afterwards, the defendant turned the plaintiff out of his house, but did not divorce her. Plaintiff brought a suit to recover the amount of her dower from the defendant:

Held, that the suit was maintainable **B** KULSAMBI *v.* ABDUL KADIR, 22 BOM. L. R. 1142; 45 B. 151 **433**

——— **Minor**—*Mother, whether can alienate property of minor.*

Under the Muhammadan Law, a mother, as the *de facto* guardian of her minor daughter, cannot alienate the property of the minor. **C** ASHIRUDDIN MOHAMMAD *v.* TAHER MOHAMMAD **306**

——— **Succession**—*Heirs, whether take as tenants-in-common—Right of one heir when becomes barred—Suit for share of inheritance—Limitation Act (IX of 1908), Sch. I, Art.* **144.**

The heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred unless and until the other heirs set up an adverse right to the knowledge of that heir. **L** MURAD BIBI *v.* RAHIM BAKHSH; 20 P. L. R. 1921; 18 P. W. R. 1921 **346**

——— **Sunni Schools**—*Guardianship—Mother, right of, to visit child after expiry of period of* hizanat—*Suit to enforce right, maintainability of.*

According to Sunni Law, a mother has a right to visit and see her child after it has come under the control and guardianship of the father or his relatives, but there is no machinery under the Guardians and Wards Act for working out such a right by means of a suit **L B** HAZRA BIBI *v.* SULEIMAN HAJI MOHAMMAD, 13 BUR. L. T. 86 **562**

——— **Wakf**—Mutawalli—*Minority, whether absolute bar to valid appointment.*

A minor can be validly appointed a *mutawalli* of *wakf* property under Muhammadan Law if he has attained puberty *(bulug)* and has understanding *(aql)* and a person who has completed his fifteenth year may fairly be presumed to have attained both these, both under section 114 of the Evidence Act and the Muhammadan Law. **N** HANSKUARBAI *v.* IMAM ALI **717**

——— ——, *validity of—Substantial dedication.*

Where there is a substantial dedication of property to charitable and religious purposes the dedication, in the absence of any legal objection, is not invalid according to Muhammadan Law. **P C** AMATUL FATEMA BIBI *v.* ABDUL ALIM SAHIB, 24 C. W. N. 494; (1920) M. W. N. 324; 28 M. L. T. 135; 12 L. W. 487; 32 C. L. J. 417 **I**

Muhammadan Law—concld.

——— **Will**—*Bequest to heir—Consent of other heirs—Bequest, validity of—Heirs consenting, insolvents, effect of—Provincial Insolvency Act (III of 1907), s.* **16 (4).**

Under the Muhammadan Law a bequest in favour of an heir to which the remaining heirs consent after the death of the testator is a valid bequest, and such consent does not operate as a transfer by the consenting heirs of a right which has vested in them, the legatee takes from the testator. The fact that the consenting heirs are insolvent at the time of giving their consent would not affect the validity of the bequest. **A** AZIZ UN-NISSA BIBI *v.* CHIENE, 18 A. L. J. 745; 2 U. P. L. R. (A) 251; 42 A. 598 **296**

Negotiable Instruments Act (XXVI of 1881), ss. 4, 15, 16—*Amending Act of 1914—Promissory-note executed before Amending Act to payees in alternative, validity of—Acknowledgment of payment under promissory-note signed by one payee—Endorsement—Transfer of actionable claim—Transfer of Property Act (IV of 1882), s.* **130.**

A promissory-note executed before the passing of Act V of 1914 and made payable to payees in the alternative is not a negotiable instrument within the meaning of section 4 of the Negotiable Instruments Act of 1881.

A mere written acknowledgment of receipt of money due under a promissory-note does not fall within the provisions of sections 15 and 16 of the Negotiable Instruments Act.

Nor is it a transfer of an actionable claim within the meaning of section 130 of the Transfer of Property Act **M** KUNHIPARAMBATH PARKUM KUNHI KORANATH CHANDU *v.* ANTHOLI THOOVAKUNNON RAMUNNI, 39 M. L. J. 273; (1920) M. W. N. 107; 28 M. L. T. 262; 13 L. W. 183 **943**

——— **s. 20**—*Blank* hundi *signed and delivered—Presumption—Holder, rights of.*

A person who gives another possession of his signature on a blank *hundi, prima facie* authorises the latter to fill it up and give to the world the bill as accepted by him. He enables his agent to represent himself to the world as acting with a general authority, and he cannot say to a *bona fide* holder for value, who has no notice of secret stipulations, that there were secret stipulations between himself and the agent. **N** SHANTIDAS *v.* HIRALAL **657**

——— **s. 35**—*Indorser, liability of—Notice of dishonour, whether necessary.*

Section 35 of the Negotiable Instruments Act restricts the liability of an indorser to cases where notice of dishonour has been given to him: or, in other words, the fact of the bill of exchange being dishonoured and the intimation thereof to the indorser are conditions precedent to his being made liable thereunder. **A** SANEHI LAL *v.* ONKAR MAL, 18 A. L. J. 981; 2 U. P. L. R. A. 875 **675**

——— **s. 64** - Hundi—*Presentation for payment, whether necessary to charge acceptor—'Other parties,' meaning of.*

Negotiable Instruments Act—concld.

Under section 64 of the Negotiable Instruments Act presentation for payment is necessary in order to charge the acceptor of a *hundi*. The words "other parties" in the section mean parties other than the holder. **O** OUDH COMMERCIAL BANK LD. *v.* GUR DIN, 23 O. C. 364 **604**

Offence—Ignorance of law—Sentence. *See* PENAL CODE, s 494 **33**

Opium Act (I of 1878), ss. 3, 9 (d) (f)—*Morphia, whether opium—Sale and transport of morphia, whether offence.*

Morphia is not included in the term 'opium' as defined in section 3 of the Opium Act, not being a preparation or admixture of opium or a drug prepared from the poppy. The sale or transport of morphia is not, therefore, an offence under section 9 of the Opium Act. **L** SITA RAM *v.* EMPEROR, 1 L. 443: 22 CR. L. J. 8 **40**

——— **s. 9 (c)**—*Contraband opium in possession of passenger by boat—Boatman, liability of.*

The mere fact that a passenger by boat has contraband opium with him, places no liability on the boatman to give any satisfactory account of the opium; more especially where the prosecution evidence shows that it was the passenger who had the opium; the boatman, in such a case, cannot be convicted under section 9 (*c*) of the Opium Act. **C** MUKBUL ALI *v.* EMPEROR, 22 CR. L. J. 21 **133**

Partition—*Easement of necessity, whether arises.*

A right of easement by necessity arising out of a severance by partition arises from a presumed grant, but where the question of the rights of the parties has been definitely settled in a partition suit, no grant can be presumed. **C** SIBNATH SAHA *v* MOHESH CHANDRA **89**

——— *House—Objection that another house, not included in hotchpot, whether fatal to claim*

In a suit for partition of a house the plaintiff obtained a decree, but it was objected in appeal that partition ought not to have been granted without bringing another house into hotchpot:

Held, overruling the objection, that the order granting partition was right. **Pat** BIBI WASILA *v.* SHARAFAT HUSSAIN **176**

Partnership—*Suit against partnership by third party—Submission to arbitration by partner sued—Award—Liability of other partners—Payment under award—Contribution, whether can be claimed—Nattukottai Chetties, transaction between—Interest, rate of.*

Where one of several partners submits a dispute which is the subject of a suit to arbitration, the award passed on such submission will not bind the other partners at the instance of a third party.

Where, however, a partner in good faith submits the claim of a third party against the firm to arbitration and that partner has to make payments in accordance with the award passed on the submission in good faith then, in the absence of anything to show that the award is vitiated by illegality, he is entitled to claim contribution from his partners on the basis of that award. **M** VENKATACHELLAM CHETTY *v.* RAMANATHAN CHETTY, 12 L. W. 228; (1920) M. W. N. 502; 39 M. L. J. 269 **501**

Patna High Court Rules, Ch. VII, r. 2—*Limitation Act (IX of 1908), s. 12, applicability of, to appeal preferred under cl. 10 of the Letters Patent.*

Rule 2 of Chapter VII of the Patna High Court Rules excludes the applicability of section 12 of the Limitation Act to appeals preferred under clause 10 of the Letters Patent. **Pat** DEOKI LAL *v.* RAMANAND LAL, (1920) PAT. 333; 5 P. L. J. 70; 2 U P. L. R. (PAT.) 235; 2 P. L T. 42 **179**

Penal Code (Act XLV of 1860), ss. 27, 451—*Possession of wife on account of husband, nature of—Entry into house with wife's consent with intent to commit adultery with her, whether offence.*

Where, in *K*'s. absense from home, the accused entered his house with his wife's consent in order to commit adultery with her:

Held, (1) that the accused was guilty of the offence specified in section 451, Indian Penal Code;

(2) that the house being in the wife's possession on account of her husband, it was in his possession within the meaning of section 27, Penal Code, and the consent of the wife to the entry of the accused could not save him. **L** ANANT RAM *v.* EMPEROR, 22 CR. L. J. 118; 8 P. W. R. 1921 CR. **550**

——— **ss. 59, 304**—*Culpable homicide not amounting to murder—Punishment—Transportation for fourteen years, sentence of, legality of—Appeal to Privy Council—Procedure.*

Where an offence is punishable with transportation for life or imprisonment for a term of years, section 59 of the Penal Code does not authorise a sentence of transportation for a term of years exceeding the maximum term of imprisonment to which the offender is liable.

The appellants were convicted by a Sessions Judge of culpable homicide not amounting to murder under section 304 (1) of the Penal Code and sentenced to three years' rigorous imprisonment. On an application for enhancement of sentence, the High Court enhanced the sentence to transportation for 14 years:

Held, that ten years being the maximum term (short of life) for which the appellants could be sentenced to transportation, the case should be remitted to the High Court with instructions to pass sentence according to law. **P C** SAYYAPUREDDI CHINNAYYA DHORA *v.* EMPEROR, 9 A. L. J. 104; 10 M. L. J. 194; 13 L. W. 223, (1921) M. W. N. 26; 33 C. L. J. 227; 22 CR. L J 174; 25 C. W. N. 5 4; 3 U. P. L. R. (P. C.) 10; 44 M. 297; 23 BOM. L. R 705 **926**

——— **ss. 76, 79, 342**—*Criminal Procedure Code (Act V of 1898), s. 342—Mistake of fact—Police Officer acting under invalid order, whether entitled to protection*

An order by the Commissioner of Police of Calcutta regarding the treatment while under suspension of members of the Calcutta Police Force was published in the *Calcutta Police Gazette* After the order had been in force for some considerable time, it was discovered that the approbation of the Local Government had not been obtained within the meaning of section 9 of the Calcutta Police Act, but before this was discovered a Deputy Commissioner of Police, acting under the order, made an order for the confinement of a Head Constable who filed a complaint against the Deputy Commissioner for

Penal Code—contd.

wrongful confinement. The Trial Court acquitted the Deputy Commissioner on the ground that he was labouring under a mistake of fact that the order under which he acted was a legal order and he was, therefore, protected by the provisions of sections 76 and 79 of the Penal Code :

Held, that the Deputy Commissioner had been rightly acquitted. **C** PRAMATHA NATH *v.* P. C. LAHIRI, 47 C. 818: 22 CR L. J. 5 **37**

——— **s. 174**—*Summons not issued according to law—Accused's failure to appear—Offence.*

Upon receipt of a petition complaining that accused had constructed a temple which, owing to its proximity to a mosque and graveyard, was objected to by the Muhammadans, and suggesting the likelihood of a breach of the peace, the Sub-Divisional Magistrate directed a Tahsildar to make inquiries, to record the statements of the persons complained against and to return the papers for orders. The Tahsildar sent his peon to fetch these persons, but as they failed to come, he issued a summons to them to appear, written on a form provided for cases under section 193 of the Land Revenue Act, and not purporting to be under any section of the Criminal Procedure Code, and on their failure to appear, he convicted them under section 174, of the Penal Code :

Held, that the proceedings were illegal *ab initio* that the order of the Sub-Divisional Magistrate was *ultra vires*, that there was no summons issued according to law, and that there could be no conviction under section 174 of the Penal Code. **A** BEHARI LAL *v.* EMPEROR, 22 CR L. J. 79 **335**

——— **s. 188.** *See* CRIMINAL PROCEDURE CODE, s. 518 **34**

——— **ss. 192, 193**—*Criminal Procedure Code (Act V of 1898), s. 195 (b)—Fabricating false evidence—Execution proceedings, whether judicial proceedings—Judicial proceeding not pending—Sanction, whether necessary.*

Execution proceedings are judicial proceedings for the purpose of sections 192 and 193 of the Penal Code. It is not essential for the purpose of these sections that the judicial proceeding in which the person intends to use the false evidence must be pending at the date of the fabrication.

In the absence of any proceeding, pending or disposed of, in which or in relation to which an offence under section 193 of the Penal Code is said to have been committed no sanction under section 195 (*b*) of the Criminal Procedure Code is necessary. The clause cannot apply to any future judicial proceeding for which the false evidence may have been fabricated. **B** GOVIND PANDURANG, *In re*, 22 BOM. L. R. 1229: 22 CR. L. J. 49; 45 B. 668 **193**

——— **ss. 192, 193**—*Fabricating false rent-note—Offence—Judicial proceeding not pending, effect of.*

It is not essential for the purpose of section 192 of the Penal Code that there should be any judicial proceeding pending at the time of the fabrication. It is enough that there is a reasonable prospect of such a proceeding, having regard to the circumstances of the case, and that the document in question is intended to be used in such a proceeding

A person who fabricates a false rent-note showing that a house has been let to him for a certain period is guilty of an offence under section 193 of the Penal Code. **B** RAJARAM BHAVANISHANKAR *v.* EMPEROR, 22 BOM. L. R. 1229; 22 CR L. J. 23 **135**

——— **s. 193**—*Perjury—Promissory note—Accused denying receipt of consideration—Prosecution, duty of, to prove passing of consideration.*

The rule of law contained in the Negotiable Instruments Act that the presumption is that a promissory note was passed for consideration, does not necessarily apply to a criminal trial. Therefore, in a prosecution for perjury, under section 193 of the Penal Code, arising out of a civil suit upon a promissory note in which the accused denied the receipt of consideration, it is for the prosecution to prove that consideration did pass, and not for the accused to prove the contrary. **A** SAKHAWAT HAIDAR *v.* EMPEROR, 18 A. L. J. 1151: 22 CR L. J. 54 **198**

——— **s. 211**—*Workman's Breach of Contract (Act XIII of 1859), s. 1, complaint under, withdrawn before passing of any order, whether "criminal proceeding"*

The mere initiation of a proceeding under the preliminary portion of section 1 of the Workman's Breach of Contract Act for execution of the work or for re-payment of the advance which is withdrawn before any order is made therein is not a "criminal proceeding" within the meaning of section 211 of the Penal Code. **M** HUSSAINA BEARI *v.* EMPEROR, 43 M. 443; 22 CR. L. J. 13 **45**

——— **ss. 323, 353**—*Public servant, not acting as such, assault on—Offence.*

A Tahsildar was requested to procure some camels for military purposes ; he deputed some of his peons to procure the camels, and while they were persuading the owners to take their camels to the Tahsil, the accused, who was unconnected with the camel owners, assaulted one of the peons. He was tried and convicted under section 353 of the Penal Code :

Held, that the peon was not acting in the discharge of his duty as a public servant, and that the conviction could not be sustained, but as some injury was inflicted by the accused he was liable to conviction under section 323 of the Penal Code. **A** GOKAL CHAND *v.* EMPEROR, 22 CR. L. J. 65 **321**

——— **s. 373**—*Obtaining possession of minor for purpose of prostitution—Possession, whether must be obtained from third person.*

It is not requisite for the purpose of section 373, Penal Code, that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with intent that the minor shall be used for the purpose of prostitution. **B** EMPEROR *v.* SHAMSUNDERBAI, 22 BOM. L. R. 1134; 45 B. 529; 22 CR L. J. 29 **141**

——— **s. 379**—*Attachment of property without warrant—Property removed by owner—Offence, whether committed.*

Accused having failed to repay a *takavi* advance, his property was attached, but the attaching officer had not with him, at the time of the attachment, a warrant of attachment : the property was subsequently ordered to be sold when it was discovered that the accused had removed it, he accordingly was placed on his trial and convicted under section 379 of the Penal Code :

Penal Code—contd.

Held, that as the attaching officer had not with him a warrant of attachment at the time he attached the property there was no valid attachment and, consequently, the conviction of the accused could not be sustained. **A** MOLAI *v.* EMPEROR, 2 U. P. L. R. (A.) 335; 22 CR. L J. 107 **411**

——— **ss. 396, 412**—*Criminal Procedure Code (Act V of* 1898*), s.* 190—*Result of proceeding under s.* 110, *whether admissible in prosecution for dacoity.*

Where an accused person is on his trial for an offence under section 396 of the Penal Code, the fact that in proceedings under section 110, Criminal Procedure Code, he had been required to give security and had been unable to give it is not admissible. **C** ASIMUDDIN SARDAR *v.* EMPEROR, 52 C. L. J. 89; 22 CR L. J. 60 **204**

——— **s. 408**—*Criminal breach of trust—Criminal Procedure Code (Act V of* 1898*), s.* 222 (2)—*Charge, contents of—Prosecution, duty of.*

In a trial for criminal breach of trust in respect of money, although under section 222 (2) of the Criminal Procedure Code the accused may be charged in respect of the gross sum received by him, without specifying any particular item of any particular date in respect of the constituent parts of the gross sum, nevertheless, the prosecution must decide what amount they are prepared to prove the accused lawfully received and lawfully expended and what total sum, and how that total sum is made up, he has either unlawfully expended or failed to account for in such a way as to leave no doubt that he has been engaged in criminal misappropriation. And, in order to convict, there must be a definite finding of a certain definite sum traced to the accused, and clearly shown to have been wilfully and unlawfully appropriated to his own use. **A** MOHAN SINGH *v.* EMPEROR, 18 A. L. J. 633; 2 U. P. L R. (A.) 360; 42 A. 522; 22 CR. L. J. 84 **372**

——— **s. 417**—*Cheating, what constitutes—Money paid to creditor—Creditor, refusal of, to return bond—Offence.*

In order to constitute the offence of cheating it is essential, in the first place, that the person who delivers property should have been deceived before he makes delivery and, in the second place, that he should have been induced to do so fraudulently or dishonestly. The deception may be by words or by conduct.

Accused lent a sum of money to the complainant and got the latter to execute a bond. He also gave the complainant a *kamiati parcha* in respect of his homestead land. After some years, the complainant paid the money back to accused, but the latter refused to return the bond until the *kamiati parcha* was returned to him :

Held, that the accused could not be convicted of the offence of cheating under section 417 of the Penal Code. **Pat** DEODHARI MANTO *v.* EMPEROR, (1921) PAT. 12; 22 CR. L. J. 169; 2 P. L. T. 211 **921**

——— **s. 424**—*Dishonest removal of property—Burden of proof—Question of title—Civil dispute—Procedure.*

Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court.

Unless dishonesty is proved, a conviction under section 424 of the Penal Code cannot be sustained.

On the death of a person a dispute arose between his two widows as to the succession to his property and both of them put padlocks on the shop in which the property was. Some of it was subsequently removed from the shop by the accused at the instance of one of the widows : the other widow brought a suit to establish her title to the property :

Held, that the accused could not be convicted of an offence under section 424 of the Penal Code as, in the absence of a clear finding as to the respective titles of the widows, it could not be said that his removal of the property was dishonest. **L** KHUSHI RAM *v.* EMPEROR, 22 CR. L. J. 142 **654**

——— **s. 464**—*Using forged document—Offence.*

Where an insolvent uses a forged document with the intention of supporting his claim to be declared insolvent, he is liable to conviction under section 464 of the Penal Code. **A** ABDUL GHAFOOR *v.* EMPEROR, 18 A. L. J. 1137; 22 CR. L. J. 56; 2 U. P. L. R. (A.) 433; 43 A 225 **200**

——— **s. 494**—Chamar *woman becoming convert to* Islam *and marrying* Musulman *during lifetime of first husband—Offence—Ignorance of law—Sentence.*

The mere fact of a *Chamar* woman becoming a convert to Islam does not dissolve her marriage with her *Chamar* husband, and if she marries a second time during the lifetime of her first husband she is guilty of an offence under section 494 of the Penal Code.

In such a case, the fact that the woman thought her conversion had dissolved her previous marriage may be treated as extenuating her offence, although it does not absolve her from liability. **L** NANDI *v.* EMPEROR, 1 L. 440; 22 CR. L. J. 1 **33**

——— **s. 499**—*Defamation—Harm, actual, to reputation, whether necessary.*

In order to render the offence of defamation complete, there must be an imputation with reference to a person intending to harm, or knowing, or having reason to believe that such imputation will harm the reputation of the person against whom the imputation is made. Proof of actual harm to the reputation of the person defamed is not necessary. **B** ALEX PIMENTO *v.* EMPEROR, 22 BOM. L. R. 1224; 22 CR. L. J. 58 **202**

——— **s. 499**—*Defamation—Party to judicial proceeding making defamatory statement—Privilege, qualified—Party to judicial proceeding sued in Civil Court for defamation, liability of, for damages.*

Where a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise his liability must be determined by reference to the provisions of section 499 of the Penal Code, and he is entitled only to the benefit of the qualified privilege mentioned in that section.

[Case-law on the subject of absolute privilege discussed.]

Where a party to a judicial proceeding is sued in a Civil Court for defamation in respect of a

Penal Code—concld.

statement made therein on oath or otherwise, his liability, in the absence of statutory rules applicable to the subject, must be determined with reference to the principles of justice, equity and good conscience. **C** SATIS CHANDRA *v* RAM DAYAL, 32 C. L. J. 94; 24 C. W. N. 982; 22 CR. L. J. 31 **143**

——— **s. 499**—*Petition defamatory—Dismissal after inquiry—Defamation, action for, maintainability of—Witness, how far protected.*

Nine persons presented a petition, the character of which was generally defamatory, to the District Magistrate complaining of various acts of oppression against the *mukhia* of a village. An inquiry was held and certain persons were examined as witnesses with the result that the petition was dismissed The *mukhia* then filed a complaint under section 500, Penal Code, against sixteen persons, including those who had signed the petition, but the complaint was dismissed under section 202 of the Criminal Procedure Code on the ground that the parties complained against having made statements in answer to questions they could not be prosecuted:

Held, that the complaint being not only against such persons as were called and examined, but against all the signatories to the petition to the District Magistrate, the order dismissing the complaint could not be sustained.

A witness has no greater protection against a charge of defamation than any other person.

A witness in order to be protected from a statement *prima facie* defamatory made by him must bring himself within one or more Exceptions to section 499. **A** MUHAMMAD SHER ALI KHAN *v.* GHASI RAM, 22 CR. L. J. 159; 3 U. P. L. R. (A) 35 **863**

Pensions Act (XXIII of 1871), ss. 4, 6—*Suit to recover* sardeshmukhi haq, *maintainability of—Certificate, whether necessary.*

A suit against the Secretary of State for India to recover the *sardeshmukhi haq* falls within the purview of section 4 of the Pensions Act, and is not maintainable in the absence of the requisite certificate under section 6 of the Act. **B** MADHAVRAO *v.* SECRETARY OF STATE FOR INDIA, 22 BOM. L. R. 1176; 45 B. 196 **452**

Pleadings and practice—*Court, duty of—Inferences of fact at variance with case pleaded, whether permissible.*

It is absolutely necessary that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

Parties cannot be concluded by inferences of fact which are not only not consistent with the pleadings but actually contradictory of the case therein made. **P C** MALRAJU LAKSHMI VENKAYYAMMA ROW *v.* VENKATADRI APPA ROW, 19 A. L. J. 97; 23 C. L. J. 171; 40 M. L. J. 144; 13 L. W. 256; (1921) M. W. N. 77; 29 M. L. T. 164; 25 C. W. N. 651; 23 BOM. L. R. 713 **767**

"Police report", *what amounts to.*

The report of the Police is not restricted merely to reports under Chapter XIV of the Criminal Procedure Code upon information lodged to the Police but embraces all reports by the Police submitted under section 24 of the Police Act. An application by the Police to a Magistrate to take

Police Report—concld.

action against a person amounts to a "Police report" within the meaning of the term in clause (*b*) of section 190 of the Criminal Procedure Code. **Pat** ABDUL ABI *v.* EMPEROR, 1 P. L. T. 446; 22 CR L. J. 9 **41**

Pre-emption—*Custom relating to* 20-biswa mahal, *whether applicable to* haqiat mutafarriqa.

Where a custom of pre-emption relates only to lands which constitute the 20-*biswa mahal*, there can be no pre-emption in respect of the *haqiat mutafarriqa*, and the mere fact that the latter may at one time have formed part of the 20-*biswa mahal* would make no difference. **A** IZZAT HUSAIN KHAN *v* RAM CHANDER, 18 A. L. J. 120; 2 U. P. L. R. (A.) 39 **366**

——— *Mortgage-debt exceeding market-value of property—Mortgagee taking property in lieu of mortgage-debt—Price payable by pre-emptor.*

Where the amount of a mortgage-debt exceeds the amount which represents the market-value of the mortgaged property and the mortgagee cancels the mortgage in lieu of the property, the amount paid for the property is not the amount due on the face of the mortgage-deed, but the amount which was recoverable under the bond from the security, and it is only this sum that he is entitled to recover from a pre-emptor. **A** JAGAT SINGH *v.* BALDEO PRASAD, 18 A. L. J. 974; 2 U. P. L. R. (A.) 373; 43 A. 137 **679**

——— *Sale to several vendees—Indivisible transaction—Some vendees having rights equal to pre-emptor—Transfer by other vendees in favour of person having similar rights, effect of.*

The effect of a sale being indivisible is merely to prevent some of the vendees from defeating a claim for pre-emption by pleading that their rights are not inferior to the plaintiff's although the rights of the others are infeiror. But the claim can nevertheless be defeated if, before the suit is instituted, those vendees whose rights are inferior sell their share to a person who has an equal or superior right to that of the plaintiff. **L** HIRA *v.* SARDARA **712**

——— *Vendee having equal right of pre-emption on date of sale—Subsequent loss of vendee's right, effect of—Decree for pre-emption, effect of—Vendee, when divested of property.*

Where on the date of a sale the vendee's right of pre-emption is equal to that of a pre-emptor, the vendee does not forfeit his right by subsequently losing the property by virtue of the ownership of which he claimed an equal right of pre-emption. The mere fact that the vendee loses the property under a decree for pre-emption makes no difference.

A right of pre-emption is a *jus ad rem alienam acquirendam* and not a *jus in re aliena*; or, in other words, the pre-emptor can, if he so wishes, by adopting the proper procedure acquire another person's property in preference to third persons, whose rights to such property are inferior to his. But a pre-emptor has no right or interest in such property until his right of pre-emption is duly established by the decree of the Court and he has satisfied the terms of tha decree. **L** BELI RAM *v.* HARI CHAND **744**

Presidency Small Cause Courts Act (XV of 1882), s. 19 (g)—*Suit to recover stones of well wrongfully removed, whether cognisable by Small Cause Court.*

A suit to recover certain stones forming part of a well, and said to have been wrongfully removed, or their value, does not fall under clause (*g*) of section 19 of the Presidency Small Cause Courts Act, and is cognizable by a Presidency Small Cause Court, even though, in order to dispose of the suit, it is necessary to determine the question of title to the well. **M** KRISHNAMACHARRY *v.* KOMALAMMAL, (1920) M. W. N. 599; 39 M. L. J. 490; 28 M. L. T. 275; 43 M. 903 **532**

——— s. 19 (h)—*Arbitration—Reference by husband and wife to settle amount of maintenance payable to wife in case of separation, legality of—Award—Suit to enforce award, maintainability of—Jurisdiction of Small Cause Court.*

An agreement between a Parsi husband and wife to live separately is a lawful and binding agreement, and a reference to arbitration of the question as to the amount of the wife's maintenance, in the event of their separation, is quite legal.

If an award is given on such reference the wife can sue to enforce the award and to recover arrears of maintenance under the award. Such a suit is not barred from the cognizance of a Small Cause Court by clause (*h*) of section 19 of the Presidency Small Cause Courts Act, the suit not being one for the specific performance of a contract. **B** ERACHSHAW DOSABAI *v.* BAI DINBAI, 22 BOM. L. R. 1293; 45 B. 318 **189**

Presidency Towns Insolvency Act (III of 1909), s. 45—*Insolvency proceedings in British India—Discharge—Suit against insolvent in Foreign Court, maintainability of.*

It is contrary to all ideas of equity that an insolvent trading and incurring debts in British India and having property in foreign territory, which the Official Assignee could not get hold of, should be able to completely get rid of all his liabilities as regards his creditors inside British India, and then proceed to enjoy his property outside British India, free from all those liabilites. If, in such a case, after the insolvent has obtained his discharge, a creditor brings a suit against him to recover a debt in a Foreign Court within the jurisdiction of which the insolvent owns property, the High Court will not restrain the creditor from proceeding with the suit. **B** LAKHMIRAM KEVALRAM BHATT *v.* PUNAMCHAND PITAMBER, 22 BOM. L. R. 1172; 45 B. 550 **444**

——— S. 115—*Official Assignee, Attorney of, whether exempt from payment of stamp duty on copies furnished for appeal.*

An Attorney of the Official Assignee is entitled to the same privileges as to stamp duty as the Official Assignee has by virtue of section 115 of the Presidency Towns Insolvency Act, and is entitled to obtain copies of orders for purposes of appeal without the payment of any stamp-duty. **M** OFFICIAL ASSIGNEE OF MADRAS *v.* RAMASWAMY CHETTY, 12 L. W. 89, (1920) M. W. N. 424; 39 M. L. J. 135; 43 M. 747 **475**

Principal and agent—*Agent authorised to transfer property in his own name—Deed of transfer signed by agent not as such, whether binding on principal—Agent exceeding his authority, effect of.*

The omission on the part of an agent to describe in a deed that he is acting for and on behalf of a principal is immaterial. The question whether an agent is to be taken to have contracted personally or on behalf of his principal depends on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances.

Where an agent is given power to execute deeds of transfer in his own name and he executes a deed relating to the property of his principal without describing himself as the latter's agent, the omission is immaterial and the deed is binding on the principal and his representatives.

Where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities and fraudulently appropriates the difference (the lender acting *bona fide* and in ignorance of the limitation) the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry. **O** JAGRUP SINGH *v.* RAM KISHAN DAS, 23 O. C. 353; 7 O. L. J. 705 **596**

Privy Council—*Finding of fact, interference with.*

The Privy Council will not interfere with concurrent findings on issues of fact. **P C** AMATUL FATEMA BIBI *v.* ABDUL ALIM SAHIB, 24 C. W. N. 494; (1920) M. W. N. 324; 28 M. L. T. 135; 12 L. W. 497; 32 C. L. J. 417 **1**

Probate and Administration Act (V of 1881), s. 50—*Minor—Guardian appointed without consent—Guardian refusing to act—Probate—Minor, whether entitled to revocation.*

Where a guardian *ad litem* of a minor is appointed, without his consent, for the purpose of a petition for Probate, and he refuses to accept service of a citation on behalf of the minor, and Probate is granted, the minor, when properly represented, is entitled to maintain an application, under section 50 of the Probate and Administration Act, for revocation of the grant. **C** SACHINDRA NARAIN SAH *v.* HIRONMOYEE DASI, 24 C. W. N. 538 **435**

——— s. 50—*Probate, revocation of—"Just cause," meaning of.*

The mother of a deceased testator applied, as his executrix, for Probate of his Will; general citations were issued and a special citation was issued to the widow of the deceased, who was then a minor, with a direction that a guardian *ad litem* should be appointed for her; her father was so appointed, and a citation was issued to him, but he refused to receive it when it was tendered to him. The Probate proceedings were uncontested; the Will was proved in common form and Probate was granted to the mother. For several years the widow received benefits under the Will, and some five years after coming of age, and more than six years after the grant, she applied for revocation of the Probate, the petition being signed by her father on

Probate and Administration Act—concld.

her behalf. The Probate was revoked on the ground that no appearance was entered for the widow, and the mother was directed to prove the Will in solemn form. On appeal:

Held, that the facts did not disclose any "just cause" within the meaning of section 50 of the Probate and Administration Act, and that the delay in bringing forward a case against the Will was fatal to the application for revocation, **C** RADHASHYAM DASYA *v.* RANGA SUNDARI DASYA, 24 C. W. N. 541 **664**

——— **s. 89,** *applicability of, to criminal proceedings.*

Section 89 of the Probate and Administration Act has no application whatever to a criminal prosecution. **L** HAZARA SINGH *v.* EMPEROR, 2 L. 27; 22 CR. L. J. 166 **918**

Promissory note *executed for existing liability—Cause of action—Plaint, alternative claim in—Promissory note not returned to defendants—Procedure.*

It is open to the holder of a promissory note executed for an existing liability when suing to recover the amount due, to include in his plaint both claims in the alternative. If he sues on one such cause of action and the right to sue thereon is not free from doubt, the Court should direct him to amend his plaint, so as to convert it into a suit based on both causes of action, or treat it as amended and then decide the suit finally.

Where in such a suit the promissory note is not returned to the defendant, he is entitled to be indemnified against future liability thereunder. **M** DUGGEMPUDI NAGAMMA *v.* TIRUMALAREDDI, 12 L. W. 147 **363**

Provincial Insolvency Act (III of 1907), ss. 2 (1) (8), 18, 52 (1) (a) *—Adjudication, order by Official Receiver—Insolvent's estate, whether vests in Official Receiver.*

Where, in exercise of the powers delegated to him under section 52 (1) (*a*) of the Provincial Insolvency Act, an Official Receiver makes an order of adjudication the insolvent's estate does not thereupon vest in him under section 18 of the Act, it only does so in pursuance of an order passed by the Court, and in exercising the delegated powers the Official Receiver is not a Court within the meaning of section 2 (1) (8) of the Act. **M** MUTHUSAMI SWAMIAR *v.* SOMOO KANDIAR, 12 L. W. 262; (1920) M. W. N. 537; 39 M. L. J. 438; 43 M. 869 **507**

——— **ss. 10, 47**—*Death of debtor—Continuance of proceedings—Legal representatives of debtor, whether can be brought on record.*

Proceedings in insolvency do not abate by reason of the death of the debtor, and the Court has power to bring on to the record of the insolvency proceedings the names of the personal legal representatives of the deceased insolvent. **L** RAM JAS *v.* KATHA SINGH, 9 P. L. R. 192; 14 P. W. R. 1921 **51**

——— **s. 16**—*Mortgage-decree—Application for personal decree, whether new proceeding—Grant of personal decree, whether remedy.*

An application under rule 6 of Order XXXIV of the Civil Procedure Code for a personal decree is not a new proceeding but a continuation of the original suit, and does not come under the bar of section 16 of the Provincial Insolvency Act.

Provincial Insolvency Act—concld.

The issue of a personal decree against a mortgagor is not the grant to the mortgagee of a remedy against the mortgagor within the meaning of section 16 of the Provincial Insolvency Act **L** KISHEN CHAND *v.* SOHAN LAL, 2 L. 95 **710**

——— **ss. 16, 34**—*Adjudication, sale before—Receiver, right of.*

Inasmuch as section 16 of the Provincial Insolvency Act does not control the provisions of section 34 thereof, a purchaser in the course of execution of the property of a debtor, after he has filed an application to be adjudicated insolvent, but before the date of the adjudication order, acquires a good title to the property against the Receiver, the ownership in the property not vesting in the Receiver. **A** DIN DAYAL *v.* GURSARAN LAL, 18 A. L. J. 287; 42 A. 336 **67**

——— **s. 16 (4).** *See* MUHAMMADAN LAW, WILL **296**

——— **s. 37**—*Fraudulent preference—Transfer obtained under pressure, whether can be avoided.*

The test for determining whether a transfer or payment made by a debtor in favour of or to a creditor does or does not amount to fraudulent preference is, whether the transfer or payment is voluntary.

The law, however, regards only the motive of the debtor, and if the dominant motive of the debtor in making the transfer or payment is to save himself from exposure or from a criminal prosecution, it cannot be said that the transfer or payment is voluntary or amounts to fraudulent preference. **L** PURAN CHAND *v.* PUNJAB NATIONAL BANK, LTD., 3 U. P. L. R. (L.) 6 **578**

——— **s. 37,** *object of—Companies Act (VII of 1913), s. 231—Fraudulent preference by company—Person who is not creditor, whether can impeach transfer.*

The object of section 37 of the Provincial Insolvency Act is to protect the interests of the whole body of creditors over whom an undue preference has been given in favour of other creditors.

The same principle applies to a transaction which is sought to be impeached under section 231 of the Companies Act, so that a disposition of a company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of the creditors.

Therefore, a person who is not a creditor of a company, but is a debtor, cannot impeach a transfer made by the company on the ground of undue preference. **L** KAM SARUP *v.* JAGAT RAM, 2 L. 102 **977**

Provincial Small Cause Courts Act (IX of 1887), s. 25—*"Case", "decided", meanings of—Order setting aside* ex parte *decree—Revision, whether lies.*

The word "decided" in section 25 of the Provincial Small Cause Courts Act means disposed of.

The word "case" in section 25 of the Provincial Small Cause Courts Act, does not necessarily in every instance, mean the "whole" case, but may mean a particular branch of a case for which an independent remedy, or a different procedure is provided and may include an interlocutory order.

Provincial Small Cause Courts Act—concld.

A petition for revision is maintainable against an order of a Small Cause Court setting aside an *ex parte* decree. **L** RAM LAL *v.* GANESHI LAL **685**

——— **s. 25**—*Revision—Finding of fact—High Court, power of, interference of.*

Ordinarily, the High Court is averse to interfering on pure questions of fact under section 25 of the Provincial Small Cause Courts Act, but it must not be understood that the High Court has no power of interfering with decisions on questions of fact.

At the same time, interference in regard to appreciation of evidence should in general only be exercised when there appears to the Court to be a very clear case of misappreciation, which has resulted in injustice to a party and makes the decree one that cannot be regarded by a revisional Court as according to law. **B** NATHURAM SHIVANARAYAN *v.* DHULARAM HARIRAM, 22 BOM. L. R. 1199; 45 B. 242 **267**

——— **Sch. II, Art. 35 (ii)**—*Suit for compensation for mental worry and expenses incurred in criminal prosecution for breach of trust, whether cognizable by Court of Small Causes.*

Where the defendant was charged with criminal breach of trust and convicted by a Criminal Court and plaintiff filed a suit for damages—for mental and physical worry, cost of criminal prosecution and other expenses and loss:

Held, that under Article 35 (*ii*) of the Second Schedule of the Provincial Small Cause Courts Act, the suit was not cognizable by a Small Cause Court. **O** SUGHRA *v* RAM LAL MISRA, 23 O. C 252 **593**

Punjab Colonisation of Government Lands Act (V of 1912), s. 19—*Will, construction of—Devise of land by tenant—Acquisition of proprietary rights before death, effect of.*

On 5th July 1909, an occupancy tenant devised his square of land in favour of the defendant. In 1912 the Punjab Colonisation of Government Lands Act came into force and, subsequently thereto, the testator acquired proprietary rights in the devised square:

Held, that when the Will came into operation the testator's occupancy rights had ripened into proprietary ownership and that the Will was not, therefore, invalid under section 19 of the Punjab Colonisation of Government Lands Act. **L** DALIP SINGH *v.* BALWANT SINGH, 1 L. 500 **513**

Punjab Excise Act (I of 1914), s. 61—*Illegal possession of liquor and distilling apparatus—Joint owners, liability of.*

The mere fact of a person being a joint owner of a house and field in which illicit liquor and distilling apparatus are found, without anything further to connect him with the illicit distillation, is not sufficient to warrant his conviction under section 61 of the Excise Act. **L** MIHAN SINGH *v.* EMPEROR, 22 CR. L. J. 30; 15 P. L. R. 1921; 3 P. W. R. 1921 CR. **142**

——— **s. 61**—*Illegal possession of liquor—Husband and wife, whether can be considered as in joint possession.*

Where liquor, and apparatus for manufacturing it, are found in a house which is in the joint occupation of a husband and wife, but which belongs to the husband, the latter alone must be regarded as being in possession of the articles. The wife in such a case is not guilty of an offence under section 61 of the Punjab Excise Act. **L** BISHNA *v.* EMPEROR, 22 CR. L. J. 141; 9 P. W. R. 1921 CR. **653**

Punjab Pre-emption Act (I of 1913), ss. 13, 16 (sixthly)—*Pre-emption, right of, based on vicinage—Co-owner, whether can maintain suit.*

One co-sharer in a house is entitled to maintain a suit for pre-emption of an adjacent house even though all the co-owners do not join in the suit. **L** AMIR CHAND *v.* HEM RAJ, 19 P. L. R. 1921; 12 P. W. R. 1921 CR **243**

——— **s. 16 (fifthly)**—*Joint wall, user of, whether easement.*

The existence of a joint wall between two houses is not an easement within the meaning of section 16 (fifthly) of the Punjab Pre-emption Act.

The owner of a house having a joint wall with another house can use that wall in any reasonable manner, but by such user he does not acquire any right of easement over the other house. **L** ATMA SINGH *v.* HEM RAJ SHAH **939**

Punjab Tenancy Act (XVI of 1887), s. 59. *See* CUSTOM—ADOPTION **82**

Rajinama and kabuliyat, *whether constitute transfer—Bombay Land Revenue Code (Act V of 1879), s. 74.*

Before it can be held that a *rajinama* and *kabuliyat* really do evidence a transfer of ownership, there must be either evidence or indications furnished by lapse of time and possession and so forth, that there was in fact an intention to transfer ownership. A *rajinama* and *kabuliyat* do not by any means completely take the place of a sale-deed. They only serve as documentary evidence of transfer if that transfer can properly be inferred from the totality of facts proved. **B** CHANDANMAL HAMBIRMAL *v.* BHASKAR WAMAN, 22 BOM. L. R. 1079 **114**

Registration, whether notice. *See* COVENANT **506**

Registration Act (XVI of 1908), s. 17—*Mortgage, equitable, by deposit of title-deeds—Memorandum recording deposit, whether requires registration.*

Where an equitable mortgage is created by deposit of title-deeds, a memorandum recording the deposit and the purpose for which it is made does not require registration, for such a document does not create any interest in immoveable property the mortgage being complete independently of it. **L** PURAN CHAND *v.* PUNJAB NATIONAL BANK, LTD., 3 U. P. L. R. (L.) 6 **58**

——— **ss. 17, 49**—Lease, unregistered for less than a year, admissibility of, to prove character of possession. *See* TRANSFER OF PROPERTY ACT, s. 4 **350**

——— **s. 17 (3)**—*Authority to adopt executed outside British India—Registration, whether necessary.*

An authority to adopt executed in a Native State by a person domiciled therein is not inadmissible in evidence in a suit in British India by reason merely of its non-registration, as the Registration Act has no application to documents executed outside British India. **M** KEESARA VENKATAPAYYA *v* NAYANI VENKATARANGA RAO, 38 M. L. J. 149; 43 M. 288 **978**

Religious endowment—*Contract with* shebait *of* thakur, *whether terminates on death of* shebait.

Contracts in respect of dedicated property entered into by the *shebait* of a *thakur*, not in his personal capacity but as *shebait*, do not terminate on the death of such *shebait*. **C** DASRATHI CHATTERJEE *v.* ASIT MOHAN GHOSH, 24 C. W. N. 879 **126**

——— *Resumption by Government—Fresh grant to Committee—Committee, power of, to appoint trustee.*

The Government, finding that endowments to a temple by previous rulers were mismanaged, resumed the endowments and made a fresh grant to the temple by donating the lands to the Temple Committee, and asked them "to make satisfactory arrangements for the due performance of the service, etc." The Committee appointed the plaintiff as the trustee, and the question was whether he had been validly appointed:

Held, that the Government, as grantor, had given ample power to the Committee not only to see that the services were properly conducted but also to appoint competent men to supervise the performance of those services, and that the appointment of the plaintiff by the Committee was a valid appointment. **M** PALAYAKAYAL SWAMI SANGUMUGESWARAR *v.* VEYINRAMUTHU PILLAI, 12 L. W. 324 **183**

——— *Temple properties, lease of, by trustee—Permanent tenancy—Presumption—Burden of proof.*

In respect of temple properties leased out by the trustees of the temple, the presumption is against the existence of a permanent tenancy, and the burden of proving such a tenancy is upon those who allege its existence. **M** CHINNAMMALL *v.* RATNASABAPATHY CHETTIAR, 12 L. W. 191; 1920) M. W. N. 532 **241**

Religious institution—Darbar Sahib *at Amritsar*—Granthi, *office of, whether religious—Appointment of* granthi, *mode of—Office, whether descendible inheritance—Son, whether can succeed—* Singh, *who is—Infant, whether can be* Singh.

The office of the *granthi* of the *Darbar Sahib* at Amritsar is a religious office and is not a descendible inheritance, so that a son, merely as a son, is not entitled to succeed to the office.

Initiation as a *chela* is a necessary condition for the appointment of a *granthi*. The other necessary conditions are nomination, election and installation.

In order to be qualified for the office of a *granthi* it is necessary that the candidate must be a good *Sikh* and a properly initiated *Singh*. A *Sikh* is created a *Singh* by the ceremony called *khanda ka pahul* or baptism by the sword. This ceremony involves the uttering of certain *mantras* by the candidate and the wearing of the five Ks, therefore, an infant cannot become a *Singh*. **L** INDAR SINGH *v* FATEH SINGH, 1 L. 511 **721**

——— *Golden Temple, Amritsar*—Granthi—*Succession to property acquired by* Granthi—*Self-acquisition of* Granthi—*Judgment, previous, admissibility of.*

A person who holds the office of *granthi* of the Golden Temple at Amritsar is at liberty to spend the income of his office in any manner he pleases, and is not bound to spend any portion of it in charity. If he acquires property out of such income, he is free to dispose of it as he thinks best, and unless such property is dedicated by him to religious purposes, the property descends on his death to his natural heirs according to the usual rule of inheritance.

Religious institution—concld.

Where, however, a *granthi* succeeds to property from another *granthi* to the exclusion of natural heirs, there is a presumption that such property has been dedicated to religious uses, even in the absence of positive evidence of actual dedication.

A judgment in a suit holding that the property attached to the office of *granthi* is *wakf* and inalienable, is admissible in a subsequent suit for the purpose of showing that at the time it was given the right of the *granthi* to alienate was called in question. **L** INDER SINGH *v.* FATTEH SINGH, 1 L. 540 **734**

Res judicata—*Execution of decree—Mortgage-decree - Final decree, absence of—Decree-holder directed to obtain final decree—Subsequent application for execution without final decree, whether barred.*

In execution of a mortgage-decree the decree-holder was directed to obtain a final decree for sale before execution could issue. Without obtaining such a decree he again applied for execution and his application was allowed:

Held, that the application was not maintainable in consequence of his failure to comply with the Court's order to obtain a final decree, which order was binding on him. **M** RAMALINGA ROWTHAN *v.* IBRAHIM SAHIB, 12 L. W. 34 **161**

——— *Previous rent suit—Subsequent suit for possession—Appeal, second—Point involving question of fact, whether can be raised for first time.*

A decision in a rent suit as to the length of the defendant's occupation, the main issue in which was whether the relationship of landlord and tenant existed between the parties, does not operate as *res judicata* to bar a subsequent suit between the same parties to recover possession by ejectment, the main issue in which is, whether plaintiff's possession is within 12 years of the institution of the suit.

A point involving a question of fact not taken in the Courts below cannot be raised in second appeal for the first time. **C** DINESH CHANDRA BANERJEE *v.* ROMESH CHANDRA DAS **316**

——— *Rent, rate of, decision as to, in suit for enhancement—Subsequent suit for rent—Previous decision, effect of.*

In a suit for enhancement of rent the question of the rate of rent is an issue which must necessarily be decided by the Court, and the Court's decision on that point would operate as *res judicata* in a subsequent suit for rent in which the same question is in issue. **C** KIRAN CHANDRA *v.* BONO BEHARI DATTA **752**

Restriction of Habitual Offenders (Punjab) Act (V of 1918), ss. 4, 7— *Criminal Procedure Code (Act V of 1898), s. 110, proceedings under—Order of restriction, whether can be passed*

Where proceedings were started against a person under section 110 of the Criminal Procedure Code and at the very close of the case, without even calling upon him to show cause to the contrary, the Magistrate passed an order of restriction against him under the Punjab Restriction of Habitual Offenders Act:

Held, that the Magistrate had no jurisdiction to make the order of restriction. **L** KANWAR *v.*

Restriction of Habitual Offenders (Punjab) Act—concld.
EMPEROR, 22 CR. L. J. 144; 3 U. P. L. R. (L.) 3; 7 P. W. R. 1921 CR. **656**

——— **s. 8**—*Order of restriction for period exceeding one year—Confirmation by Sessions Judge, whether necessary.*

An order of restriction for a period exceeding one year passed under the provisions of the Restriction of Habitual Offenders (Punjab) Act does not stand in need of any confirmation by the Sessions Judge. **L** EMPEROR *v.* SUHELA, 1 L. 614; 22 CR. L. J. 108; 17 P. L. R. 1921; 5 P. W. R. 1921 CR. **412**

Revision—*Acquittal, order of—High Court, interference by.*

Unless the setting aside of an order of acquittal is urgently demanded in the interests of public justice the High Court will not, in the exercise of its powers of revision, set aside such an order. **C** PRAMATHA NATH *v.* P. C. LAHIRI, 47 C. 818; 22 CR L. J. 5 **37**

Right of way, *not appurtenant to dominant tenement, nature of.*

Private rights of way, not appurtenant to a dominant tenement, like public rights of way, are not easements but rights in gross and can be enforced as such. **C** BALAI CHAND PAL *v.* PANCHU GOPAL SEAL **319**

Riparian owners, *rights of—Natural and artificial streams, difference between—Water spreading itself along fields and again running in definite channel, whether stream.*

The rights of riparian owners to natural streams are somewhat different from their rights to water flowing through artificial water courses. The natural rights do not depend upon a grant or upon the ownership of the soil of the stream, but are *jure naturæ* incident to the ownership of the soil of the land abutting upon the stream. The rights to water flowing through artificial water courses are rights of easement, and must rest on some grant or arrangement, either proved or presumed, from, or with the owners of the lands from which the water is artificially brought, or on some other legal origin.

The proper inference from the user of the water of a natural stream though flowing in an artificial channel is that the artificial channel had been originally constructed upon the terms that all the proprietors of lands situated on the artificial channel should have the same rights in regard to the use of the water as they would have had if the stream had been a natural one.

Where the channel of a stream continues as a definite water course up to a certain point, and then spreads along certain fields, but on emerging from those fields it again runs as a definite water course, the identity of the water is not destroyed and it remains the subject of riparian rights. **Pat** RAM KRIPAL SINGH *v.* HANUMAN SINGH, 6 P. L. J. 6; 2 P. L. T. 122 **929**

———, *rights of, nature and extent of.*

The right of a riparian owner does not depend on the ownership of the soil of the stream. It belongs to the proprietor of the adjoining land as a natural incident to the right of the soil belonging to him and he is entitled to the benefit of it, as he is to all other natural advantages belonging to the land, of which he is the owner It is not based on prescription or a presumed grant, but rests on the natural advantages arising from the situation. The stream may be permanent or intermittent; but so long as it has a natural origin and flows in a known or defined channel, the right of a riparian owner to use its water, when it flows alongside his land, continues unaffected. In addition to the right to take the water when the water flows adjoining his land, a person may also have an easement to go across the land of another, when the water recedes; but such a user can only be claimed by virtue of prescription or custom. **O** LACHHMI NARAYAN *v.* GANGA BAKHSH SINGH, 7 O. L. J. 268; 2 U. P. L. R. (J. C.) 103 **364**

Road Cess Return—Bhaoli *land not mentioned—Rent, whether can be recovered.*

The fact that *bhaoli* is not mentioned with respect to any land in the Road Cess Return would not debar the landlord from claiming produce rent for the same. **Pat** NAND LAL SINGH *v.* RAMPHAL SINGH **875**

Rubkari, whether decree—Execution—Limitation, *terminus a quo. See* CIVIL PROCEDURE CODE s. 2 (2) **51**

Sale of goods—*Goods ordered despatched to buyer—Refusal to take delivery—Suit to recover price, whether maintainable.*

In a case where damages are claimed for breach of a contract they become due on the date when the contract is broken, and must be calculated with reference to the rates prevailing on that date, but where the suit is for the recovery of the price of goods sold, this consideration does not apply. Where ascertained goods are sold and are despatched to the buyer, but the latter refuses to take delivery of the goods, the seller is entitled to sue him for the price of the goods. **L** SURJAN MAL-KISHAN CHAND *v.* GIAN CHAND-CHIRANJI LAL **877**

——— *Principal and agent—Goods sent in excess of quantity ordered—Goods sent of inferior quality—Agent, whether can recover price of goods—Principal, whether bound to accept part performance.*

An agent on general grounds is entitled to re-imbursement and indemnity by his principal, but only on the condition that he has acted within the scope of his directions.

A promisee is not bound to accept part performance of a contract.

Defendant sent an order for 25,000 hides of a particular quality to plaintiff, his agent. Plaintiff sent 37,000 hides of different qualities, of which only a small number corresponded with the quality ordered. Defendant refused to take delivery of the consignment:

Held, (1) that the plaintiff had not substantially complied with defendant's order;

(2) that the defendant was not bound to accept that portion of the consignment the quality of which corresponded with the quality ordered;

(3) that the plaintiff was not entitled to recover anything from defendant. **L** SHAMAS DIN MEHR BAKHSH *v.* AGHA MOHAMED KHALIL **971**

——— *Warranty of quality—Re-sale—Buyer, duty of, to ascertain contents—Negligence—Damages whether can be claimed,*

Sale of goods—concld.

Where there has been a re-sale, in order to recover special damages for a breach of warranty it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he re-sells or deals with them.

One *S.* sold two cases said to contain muslin of a particular description and lying at Karachi to certain persons by making over the relative documents. The vendees passed on the goods in a similar manner until they were bought by the defendant firm *K. C.* on the 17th May 1918. They sold it to a firm *B. J.* on the 19th. *K. C.* had never taken delivery of the cases at Karachi but *B. J.* took delivery on the 20th May. On the 25th July 1918 *B. J.* sold these cases to *H. S* and gave them delivery on the 31st. *H S.*, however, did not open these cases till early in September 1918 when they were found to contain muslin of a different description. On the 22nd October *B. J.* wrote to *K. C.* claiming damages which not having been paid, they instituted the present suit:

Held, that, although the sale by the defendants carried with it an implied warranty that the cases contained muslin of a particular quality, the plaintiffs ought to have ascertained earlier whether the contents of the cases corresponded with the invoice, and that, having been negligent, they were not entitled to recover any damages. **L** FIRM KOTU MAL-CHARAN DAS *v.* FIRM BIHARI LAL-JAGGA MAL, 22 P. L. R. 1921; 16 P. W. R 1921 **424**

Service tenure—*Refusal to perform service—Ejectment—Notice to quit, whether necessary.*

On failure to perform the service, a service tenure-holder becomes a trespasser, and is not entitled to a notice to quit before ejectment. **Pat** WAZIR NONIAN *v.* RAM PRASAD LAL **893**

Specific performance—*Sale-deed inoperative for non-registration—Deed, whether can be regarded as agreement to sell—Suit for specific performance, whether maintainable.*

A sale-deed which becomes inoperative by reason of non-registration owing to the plaintiff's default cannot be treated as an agreement to sell and thus form the basis of a suit for specific performance of the contract of sale. **M** THAYARMMAL *v.* LAKSHIMI AMMAL, 12 L. W. 161; (1920 M. W. N. 457: 39 M. L. J. 181; 43 M. 822 **417**

Specific Relief Act (I of 1877), s. 27—*Transfer of Property Act IV of* 1882), *s.* 54—*Agreement to sell property specifically devised—Death of vendor before sale, effect of—Specific performance, decree for, against whom to be made.*

Where a person makes an agreement to sell property which he has already specifically devised and dies before the sale takes place, the vendee is entitled to enforce the agreement specifically against the devisee and to obtain a conveyance from him. **B** GANGA RAMA *v.* SAKHARAM BABAJI, 22 BOM. L. R. 1296 **796**

——— s. 42--Mahabrahmin, *status of—Right to receive alms, declaration as to, whether can be obtained.*

Inasmuch as the right to beg, or a beggar's right to receive alms, does not constitute property as it is understood in law, a beggar cannot, under section 42 of the Specific Relief Act, obtain an injunction entitling him to receive alms to the exclusion of other beggars.

The *Mahabrahmins* who solicit alms from pious Hindus on the bank of the Ganges river at Allahabad are beggars, and as such have no legal status. **A** BANSI *v.* KANHAYA, 18 A. L. J. 953; 43 A. 159 **659**

——— s. 42, proviso, *scope of—Declaration, suit for—Consequential relief not asked—Procedure—Amendment of plaint.*

A suit should not be dismissed by an Appellate Court on the ground of its being one asking merely for a declaratory decree and no consequential relief where that objection has never been taken by the defendants to the suit. The plaintiff should in such a case be allowed an opportunity of amending his plaint.

Section 42 of the Specific Relief Act does not require a plaintiff to include in his prayer every relief or every claim that he can make against every and any person but it only requires that he should ask for such reliefs as against the particular defendant in the suit. **L B** S. T. K. CHETTY FIRM *v.* BALASUNDARAM, 10 L. R. R. 199 13 BUR. L. T. 100 **809**

——— s. 54. *See* HINDU LAW, VRITHI **271**

Stamp Act (II of 1899), s. 36, *applicability of, to document executed previous to passing of Act.*

The admission in evidence of a document cannot, by virtue of section 36 of the Stamp Act, be subsequently objected to on the ground that under the Stamp Act in force at the date of its execution—in this case Act XXXVI of 1860—the document was insufficiently stamped, as that section is as applicable to documents of the years when the Act of 1860 was in force as it is to insufficiently stamped documents under the Act in which it is contained. **C** NILRATAN MITRA *v.* ABDUL GOFUR GAZI, 32 C. L. J. 75 **3**

Succession Act (X of 1865), s. 46. *See* WILL—EXECUTION, PROOF OF **814**

Survey map, *evidentiary value of—Record of Rights, entry in, whether operates between landlords of neighbouring estates.*

Maps and Surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible as valuable evidence of the state of things at the time they were made. Therefore, unless such a map is shown to be wrong it may be properly judicially received in evidence as correct when made.

An entry in the Record of Rights operates in the same way between landlords of neighbouring estates as between landlord and tenant, or between landlords of the same estate or between tenant and tenant. **Pat** BIBI WAKILAN *v.* DEO NANDAN PROSAD, 5 P. L J. 681; 2 P. L. T 81 **298**

Temple lands--*Grant in favour of menial servant, nature of—Servant, whether trustee—Resumption of lands—Suit by manager in his own name, maintainability of.*

Where a menial servant of a temple holds no office of a hereditary character and is remunerated for the performance of his duties by the use of certain lands on payment of an annual cess the

Temple lands—concld.

lands are not burdened with any service in connection with the temple, nor is the holder a trustee, and, upon cessation of his service the land is liable to immediate resumption.

A suit by the manager of a temple or the *shebait* of *debutter* property in his own name is not bad, there being nothing which requires such suit to be brought in a representative capacity. **C** JOYNATH SARKAR *v.* HARI MOHAN DAS **469**

Testamentary jurisdiction – *Consent terms not falling within jurisdiction—Decree, form of—Practice – Procedure*

Where in a testamentary suit the parties agree on certain terms, some of which do not fall within the testamentary jurisdiction of the Court, the proper procedure is to put all the terms in a schedule and to carry them out in the body of the order so far as the Court has jurisdiction. Those terms which do not fall within the testamentary jurisdiction of the Court can rest on agreement and, if necessary, they can be enforced in a suit on the Original Side. **B** BAI MONGHIBAI *v.* BAI RAMBHALAXMI, 22 BOM L. R. 1256 **344**

Third party notice. *See* INDEMNITY **16**

Third party proceedings – *Costs of successful defendant—Taxation, method of.*

Where a decree is passed against a defendant in a suit and the defendant then succeeds in third party proceedings his costs of the suit should be taxed as against the third party as between solicitor and client and the costs of the third party proceedings as between party and party. **B** WELD & Co. SHER AHMED EKBAL AHMED, 21 BOM L. R. 808 AT P. 816 **18**

——— *See* LETTERS PATENT BOM.), CL. 12 **12**

Transfer of Property Act (IV of 1882), ss. 4, 107—*Registration Act (XVI of 1908), ss. 17, 49—Lease, unregistered for less than a year, admissibility of, to prove character of possession.*

An unregistered deed of lease for less than a year is admissible in evidence to prove the character of the possession of the occupier of the demised premises.

The provisions of section 107 of the Transfer of Property Act which says that a written instrument in order to have the effect of a lease for less than a year must be registered cannot be taken to have been inserted in section 17 of the Registration Act. Such a lease is not a document required by section 17 of the Registration Act to be registered and section 49 of the Act can have no application to it. **M** RAMA SAHU *v.* GOWRO RATHO, (1920) M. W. N. 711; 12 L. W. 649; 30 M. L. J. 639; 29 M. L. T. 10; 44 M. 55 **350**

——— **s. 6 (h) (2)**—*Contract Act (IX of 1872), s. 23—Transfer for unlawful or immoral purpose—Purpose achieved—Transferor, whether can dispute nature of transaction.*

A person who enters into a transaction for an immoral or unlawful purpose is estopped from disputing the transaction, if the immoral or unlawful purpose for which it was entered into has been carried out. In such a case the Court will not interfere at his instance to relieve him from the legal effects of the transaction.

Transfer of Property Act—contd.

Section 6 (*h*) (2) of the amended Transfer of Property Act has not altered the law in India in this respect. **M** DEIVANAYAGA PADAYACHI *v.* MUTHU REDDI, 12 L W. 291; (1920) M. W. N. 547; 39 M. L J. 525; 28 M L. T 255; 44 M. 329 **1003**

——— **s. 43**—*Transferee not misled by representation, whether entitled to protection – Estoppel.*

Section 43 of the Transfer of Property Act being intended to benefit only transferees who have been really misled cannot be taken advantage of by a transferee who is not proved to have been misled by the erroneous representation of the transferor as to the latter's power to transfer. **M** KRISHNAMA CHARIAR *v.* TIRUVENGADA CHARIAR, 12 L. W. 149 **275**

——— **s. 53**—*Transfer in fraud of creditor decree-holder—Claim by transferee, dismissal of—Suit to set aside order on claim petition—Plea that transfer voidable by decree-holder, competency of*

It is open to an attaching decree-holder to plead in defence to a suit by the alienee from the judgment-debtor whose claim has been rejected, that the transfer to him was fraudulent under section 53 of the Transfer of Property Act without the creditor himself filing a suit to avoid the transfer. **M** RAMASWAMI CHETTIAR *v.* MALLAPPA REDDIAR, (1920) M. W. N. 572; 39 M. L. J. 350; 28 M. L. T 170; 43 M. 760; 12 L W. 475 **947**

——— **s. 54**—*Registration Act (XVI of 1908), s. 47—Sale-deed, whether operative from date of execution or date of registration.*

Under section 54 of the Transfer of Property Act acquisition of ownership can be effected only by a registered conveyance and the title does not pass to the vendee until the sale-deed is registered After the deed is registered it will become operative as from the date of its execution under section 47 of the Registration Act, but so long as it is not registered no title vests in the vendee and a suit brought in respect of the property after the execution of the sale-deed but before its registration will not be affected thereby. **Pat** TILKDHARI SINGH *v.* GOUR NARAIN, 5 P. L. J. 715; 2 P. L. T. 95; (1921) PAT. 122 **290**

——— **s. 54**—*Sale—Title when passes—Possession not delivered—Consideration not paid—Registration, whether sufficient to pass title.*

Where neither the deed of sale nor possession of the property sold is delivered to the vendee and no consideration passes, the mere registration of the deed of sale does not operate to pass the title to the vendee. **Pat** RAJU MAHTON *v.* HOSSAINI MIAN **171**

——— **s. 56,** *applicability of.*

The rule of marshailing in the case of purchasers, embodied in section 56 of the Transfer of Property Act, has no application as between purchasor and purchaser, the provisions of that section being limited to the case in which the party claiming marshalling is a purchaser, and the party against whom it is claimed is the original mortgagor. **A** DIN DAYAL *v.* GURSARAN LAL, 18 A. L. J. 237; 42 A. 316 **67**

——— **ss. 58, 67, 68**—*Mortgage, usufructuary—Possession not delivered to mortgagee—Interest whether can be recovered.*

Transfer of Property Act—contd.

Where under a usufructuary mortgage the mortgaged property is made security only for the amount borrowed and not for interest, and the mortgagee is to have possession and enjoyment of the profits of the mortgaged property in lieu of interest, which is not made payable otherwise, and the mortgagee does not take any steps to obtain possession of the mortgaged property, he loses his right to interest. **B** MANIKCHAND MAGANCHAND *v.* RANGAPPA KONDAPPA, 22 BOM. L. R. 1435; 45 B. 523 **765**

——— **S. 60**—*Mortgage—Redemption—Clog on equity of redemption—English rule, whether applicable in India—Redemption not to take place so long as there are fruit trees standing on land, whether clog—Suit brought while trees are standing, whether maintainable.*

The rule of English Law regarding a clog on the equity of redemption is not applicable in India.

A provision in a mortgage-deed that the mortgage shall not be redeemed so long as there are fruit trees standing on the mortgaged land which have been planted by the mortgagee is not a clog on the equity of redemption, and a suit for redemption brought while such trees are standing on the land is premature. **B** GENU TUKARAM *v.* NARAYAN RAGHU, 22 BOM. L. R. 1147; 45 B. 117 **258**

——— **S. 60**—*Mortgage—Redemption, suit for—Tender of mortgage-money before suit, whether necessary.*

All that section 60 of the Transfer of Property Act means is that there is an inherent right in the mortgagor to require the mortgagee to deliver the mortgage-deed, etc, when the mortgagor pays the amount due at a proper time and place. It does not necessarily mean that before a suit for redemption can be instituted the amount must be paid or tendered. In other words his right to claim redemption on payment of the mortgage-money exists, although he has not yet made any tender, provided the mortgage-money has become payable. Where the mortgage-money is stated to have been satisfied out of the usufruct, a tender would obviously be out of question. **A** HAIT SINGH *v.* BEHARI LAL, 18 A. L. J. 947; 43 A. 95 **92**

——— **S. 73**—*Mortgage—Mortgaged property acquired under Land Acquisition Act—Injunction, suit for, by mortgagee, restraining mortgagor from receiving compensation, maintainability of.*

Section 73 of the Transfer of Property Act is applicable to a case where the mortgaged property is acquired under the provisions of the Land Acquisition Act.

Where, during the pendency of a mortgage-suit, a portion of the mortgaged property was acquired under the Land Acquisition Act and the mortgagee brought a suit for an injunction restraining the mortgagor from taking out the compensation-money in respect of the portion acquired :

Held, that the suit was maintainable and must succeed. **Pat** ASHUTOSH RAI *v.* BABU LAL JHUNGAR, 5 P. L. J. 650; 2 P. L. T. 110 **513**

——— **ss. 106, 107**—*Lease for life—Registration, whether necessary.*

A lease for life can only be granted by a registered instrument under section 107 of the Transfer of Property Act. **Pat** WAZIR NONIAN *v.* RAM PRASAD LAL **893**

Transfer of Property Act—concld.

——— **S. 108**—*Landlord and tenant—Destruction of building—Negligence—Tenant, liability of—Notice, whether necessary—Tenant determining tenancy, effect of.*

The destruction of a building owing to the negligence of a tenant renders the tenant liable for damages.

When a tenant elects to determine the tenancy under section 108 (*c*) of the Transfer of Property Act, such election amounts to a waiver of the notice calling on him to restore the property required by section 108 (*m*) of that Act.

A. rented certain premises in which he had stored a large number of bales of piece goods, and put a watchman in charge, who, one night, lit a hanging lamp in the hall in close proximity to the bales of piece goods, locked up the premises and went away intending to return and sleep there. On his return he found the premises destroyed by fire :

Held, that the fire was caused through the default of *A.'s* servant in leaving a lighted lamp unattended for some hours; that such default amounted to a negligent act, and that *A.* was bound to make good the damage caused under section 108 (*m*) of the Transfer of Property Act. **M** GIRDARIDOSS RADHAKISHENDOSS *v.* PONNU PILLAI, 12 L. W. 19; 39 M. L. J. 233; 28 M. L. T. 461 **252**

——— **S. 112**—*Fisheries, lease of—Lease, forfeiture of—Waiver of forfeiture.*

Plaintiff obtained certain fisheries on lease from the Government on the condition that they should not be transferred without the permission of the Deputy Commissioner. In 1908 the plaintiff sub-let the fisheries and thereby incurred a forfeiture of his lease and, owing to this, the Deputy Commissioner in 1911 cancelled the lease. It appeared that rent for a period subsequent to the plaintiff's granting the sub-lease and before cancellation of the lease, and for the period subsequent thereto had not only been accepted but was realised by attaching the moveable property of the plaintiff:

Held, that, having regard to the provisions of section 112 of the Transfer of Property Act, there was a waiver of the forfeiture and the plaintiff was entitled to a declaration of his title to the fisheries under the lease, and to possession thereof. **C** BASANTA KUMAR CHOWDHURI *v.* SECRETARY OF STATE **273**

——— **S. 114**—*Lease—Forfeiture, relief against, rule as to*

No hard and fast rule can be laid down as to relief against a forfeiture clause in a lease, but the general principle of equity is, that the Court will relieve against forfeiture unless the tenant has done something to forfeit his right to bring himself within the principles of equity. **3** KRISHNAJI GOVIND *v.* SITARAM HANMANT, 22 BOM. L. R. 1439; 45 B. 300 **769**

U. P. Electoral Rules, r. 11 (2)—

Declaration appointing Election Agent not signed in presence of Attesting Officer, whether renders nomination invalid—Election petition, maintainability of, against order of Returning Officer—Objector, liability of, for costs.

The mere fact that a declaration made under rule 11 (2) of the U. P. Electoral Rules by a candi-

U. P. Electoral Rules—concld.

date appointing himself his Election Agent is not signed by him in the presence of the Attesting Officer, does not render the nomination of such candidate invalid. When the declaration has been filed by a candidate, the presumption is that that candidate asserts that the signature on the declaration is his own, and the Attesting Officer will accept this position until some person interested has made an objection.

An election petition is maintainable against the order of a Returning Officer declaring the nomination of a candidate invalid.

Where an objection is filed to the nomination of a candidate, and such nomination is declared invalid, the objector is liable for costs upon an election petition against such declaration, in the event of the petition being decided against him. **U P** SHAKIR ALI *v.* ABDUL HAKIM **846**

Upanayanam ceremony, *performance of, when valid—Irregular performance of ceremony, whether bar to adoption.*

In order to render the *Upanayanam* ceremony of a boy valid, it must be performed by the father, or, in his absence, by another kinsman in the family to which the boy concerned actually belongs, the performance of the ceremony in a family which the boy has not entered is invalid, and the irregular performance of the ceremony in a family into which the boy is wrongly believed to have entered is a nullity, and is no bar to the subsequent adoption of the boy into that family. **M** VADREVU RANGANAYAKAMMA GARU *v.* RYALI SOMASUNDARA RAO, 43 M. 876 **609**

Vendor and purchaser—*Purchaser, failure of, to complete contract—Earnest-money, whether forfeited.*

Where a contract of sale specifically provides that the whole of the earnest-money deposited by the vendee shall be forfeited in the event of his failing to pay the balance of the consideration-money within a stipulated period, and it is found that not only was he not in a position to pay that money, but that he never offered to pay, either within the time fixed or at any time afterwards, the balance of the purchase-money, he is not entitled to recover the earnest-money paid by him. **C** ATUL CHANDRA KUNDU *v.* SARAT CHANDRA LAHA, 24 C. W. N. 937 **215**

——— *Title, want of, in vendor—Vendee, right of, to damages.*

Where the title of a vendor of land is superseded by a superior title, the vendee is only entitled to be indemnified in damages for breach of warranty of title, and to ask that the damages be assessed at the enhanced value of land at the time of the suit. He is not entitled to recover the property which his vendor has obtained in substitution for the property sold. **M** DHADA SAHIB *v.* MUHAMMAD SULTAN SAHIB, (1920) M. W. N. 710; 12 L. W. 603; 39 M. L. J. 706; 44 M. 167 **311**

Waiver—Question of fact—Appeal, second—Question whether can be raised—Limitation. *See* INSTALMENT DECREE **607**

Warrant, *execution of, by person other than the one to whom it is addressed, legality of.*

Warrant—concld.

Where a warrant addressed to the bailiff of the Court was executed by a Naib Nazir and process-servers without any endorsement by the bailiff:

Held, that the service of the warrant was illegal. **L** GHASITA MAL *v.* EMPEROR, 22 CR L. J. 145 **849**

Water, *damage caused by flow of—Suit to recover damages, maintainability of—Rights of owners of land.*

An owner of property is entitled to protect himself against water which he has not brought on his land himself. He is entitled to divert water which threatens to do damage to his land. Likewise, his neighbours have a right to protect themselves against water which threatens to do damage to their properties.

Where the plaintiff and the defendant have equal rights to protect their own properties by turning the water which threatens to flow over their lands in times of flood into a ditch, and in consequence of that the combined water which would otherwise have gone on to their respective lands causes damage to the banks of the ditch on either side, it is the business of both parties to protect themselves against damage which may result when there is an excess flow of water in the ditch, and neither party can, in such a case, have a cause of action against the other. **B** SHIDRAMAPPA *v.* MAHOMED YUSAF, 22 BOM. L. R. 1107 **391**

Will, *construction of—Life-interest, forfeiture of—Remainderman, suit by, to recover estate—Limitation.*

A testator by his Will gave certain properties to his mother and widow absolutely and further provided that—

"The tank and the homestead which belongs to me will remain in half and half share in possession of my mother and my wife but they will not have the power to sell the properties. On the death of both my heirs will get it. If in the meantime they go elsewhere by leaving my homestead they will not get this property."

Some time in 1867 the mother sold the property and left the house, the widow ratified the sale and also left the house. The mother died more than 12 years before the institution of the present suit, and the widow died in 1908. In 1915 plaintiff, the heir of the testator, instituted the present suit to recover possession of the property from the purchasers from the mother and widow:

Held, upon a proper construction of the Will, that it was the intention of the testator that the interest of the mother and widow should cease in the event of their death and also in the event of their leaving the family-house; that there was a forfeiture of the estate by the widow and the mother leaving the house in 1867, and that the suit having been brought more than 12 years from that time was barred by limitation. **C** KALI KANT CHAKERBUTTY *v.* RAJANI KANTA CHAKRAVARTY **308**

——— *Execution, proof of—Burden, how discharged—Succession Act (X of 1865), s. 46—Evidence Act (I of 1872), ss. 68, 154—Sound mind—Hostile witness, who is—Attesting witnesses, necessity for calling—Unattested alterations in Will—Presumption—Presumption, how may be rebutted.*

Will—concld.

The onus of proof lies in every case upon the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator, and this burden is, in general, discharged by proof of capacity and the fact of execution.

A hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth, and when such a witness is treated as hostile and examined by the party calling him, this must be done to discredit the witness altogether and not merely to get rid of part of his testemony.

Although, in order to prove due execution of an instrument requiring attestation, it is, in general sufficient, where several witnesses have subscribed, to call one of them, but in the case of a Will, it is desirable that all capable of being called should be examined to remove all suspicion of fraud. The mere fact, however, that one attesting witness to a Will is not called would not invalidate the Will provided there were two attesting witnesses as required by law.

Where unattested alterations occur in a Will, the presumption of law is that such alterations were made after the execution of the Will, but this presumption may be rebutted (1) by direct evidence showing that the alterations accord with the obvious intention of the testator, and (2) by internal evidence and by inferences drawn from the condition of the Will. **C** SURENDRA KRISHNA MONDAL *v.* RANEE DASSI, 24 C. W. N. 860; 33 C. L. J. 34; 47 C. 1043 **814**

———*Probate—Burden of proof—Suspicious circumstances.*

Where circumstances exist in connection with a Will which, in Probate proceedings, excite the suspicion of the Court it is for those who propound the Will to remove the suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only when this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the Will. **L B** PAUL *v.* THOMSON, 13 BUR. L. T. 80 **535**

Workman's Breach of Contract Act (XIII of 1859)—*Contract entered into where Act not in force, effect of—Minor, contract with, or for more than one year, validity of.*

A contract entered into under the Workman's Breach of Contract Act at a place where that Act is not in force cannot be enforced, and the contracting workman is not liable for any breach of the contract.

A contract under the same Act for a period exceeding one year, or by a person under the age of 18 years, is void. **A** MAZHAR HUSAIN *v.* EMPEROR, 22 CR. L. J. 50 **194**

——— **S. 1,** complaint under, withdrawn before passing of any order, whether "criminal proceeding." *See* PENAL CODE, s. 211 **45**

——— **S. 2**—*Criminal Procedure Code (Act V of 1898), s. 4 (o), 260—Punishment—Offence—Summary trial, legality of.*

Inasmuch as the Legislature in the Workman's Breach of Contract Act has described the order which a Magistrate is authorised to make against a workman in a case proved as "punishment", the act if proved amounts to an "offence" punishable by law within the meaning of section 4 (*o*) of the Criminal Procedure Code, consequently a Magistrate of the First Class has jurisdiction under section 260 to deal with the case summarily. **A** ABDUS SAMAD *v.* YUSUF, 19 A. L. J. 22; 2 U P L R (A.) 389; 22 CR. L. J. 165 **917**

——— **S. 2**—*Proviso (a) to clause (1), scope of—Order directing performance—Failure to perform contract—Application for arrest—Limitation.*

Proviso (*a*) to clause (1) of section 2 of the Workman's Breach of Contract Act merely provides that an order directing re-payment of the advance or performance of the contract shall not be made unless the employer moves the Court within three months of the breach of the contract.

The proviso has no application to a case where a complainant has already obtained an order under section 2, sub-section (1), and is applying for an order of imprisonment under clause (2) for failure to obey the order under clause (1). **L B** JESMUDIN *v.* ISADALLY, 10 L. B. R. 240; 22 CR. L. J. 149 **853**

S. N. Das
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